



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 84 OF 2017

1. ALFRED CHIVATSI GEORGE
2. STEPHEN CHARO KARISA
3. ARNOLD CHANDI BUNDI
4. CHARLES CHIVATSI JOHN(Suing on their own
behalf and on behalf of SIMEON MUPE Family).....PLAINTIFFS

VERSUS

1. GAZOHERE NYAWA MUNDU
2. NDOKOLA CHIVATSI DZOMBO
3. STANLEY RAYMOND CHIVATSI
4. THE DISTRICT ADJUDICATION OFFICER, KILIFI
5. THE COUNTY AND LAND REGISTRAR, KILIFI
6. THE NATIONAL LAND COMMISSION
7. HON. ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Complaint dated 10th April 2017 and filed herein on 11th April 2017, the four Plaintiffs suing on their own behalf and on behalf of the family of Simeon Mupe pray for Judgment against the seven Defendants jointly and severally as follows:-

a) A declaration that the purported issuance of title to the 1st Defendant is illegal, unlawful, unprocedural, corrupt and not supported by any law or facts and the same be nullified and cancelled and/or reversed.

b) An order that the whole of Portion No. Mwapula/Magogoni/467 is the Plaintiff's ancestral land and they should be allocated the same in accordance with the first adjudication register of 16th October 1993 and the title to issue thereof in their names on behalf and in trust of Simeon Mupe family.

In Alternative

c) In the event that the Court finds that the 2nd and 3rd Defendant's family are entitled to an interest in the said land, the same to

be sub-divided between the two families in equal shares as Plot Nos 1022 and 467 respectively.

d) Costs of this suit.

2. The basis for seeking the said Orders is the contention by the Plaintiffs that at the time of adjudication of the land in Mwapula/Magogoni Adjudication Section, Parcel No. 467 was identified on the ground to belong to the Simeon Mupe family and the names entered in the adjudication register were those of John Simeon Katana and Japhet Simeon Mupe on behalf and in trust of the larger Simeon Mupe family.

3. It is the Plaintiff's case that thereafter the 2nd and 3rd Defendants fraudulently and unprocedurally altered the records and had the names of the first allottees cancelled and their names substituted and superimposed thereon. The Plaintiffs aver that since the said alteration, there have been various attempts to resolve the dispute through various tribunals. The 1st tribunal sitting concluded on 2nd July 2002 that the land belonged to the 2nd and 3rd Defendant's family.

4. Being dissatisfied with the findings and the award of the land in dispute to the 2nd and 3rd Defendants, the Plaintiffs sought for a re-hearing and on 26th May 2003, a Board recommended that the land be sub-divided into two portions to be allocated to the two families. In that decision, it was recommended that the Plaintiffs' family be allocated Parcel No. 1022.

5. Each of the two families were dissatisfied with the Board's findings and sought to have the same reviewed. Accordingly and after the said review was carried out, a decision was rendered on 11th May 2007 wherein the entire parcel of land was reverted to the ownership of the 2nd and 3rd Defendants.

6. The Plaintiffs appealed the said decision to the Minister in accordance with Section 29 of the Land Adjudication Act Cap 284, Laws of Kenya. It is the Plaintiff's case that even before the outcome or hearing of the Appeal to the Minister, the 5th and 6th Defendants have purported to issue the title to the whole of Plot No. 467 to the 1st Defendant. It is their case that the purported issuance of title to the 1st Defendant as aforesaid is illegal, unlawful, and unprocedural and contrary to the Provisions of Section 28 of the Land Adjudication Act and the same ought to be nullified, cancelled and/or reversed.

7. From the material placed before me, it is apparent that the 1st to 3rd and 6th Defendants, though served, neither entered appearance nor filed any defence. The Honourable the Attorney General sued as the 7th Defendant entered appearance on behalf of the 4th, 5th and 7th Defendants but did not thereafter file any other document.

THE PLAINTIFFS' CASE

8. At the hearing hereof, Arnold Chandi Bundi(PW1) the 3rd Plaintiff testified on behalf of the other Plaintiffs. He told this Court that Simeon Mupe was his grandfather and that he was therefore grandfather and that he was therefore a beneficiary of the parcel of land in dispute.

9. It was PW1's testimony that at the time of adjudication of the land in Mwapula, Magogoni Adjudication Section, Parcel No. 467 was identified on the ground to belong to the Simeon Mupe Family. The records were thereafter fraudulently altered to reflect the names of the 2nd and 3rd Defendants herein.

10. PW1 told the Court that after various attempts were made to resolve the dispute, their family lodged an appeal to the Minister in accordance with Section 29 of the Land Adjudication Act. However, even before the Appeal could be heard, the 5th and 6th Defendants purported to issue the title for Plot No. 467 to the 1st Defendant while Portion No. 1022 was given to the 2nd Defendant.

11. It is PW's case that the land in contention is their family's ancestral land the said family is the one in occupation thereof and hence entitled thereto.

DETERMINATION

12. I have considered the Plaintiffs' case and the submissions filed on their behalf by their Learned Counsel on record.

13. Section 26 of the Land Adjudication Act empowers a Land Adjudication Officer to receive, consider and determine an objection by an affected person where such person considers an adjudication register to be incorrect or incomplete. Section 29 of the Act which provides the right of appeal states as follows:-

“ Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by:-

a) Delivering to the Minister an appeal in writing specifying the grounds of the appeal and

b) Sending a copy of the appeal to the Director of Land Adjudication.

And the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

14. From the material placed before me, it is evident that the 3rd Plaintiff who testified herein as PW1 appeared before the Kilifi District Land Adjudication and Settlement officer on 7th June 2007 whereupon he laid out the case on behalf of the other Plaintiffs in regard to the claim herein. Having heard the case in which the 3rd Defendant was present and cross-examined PW1, the Plaintiffs' case was dismissed on 15th June 2007 with an order that the defendants to remain as the owners of the plots in the Adjudication Act. The officer presiding granted any party aggrieved by the decision sixty days from the date of the order within which to lodge an appeal with the Minister.

15. Again from the material placed before me, it is evident that the Plaintiffs lodged an appeal to the Minister as directed on 2nd July 2007, a date which did not exceed the sixty days period of appeal. According to the Plaintiffs, the 5th and 6th Defendants have now proceeded without waiting for the outcome of the Appeal to issue title for Plot No. 467 to the 1st Defendant while the 2nd Defendant was issued with title for Plot No. 1022.

16. While no title deed was exhibited in evidence to demonstrate the alleged issuance of titles, counsel for the Plaintiff urged this Court to find for the Plaintiff in light of the fact that their testimony was uncontroverted.

17. I have read and re-read this file. I was however unable to find even an iota of evidence from which to infer that the titles for the disputed property were issued by the 5th and 6th Defendants herein to either the named or any party.

18. Section 107 of the Evidence Act provides as follows:-

“ (1) Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of facts it is said that the burden of proof lies on that person.

19. In the instant matter, I must say that the Plaintiffs have failed to discharge the burden of proof that is placed upon them by the law. That being the case, this Court is left with no option but to dismiss the suit.

20. And it is so ordered. I make no order as to costs.

Dated, signed and delivered at Malindi this 25th day of May, 2018.

J.O. OLOLA

JUDGE