



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

LAND CASE NO. 232 B OF 2013

STEPHEN MUTUKU MULINGE.....1ST PLAINTIFF

BENEDATA KATHINI.....2ND PLAINTIFF

-VERSUS-

DICKSON M. MUTUKU.....1ST DEFENDANT

JOHN KARANJA MURITU.....2ND DEFENDANT

JUDGEMENT

1. By an amended plaint dated 29th September 2014, the plaintiffs sued the two defendants seeking the following reliefs:

(a) A declaration that the plaintiffs are the proprietors of all that parcel of land known as plot number MN/VI/121 measuring approximately 0.418 Ha situate at Aldina Area in Jomvu within Mombasa County.

(b) An order of permanent injunction restraining the defendants by themselves, their servants and/or agents or otherwise howsoever from entering, trespassing into or continuing to trespass into, alienating, disposing of, constructing, developing or in any way interfering with the plaintiffs' quiet possession of Plot No MN/VI/121 measuring approximately 0.418 Ha situate within Aldina Area.

(c) Damages for trespass and an order directing the defendants to put back the plaintiff's beacons.

(d) Costs of the suit.

2. The 1st defendant who was the original defendant before the plaint was amended filed a defence dated 15th November 2013. He denied that the plaintiffs are the proprietors of plot No. MN/VI/121 & pleaded that the sale agreement dated 14.8.2012 lacks disclosure of material facts for not stating the size of plot purchased. The 1st defendant further denied trespassing on the suit land. He urged the Court to dismiss the suit with costs.

3. The second defendant added after the amendment also filed his defence. He also denied the plaintiffs' claim in toto. The plaintiffs filed a response to this defence on 2nd December 2014. At the close of pleadings, parties called oral evidence.

4. The plaintiffs called a total of 4 witnesses while the defendants called five (5) witnesses. Mr Stephen Mutuku Mulinge testified as PW 1. He said he bought the suit land from Mzee Jela who was represented by his son Juma at an agreed price of Kshs 600,000. That the land was measuring 0.418 Ha. He produced as Pex 2 a sketch map showing the physical location of the land and the sale agreement as Pex 1. PW 1 continued that he took possession of the land and placed the boundary beacons. That there was no problem for one year. Later he received a call that the 1st defendant had placed a fence on the side of the Swede's house.

5. PW 1 reported the matter to the police and also the clan elder but no solution was reached. He stated that he purchased his land at least a year before the statement of Ndoro Kalama dated 1st November 2013. He urged the Court to order the defendants to return to him almost ¾ ha of his land they have taken.

6. During cross – examination, PW 1 said the agreement did not indicate the size of plot sold. That he engaged a qualified surveyor who placed the beacons & drew the sketch map. That the 1st defendant who bought from Swede bought after him. That Mzee Jela had sold to

Swede a plot measuring 84 by 60. In re – examination, PW 1 said the size of the plot was not indicated in the agreement because they did not anticipate a problem. That the 1st defendant purchased the plot that measured 84 by 60.

7. Rachel Mutheu Ndambuki testified as PW 2. She is a surveyor working with the government in District Survey Office, Mombasa. She produced her report after carrying out survey on the land. That her report contains details of plots as claimed by the parties herein but does not specify who came first. The report was produced as Pex 5. In cross – examination, she said the whole area measured was approximately above 1 acre. She did not do a search to confirm ownership of the land.

8. PW 3 is Stephen Charo Ziro. He said he is an assistant village elder. In 2012, his father was the clan elder. He stated that on 14.8.2012, the plaintiff, Juma Charo and Abdalla Charo came to his father's office to draw a sale agreement. That PW 3's father sent him to go and confirm whether the land was available for sale. That he went and met the family of Jela who confirmed the land was available. He took the report back and thereafter an agreement was drawn. PW 3 stated he is the one who prepared the agreement. That he was also present when the surveyor came to the land. That the land sold was 1.03 acres. It is his case that the suit land belongs to the plaintiffs. The witness blames the defendants for invading the plaintiffs' land.

9. In cross – examination, the witness said Mzee Jela did not sign the agreement but he verbally authorised the two sons to sell. That the size of the land was not indicated in the sale agreement. That the sale agreement was not signed by all the sons of the Mzee Jela. That it is only the plot of Swede which was developed. That each plot was measuring 42 by 60. Two plots would be 84 by 60. That the plaintiffs bought very many plots which they did not measure because the buyer was to bring a surveyor.

10. PW 4 NOAH MWANGI stated that he witnessed the sale agreement. That they walked on this land which extends upto the ocean and it is more than 1 acre. In cross – examination, the witness said they walked around the sold portion in the company of the two sons and a clan elder. That he only approximated the land sold as 1 acre. PW 4 also said he accompanied the plaintiff to see the fence put up by a stranger.

