



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT NO. 9 OF 2009

HENRY GEORGE MKANGI.....1ST PLAINTIFF
WYCLIFFE MUNGA MKANGI.....2ND PLAINTIFF
AMON GEORGE MKANGI.....3RD PLAINTIFF
STEPHENE GEORGE MKANGI.....4TH PLAINTIFF
DICKSON GEORGE MKANGI.....5TH PLAINTIFF
GERFFREY GEORGE MKANGI.....6TH PLAINTIFF
CLEMENT GEORGE MKANGI.....7TH PLAINTIFF
JACKSON GEORGE MKANGI.....8TH PLAINTIFF
DICKSON TOFIKI MKANGI.....9TH PLAINTIFF
WILLIAM KATAMA MKANGI.....10TH PLAINTIFF

-VERSUS-

WILLIAM GEORGE MKANGI.....1ST DEFENDANT
ATTORNEY GENERAL (Sued on behalf of the Commissioner
Of lands and the Kilifi lands Registrar of Titles).....2ND DEFENDANT

JUDGMENT

Introduction

1. In the Plaint dated 10th February, 2009, the Plaintiffs averred that at all material times, they were the bonafide proprietors of parcels of land known as plot number 13 Kilifi/Kinuguna,48 Kilifi /Kinunguna,67 Kilifi/Chauringo,78 Kilifi Forodhani, 99 Kilifi/Forodhani and 140 Kilifi/Chauringo(the suit properties).
2. The Plaintiffs averred that 1st Defendant, who is their brother, has fraudulently caused the suit land to be registered in his favour; that the 1st Defendant appropriated the suit land to himself and that this court

should issue a declaration that the land belongs to them.

3. In his Defence, the 1st Defendant averred that the 1st Plaintiff is a lone ranger who does not have the authority to appear, plead and act for the other Plaintiffs and that the suit properties are registered in his name.

4. On its part, the 2nd Defendant averred that the Plaintiffs are not the owners of the suit properties; that the 2nd Defendant is not privy to the allegations in the Plaint and that the 2nd Defendant was not served with the requisite notice before the so filing of the suit.

The Plaintiffs' case.

5. The nephew to the Plaintiffs and the 1st Defendant, PW1, informed the court that he grew up on plot number 13 Kinunguna; that the said land belonged to his grandfather who died in 1968 and that after his grandfather's death, his father, Samson chamanje Mkangi, was registered as a trustee of the said plot.

6. According to PW1, plot No. 13 Kinunguna had a dispute which was handled by the council of Elders; that because his father was sick, all his uncles appointed the 1st Defendant to be in charge of the said land and to handle the dispute and that when his father died in 1984, the 1st Defendant started leasing out the said plot.

7. PW1 informed the court that later on, the family discovered that the 1st Defendant had sold the plot to a third party.

8. In respect to plot number 67, PW1 stated that he was present when the 1st Plaintiff bought the land from a Mr. Charo; that during demarcation, the 1st Defendant recorded his name and that the Title Deed was issued in his name.

9. In respect to plot number 99, PW1 stated that the 1st Plaintiff gave his mother money to buy the plot for him.

10. According to PW1, the 1st Defendant who was residing at home took advantage of the situation and had the said plot registered in his favour. The 1st Defendant later on transferred the land to a third party.

11. PW1 informed the court that plot number 48 belongs to the family and that currently the said plot is in the name of the 1st Defendant.

12. In cross-examination, PW1 stated that other than plot numbers 67 and 99 which were purchased by the 1st Plaintiff, the rest of the plots are owned by the family and that all the plots have been registered in favour of the 1st Defendant.

13. PW2 informed the court that the 1st Defendant is his step brother and that he had the Power of Attorney from the 1st Plaintiff to testify on his behalf. PW2 produced the said Power of Attorney in evidence.

14. PW2 informed the court that his late father had five wives; that the late Samson Chamanja Mkangi was nominated by the family to arrange for the division of their father's estate and that some of the assets that their father left were plot number 13 Kinunguna, plot number 78 Forodhani plot number 79 Kinunguna, Plot number 97 Forodhani, plot number 67 Chauringo and plot number 140 chauringo.

15. According to PW2, Seven (7) sons of the late Geroge Ketema Mkangi, including himself and the 1st Defendant are still alive while five are deceased.

