



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 102 OF 2009

CHENGO KATANA KOI.....PLAINTIFF

VERSUS

PROTUS EVANS MASINDE.....DEFENDANT

JUDGMENT

BACKGROUND

1. Chengo Katana Koi, the Plaintiff herein moved to this Court vide a Plaint filed on 19th November 2009 seeking immediate withdrawal of the Defendant's name as the registered owner of all that parcel of land known as Kilifi/Madeteni/396 and that the same be registered in the name of the Plaintiff. He also sought the costs of the suit as well an interest thereon.

2. Upon Service of Summons, the Defendant moved to Court on or about 11th January 2010 whereupon he filed a Statement of Defence and Counterclaim in which he sought that the Plaintiff's suit be dismissed with costs and that the Plaintiff be forthwith ordered to vacate the said Plot No. Kilifi/Madeteni/396. The Defendant also sought in the Counterclaim an order of injunction restraining the Plaintiff from interfering with the said parcel of land. He also sought costs of the suit and the Counterclaim as well as interest thereon.

3. Subsequently by an application dated 15th May 2014, the Plaintiff sought orders to enjoin herein the Chairman of the National Land Commission (2nd Defendant), the Chief Land Registrar (3rd Defendant) as well as the Director Land Adjudication and Settlement (4th Defendant). The Plaintiff was granted the Orders sought and he proceeded to file an Amended Plaint on 25th August 2014 in which he sought inter alia that the purported allotment of the subject property to the 1st Defendant by the now enjoined 2nd, 3rd and 4th Defendants be revoked and that the title be registered in the Plaintiff's name. In addition, the Plaintiff sought orders of injunction restraining the Defendant from dealing and/or interfering with the suit property.

The Plaintiff's Case

4. At the trial hereof, the Plaintiff testified in support of his case. The Defendant did not however call any witness.

5. Testifying as PW1 in his own case, the Plaintiff told the Court that the parcel of land known as Kilifi/Madeteni/396 is his ancestral land and that the same is owned by the Koi Clan although it is registered in the name of one Katana Koi Mungumba who is now deceased. He further told the Court that several members of his clan were born and bred on the suit property and that those who died had equally been buried thereon.

6. PW1 testified that his now deceased grandfather, his father and brothers had built houses on the property in which he was born and grew up. According to PW1 his later father Katana Koi Mugumba had sometime in 1983, applied to the Director of Land Adjudication and Settlement seeking to be allocated the suit property. On 30th May 1983, his father obtained the Land Control Board Consent after which he proceeded to pay the mutation and survey fees for the property. His father however passed away on 17th July 1988 before being issued with a title.

7. PW1 told the Court that later on after the death of his father, he filed High Court Succession Cause No. 410 of 2006 and was issued with a Grant of Letters of Administration for his estate on 19th June 2007. Thereafter on 25th April 2009, PW1 visited the District Lands office to have the title for the parcel of land processed in his name. To his surprise, he discovered that the 1st Defendant had been registered as the owner of the suit property. From the documents PW1 found at the Lands Registry, the 1st Defendant's registration was done pursuant to a purported offer made by the Settlement Fund Trustees through the then Director Land Adjudication and Settlement Fund Trustees to the 1st Defendant on 9th December 2002. A title deed was thereafter issued on 29th June 2005 without the knowledge of the Plaintiff's family.

8. It was PW1's case that the Records Section of the Register at the District Land Adjudication and Settlement Office at Kilifi and the Lands Office in Nairobi indicate that his late father is the owner of the suit property and that the registration of the 1st Defendant as the owner thereof was therefore fraudulent. Accordingly, it was PW1's prayer that he be declared the absolute owner of the suit property and that the title issued on 29th June 2005 in the 1st Defendant's name be revoked.

9. I have considered the Plaintiff's testimony and the evidence adduced before me. I have equally considered the submissions filed herein.

10. As it were, it is not in dispute that the Defendant is presently registered as the owner of the suit property. In his Defence and Counterclaim filed herein as well as an Affidavit sworn and filed herein on 19th March 2010, the Defendant brings out this fact clearly and repeatedly avers that he validly acquired the suit property under the Land Adjudication Act after successfully applying therefor to the Government.

11. The Defendant who did not testify at the trial herein avers in the said affidavit that he received a Letter of Offer from the Director Land Adjudication and Settlement dated 9th December 2002 asking him to report to the District Land Adjudication and Settlement Officer Kilifi District so that he could be shown the boundaries of the Plot of land he was being referred within what is described as Madeteni Settlement Scheme. The Defendant accepted the offer and was allocated the land which according to him was vacant at the time. He avers further in the said affidavit that the Plaintiff was a stranger to him and he only came to learn about him when he (the Plaintiff) sued him and he visited the land whereupon he found a recently built temporary structure which had not been on the land when it was allocated to him in the year 2002.

12. On his part, the Plaintiff testified that he was born and grew up on the suit property in which he told the Court, his grandfather and father are buried. His father, Katana Koi Mugumba passed away in 1988 having initiated the process of registering the parcel of land in his name when he paid a sum of Kshs 375 to the Lands Office in 1983.