11. Benedeta Kathini Maingi testified as PW 5. She brought the suit against the 1st defendant for fencing their land which they bought. That they were shown the boundaries by the father, mother and their two sons. She described the land as neighbouring the vendors on one side, Mzee Swedi on the right and the ocean on the front. She referred to the sketch map produced as Pex 5. That after one month, the 1st defendant introduced himself and asked to be sold the shaded green area in the sketch map. They did not sell him the portion. In October 2013, she received a call from Juma that the 1st defendant had fenced off their land. The witness proceeded to the ground and confirmed there was fencing done. She made a report to the clan elder. She asked the Court to return to her their plot & award them costs of the suit.

12. In cross – examination, the witness said Mzee Jela did not sign the sale agreement. PW 5 also did not sign the agreement. That Mzee Jela had 4 sons among them Abdsalla & Juma who signed their agreement. On the date they were shown the boundary no neighbour was present and they did not take measurements. In re – examination, she stated she knew their beacons because they planted trees.

13. PW 6 was Police Corporal Isaiah Kanene who came and confirmed he recorded statements from various persons pursuant to a complaint made by the 1st plaintiff. He produced copies of these statements as exhibits. In cross – examination, the witness said the initial complaint was of the offence obtaining by false pretences. That he received no complaints against either of the defendants and he has never met them. The witness stated that the plots do not have titles so it was difficult to bring charges. That he visited the suit property and the village elder confirmed the building belonged to the plaintiffs. This marked the close of the plaintiff's case.

14. SALIM NDORO KALAMA testified as DW 1. He opened his evidence by stating that while his father was alive, he showed each of his sons their shares. He stated that his father died on 23.7.2013. That the shares were as follows:-

i) Salim Ndoro: 88 feet by 200 feet

ii) Juma: 55 feet by 200 feet

iii) Yusuf: 50 feet by 200 feet

iv) Abdalla: 50 feet by 200 feet

15. DW 1 confirmed that he sold his portion to bwana Swedi. Swedi later sold to the 1st defendant; Juma sold to the plaintiffs while Yusuf and Abdalla sold to the 2nd defendant. That with that, their land was finished. That he witnessed the sale to the 2nd defendant.

16. In cross – examination, the witness admitted he was not present when the plaintiffs bought their plot thus cannot tell the size sold to them. That the meeting where his father shared the land was shortly before he died. That he did not produce their sale agreement between him and Swedi. That his father's land was approximately 200 feet by 200 feet. He disowned his statement to the police which stated that Yusuf & Abdalla had sold their portions to the plaintiffs. That Abdalla was only a witness to the sale of the plaintiffs and lastly by the time the land was shared out, he had already sold his portion.

17. The 1st defendant testified as DW 2. He stated that he bought his plot measuring 88 feet by 200 feet in August 2012 from Mr Swedi. That about 10 feet was left for a neighbour's gate. He produced his sale agreement as Dex 1. DW 2 said he met the plaintiffs in the process of visiting his plot. After one year, he returned and found some beacons which had been placed encroaching on his plot. He reported the matter to the village headman who called a meeting but he was not given time to explain himself. That before buying his plot, the same was measured in the presence of all Mzee Jela's children. He asked the Court to dismiss the plaintiff's case with costs to him.

18. In cross – examination, DW 2 said he purchased his plot on 8.8.2012 and all the process were followed. That he knew the plaintiffs after

he was sued. He does not know who sold the land to the plaintiffs. He agreed by the survey report. That his plot length is 200 feet. He is claiming 35 metres as the part encroached on.

19. The second defendant testified as DW 3. He denied trespassing on the plaintiffs' land. He stated that he bought his plots from Abdalla & Yusuf Charo jointly measuring 110 feet by 200. He paid the entire purchase price and produced the sale agreement as Dex 2. That his agreement was witnessed by Charles Rua and Mr Bakari – deceased.

20. In cross – examination, he said he bought his land on 20.8.2012. That there is no rubber stamp of the headman in his agreement. The county surveyor visited the suit property in his absence but he was represented. He bought the land in vacant possession.

21. DW 4 Omar Masud Wainji said he participated on the division of the suit property by virtue of being a member of the development committee. That some of the sons sold their portions. He witnessed the sale to Mr Swedi by Salim. In cross – examination, the witness said he was called by Mzee Charles Rua to witness the sharing. That the meeting held after the death of Mzee Jela was only to confirm how the land had been distributed amongst the sons.

22. Charles Rua gave evidence as DW 5. He testified that mzee Jela is his uncle. The whole land M. N/V/121 is 168 acres. There are more than 20 families living on the land. Mzee Jela got his portion from DW 5's mother. That mzee Jela used to cultivate the land before sharing it to his sons as follows:

Salim: 88 by 200

Juma: 55 by 200

Abdalla: 55 by 200

Yusuf: 55 by 200

Each of the sons have sold their plots. That DW 5 witnessed the sale to the 2nd defendant. That he knew each of the boundaries for the plots. That he only witnessed one agreement. It is a mistake if it is recorded the land was distributed after the death of mzee Jela. This also marked the close of the plaintiff's case.