16. The evidence of PW2 was that plot number 13 belonged to his late father; that the 1st Defendant was nominated by the family to represent them in a pending dispute and that the 1st Defendant had the plot registered in his name.
17. According to PW2, when they checked at the land's office, they discovered that the Title Deed had not been issued.
18. It was the evidence of PW2 that initially, plot No. 78 was plot No. 77; that it was sub-divided into plots 77, 78 and 79 and that plot number 79 was owned jointly by Geoffrey(deceased), Henry and the 1st Defendant but the 1st Defendant had the plot registered in his name.
19. PW2 informed the court that it is the 1st Plaintiff who bought Plot No. 99 from one John Kululu; that the 1st Plaintiff sent the purchase price to his mother to purchase the land for him and that the 1st Defendant took advantage of the situation and had the land registered in his favour.
20. It was the evidence of PW2 that the 1st Plaintiff also purchased plot No. 67 for kshs. 7000 from Charo wa Mekevumbi but again the 1st Defendant had it registered in his favour.
21. In respect to plot number 140, PW2 stated that the same is behind the 1st Plaintiff's house and that it was bequeathed to the 1st Plaintiff by his mother. However, the 1st Defendant had the land registered in his favour.
22. According to PW2, the 1st Defendant has sold plot numbers 13 and 99 to third parties.
23. In cross-examination, PW2 stated that plot number 13 belongs to the family while the other plots belong to the 1st Defendant's mother; that he had never been on the family land and that plot number 13 was registered in the name of one family member on behalf of the rest of the members of the family.
24. According to PW2, the 1st Defendant had the name of Samson substituted with his at the land registry and that he was now aware that a Title Deed had been issued to the 1st Defendant.
25. In respect to plot numbers 78 and 79, PW2 stated that the 1st Defendant sidelined his two brothers, Geoffrey (deceased) and Henry-the 1st Plaintiff.

The Defence Case.

26. The 1st Defendant, DW1, informed the court that he is the one who took care of their sick father; that when their father divided his land, plot number 13 was not amongst them because of the pending dispute and that he is the one who was involved in the land dispute until 1985.
27. According to DW1, his father authorized him to deal with plot number 13 and that after the dispute, he sold the land for kshs. 150,000 after he acquired a Title Deed with the assistance of the chairman of the clan.
28. In respect to plot numbers 77,78,79 and 99, DW1 stated that they were grazing land; that his step-brother, Samson, took plot number 77, Gilbert Mkanga took plot number 79 and he took plot numbers 78 and 99.
29. According to DW1, both Gilbert and Samson have since died and that during the objection proceedings, he is the one who successfully defended the acquisition of the four plots.
30. DW1, stated that after he won the dispute in respect to the four plots, he handed over the two plots to the sons of the deceased and retained his two plots.

31. Dw1, denied that the 1st Plaintiff purchased plot number 99; that plot numbers 67, 48 and 140 were surveyed by his mother and that the Title Deeds have not been issued.

32. According to DW1, he cultivates the upper side of plot No. 140 while Henry, the 1st Plaintiff, cultivates the lower side of the said land.

33. Dw1 informed the court that his mother informed him that he is the one entitled to plot number 140; that she also told him that plot number 67 and 48 jointly owned by herself, the 1st Plaintiff and his nephew and that he has not managed to trace the green cards for those parcels of land.

34. It was the evidence of DW1 that he is not claiming plot numbers 77 and 79; that plot numbers 78, 13 and 99 are the ones he is entitled to and that he sold plot numbers 13 and 99.

35. Dw1, produced in evidence the original Title Deed for Plot No. 78 only.

36. According to DW1, he is cultivating plot numbers 78 and 99 which are 15 acres while the 1st Plaintiff is cultivating three plots measuring 60 acres.

37. An official from the Kilifi Lands Registry, DW2, produced in evidence the adjudication record for plot 99 and a copy of the green card for the said plot.

38. DW2 informed the court that plot number 99 was registered in favour of the 1st Defendant and a Title Deed was issued to him in 1989.

39. It was the evidence of DW2 that plot number 78 was also registered in favour of the 1st Defendant after the adjudication process and so was plot number 140.

40. In cross-examination, DW2 stated that the area was an adjudication section; that he was unable to locate the records for plot numbers 48, 67 and 13 and that Title Deeds have not been issued in respect to some of those parcels of land.