13. The Plaintiff testified that after the death of his father, he visited the Kilifi Lands Office on a number of occasions pursuing the issue of the title. Later on, he was advised by that office to obtain Letters of Administration in order to have the title issued in his name. In compliance with that advise, he filed Succession Cause No. 410 of 2006 and was issued with a Certificate of Confirmation of Grant on 19th June 2007.

14. According to the Plaintiff, when he subsequently visited the Lands Office, in the year 2009, he discovered to his dismay that the suit property had been registered in the name of the 1st Defendant and that a title deed had indeed been issued to and in the name of the 1st Defendant on 29th June 2005.

15. From the material placed before me, it is not clear under what circumstances the Defendant applied to be allocated the said Plot No. 396 within the said Madeteni Settlement Scheme in Kilifi. It is also not clear how the Settlement Scheme was created and whether as the Plaintiff contends, the local inhabitants were aware of the creation of the scheme. The Plaintiff testified that the parcel of land concerned has always been in use by his grandparents as well as his father all who apparently died and were buried on the land before the alleged scheme was created.

16. As it were, the Land Adjudication Act provides for mechanisms that have to be put in place in ascertaining the rights and interests of the people who are entitled to land which is held under customary tenure or as trust land from the beginning to the point where individuals are issued with Title Deeds. Section 4(1) of the Act provides that:-

“.....the Minister shall, by notice in the Gazette, appoint a public officer to be the adjudication officer for the adjudication area, and the adjudication officer may in writing appoint such demarcation officers, survey officers and recording officers, being public officers, as may be necessary for demarcating, surveying, and recording interests within the adjudication area, and they shall be subordinate to him.”

17. Section 6 of the same Act further requires the said adjudication officer after consultation with the District Commissioner of the District within which the adjudication section lies, to appoint not less than 10 persons resident within the adjudication section to be the adjudication committee for that adjudication section.

18. From the material placed before me, it would appear that no such appointments were made in line with the provisions of Sections 4 and 6 of the Land Adjudication Act aforecited. At it were, the essence of the provisions of the Act is to ensure proper consultation and participation of the local communities and residents during the process of adjudication. Section 5 of the Act indeed obligates the adjudication officer to publish a notice in respect of each adjudication Section in which he is required inter alia to define as clearly as possible the area concerned and fix a period within which a person claiming an interest in land within the adjudication section must make his claim to the recording officer.

19. As it were, the Plaintiff who is a resident of the Madeteni area testified that he was unaware of the adjudication process that led to the registration of the 1st Defendant as the owner of the disputed parcel of land. It was his case that the land was his ancestral land owned by the Koi Clan to which he belongs. Indeed, the Plaintiff told the Court that while the Records Section of the registers at the District Land Adjudication and Settlement Office at Kilifi and the Lands office in Nairobi showed his late father Katana Koi Mugumbo as the owner of the suit property, there was nothing on the record to show how the 1st Defendant became registered as the owner thereof.

20. In this regard, I am in agreement with the submissions of the Plaintiff's Advocates on record that the residents of Madeteni were neither consulted nor given notice of the adjudication process to enable them record their rights. The mischief sought to be cured by the Adjudication Act is two fold. First, it ensured that the primary residents in an adjudication section acquired primary interest in that land at first registration. And secondly, the procedure provided under the Act ensured the recognition and registration of customary land rights as well as the public participation and consultation of the local community.

21. From the material placed before me, it is apparent that by a letter dated 19th December 2002, the 4th Defendant herein asked the 1st Defendant to report to the District Land Adjudication and Settlement Officer Kilifi so that he could be shown the Plot boundaries to the suit property. Section 23(2)(b) of the Land Adjudication Act requires the Land Adjudication Officer to establish who according to the indigenous people and customary law of the residents of the area is recognized as the bona fide owner of the land. That section further provides that in preparation of the adjudication record, if the officer is satisfied that any group has under the recognized customary law exercised their rights in or over the land, he shall determine that group to be the owner of that land and that the parcel of land in question is entirely free from private rights.

22. From a letter dated 20th April 2009 written by the Chief Matsangoni Location and produced by the Plaintiff in support of his case, it is evident that Plot No. 396 Madeteni was all along occupied by the Plaintiff's clansmen. The 2nd, 3rd and 4th Defendants therefore acted irregularly in allocating the suit property in total disregard of the position on the ground. In this regard, it is to be noted that the 1st Defendant has not stated under what circumstances he applied to be allocated the suit property.

23. As the Court of Appeal stated in *Munyu Maina –vs- Hiram Gathiha Maina(2013)eKLR:-*

“.....when a registered proprietor's root of the title is under challenge, it is not sufficient to dangle the instruments of title has proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

24. In the circumstances before me, I am satisfied that the Plaintiff has proved his case on a balance of probabilities. Accordingly I hereby allow the Plaintiff's suit as prayed in the Plaintiff. The Plaintiff shall also have the costs of the suit.

Dated, signed and delivered at Malindi this 11th day of October, 2018.

J.O. OLOLA

JUDGE