23. The parties herein filed written submissions which I have read and taken into consideration. Each of the parties are claiming to have bought a portion of the suit land from the family of mzee Jela. I wish to point out from the onset that the title deed is not in the name of mzee Jela. The Court will therefore not make a determination on whether or not the vendors had capacity to sell. The questions for determination in my view are:

i) What was the size of land sold to the plaintiffs?

ii) From the answer to (i), are the defendants entitled to the portions they are claiming or are they trespassers?

iii) Has there been proof of encroachment and or trespass on the plaintiffs' portion?

iv) Who should bear the costs of the suit?

24. From the evidence of the plaintiffs and their witnesses, it is not disputed that the size of land sold was not indicated in the sale agreement dated 14.8.2012. However the plaintiffs aver that what was sold to them was over 1 acre. In a sketch map prepared by Philomu Mapping Services, the area claimed by the plaintiffs is given as 1.03 acres.

25. The 1st defendant on his part said he purchased his plot on 8.8.2012 from Hamisi Swedi measuring 200 feet by 88 feet. Mr Hamisi Swedi is said to have purchased this portion from Salim Ngoro (DW 1) on 28.8.2008. Similarly the 2nd defendant purchased his on 20.8.2012 from Abdalla Charo & Yusuf Kalama (then a minor) measuring 110 feet by 200 feet. Each of them stated that they had paid the purchase price in full.

26. The Court made a site visit in the company of the County Surveyor. During the visit, the plaintiffs showed their boundaries which included the defendants' portion. This is confirmed by the survey report dated 28.7.2016 which was done after a second visit by the surveyor. The County Surveyor concluded that the plots as claimed by the parties here were overlapping.

27. There is sufficient evidence to confirm that mzee Jela owned a portion of the land comprised in title No M. N/V/121. The entire size he owned is not clear but it is approximated to be the area being claimed by the parties herein. It is also not in dispute that mzee Jela had four sons whose names are given as Salim (DW 1), Juma, Abdalla & Yusuf. All of them participated in selling parts of their father's share presumably with his consent as all the sale agreements took place before his death in July 2013. Kalama Juma who sold to the plaintiffs did not testify in this case neither did Abdalla & Yusuf who sold to the 2nd defendant.

28. These 3 sons were present during the Court visit and they did not deny selling the portions of "their plots" to the plaintiffs and 2nd defendant respectively. In the statement of Abdalla Charo to the police, he said he was not told the exact piece of land sold and that it is only the plaintiffs who should be on this land. He also said the money paid was shared by all the brothers. Kalama Juma said at the police station that the land he sold to the plaintiff touches the beach. None of them gave the sizes of land they were selling to the plaintiffs.

29. From their statements to the police, both Abdalla & Juma made no mention of any sale by Salim. It is interesting that besides the sale by Salim done in 2008, the sale to the 2nd defendant and the plaintiffs were done in August 2012. The sale to the plaintiffs was on 14.8.2012 while to the 2nd defendant on 20.8.2012. Each of the vendors selected different clan elders to witness their transactions. None of the four brothers were present during any given transaction.

30. In the sale agreements to the defendants, the sizes of the sold plot is given unlike the plaintiffs' agreement. Since the persons who sold were all sons of the late mzee Jela, I will go by the evidence of DW 1 and DW 5 that their father gave each of them a share of the disputed plot. The sizes distributed as given by defence witnesses is slightly contradictive in width. DW 1 stated he was given 88 by 200 and in his statement to the police he said Swedi got 83 by 200. DW 4 & DW 5 maintained Salim was given 88 by 200 while Juma, Abdalla & Yusuf each got 55 by 200.

31. The burden was however heavier on the plaintiffs to prove the size of the land sold to them. Having conceded that measurements were not done before the sale, this Court can only reach a conclusion that they are only entitled to the shares of the person who sold to them i.e. Kalama Juma Charo which is estimated to be 55 feet by 200 feet. If they paid more based on what they were shown, their claim for compensation can only lie as against Kalama Juma Charo and not to claim the portions other people who bought from the sons that were equally entitled to sell their shares.

32. I am thus unable to make a finding that the plaintiffs are entitled to 0.418 ha of land comprising part of title plot No MN/V/121 as contained in prayer (a) of their plaint. Neither can I issue an order of injunction against the defendants for trespassing on part of the portion measuring 0.418 ha as they are also entitled to their shares. Consequently, no damages accrues since there is no trespass. Since the misfortune of the plaintiffs was occasioned to parties not joined to this suit and in the interest of good neighbourliness, I order each party to bear their respective costs of the suit. The plaintiffs' suit is thus dismissed for not having been proved with no order as to costs.

Dated, signed & delivered at Mombasa this 2nd day of August 2018

A. OMOLLO

JUDGE