Submissions

41. The Plaintiffs' counsel submitted that the Plaintiffs and the 1st Defendant are brothers; that the suit properties are their ancestral land and that the 1st Plaintiff purchased plot number 99.

42. Counsel submitted that the Plaintiffs had proved their case that the 1st Defendant did not lawfully acquire the suit land.

43. Counsel relied on several authorities which I have considered.

44. The 2nd Defendant submitted that the Plaintiffs have not proved their case; that the Plaintiffs did not plead particulars of fraud as against him 1st Defendant and that in any event, the Plaintiffs do not have the locus standi to claim the land that was registered in the name of their late father.

Analysis and findings

45. In the Amended Plaintiff, the seven (7) Plaintiffs alleged that they are the bonafide proprietors of parcels of land known as plot Nos 13 Kilifi/Kinunguna, 48 Kilifi/Kinunguna, 67 Kilifi/Chauringo, 78 Kilifi/Foredhani, 99 Kilifi/Forodhani and 140 Kilifi Chauringo(the suit properties).

46. According to the Plaintiff, the 1st Defendant maliciously, fraudulently and irregularly caused the suit properties to be registered in his favour "whereas the Plaintiffs had submitted their names and particulars to the 2nd Defendant awaiting registration".

47. The Plaintiffs have sought for a declaration that they are the bona fide proprietors of the suit land and for an order for rectification by cancelling the 1st Defendant's name and substituting it with the Plaintiffs' names.
48. The evidence of the Plaintiffs and the 1st Defendants' nephew, (PW1), was that plot number 13 belonged to the Mkangi family, having been owned by his grandfather.
49. According to PW1, when his grandfather died in 1968, his father, the late Samson Chamanje Mkangi, was registered as the owner of the said plot on behalf of the family.
50. The evidence by PW1 was that when his father died in 1984, the family agreed that the 1st Defendant should continue representing the family in dispute that was pending before the Tribunal in respect to plot number 13. However, the 1st Defendant went ahead to register himself as the proprietor of the said land.
51. The evidence of PW4 was reiterated by PW2, who appeared on behalf of the 1st Plaintiff and on his own behalf.
52. According to PW2, after having the land registered in his name, the 1st Defendant sold plot number 13 to a third party.
53. The 1st Defendant informed the court that plot number 13 was registered in his name but denied that the land belonged to the family.
54. DW1 also informed the court that he had since sold the suit land to a third party.
55. Neither the Plaintiffs nor the Defendants produced in evidence the registration documents in respect to parcel of land number Kilifi/Kinunguna/13.
56. Indeed, DW2 informed the court that he was unable to trace the records in respect to the said plot at the Kilifi land registry.
57. There is therefore no evidence before the court to support the allegation that plot number 13 was ever registered in favour of the Plaintiffs' and the 1st Defendant's late father or the Plaintiffs' brother, the late Samson Chemange, on behalf of the Mkangi family.
58. In any event, the Plaintiffs did not adduce any evidence to show that they have the locus standi to file a suit in respect to the Estate of the two individuals who have since died.
59. If the 1st Defendant is holding plot No. 13 in trust for the family, then they ought to have produced the adjudication records and the Title Deed or the register to enable the court ascertain their allegations.
60. It is trite that under section 107 of the Evidence Act, it is the person who asserts the existence of facts who must prove those facts.
61. In the absence of records in respect of plot number 13, and in view of the allegation that the said plot has since been sold a party who was not joined in these proceedings, I find that the Plaintiffs have not proved that they are entitled to the said plot.
62. The Plaintiffs are also claiming for plot Nos. 48, 67, 78 and 99.
63. According to the evidence of PW1 and PW2, the 1st Plaintiff bought plot numbers 67 and 99 by sending the purchase price to his mother.
64. The Plaintiffs however did not call the alleged owners of plot numbers 67 Kilifi/Chauringo and 99

Kilifi/Forodhani to inform the court how they acquired the said plots and if indeed they sold the two plots to the 1st Plaintiff.

65. The Plaintiffs did not even produce the sale agreements in respect to the said sale.

66. The Adjudication record for Plot number 99 shows that there was an objection number 47/84/85 which was allowed in favour of the 1st Defendant. It is not clear to this court what the objection was all about.

67. In the absence of evidence to show that indeed the 1st Plaintiff purchased plot numbers 67 and 99, and in view of the evidence showing that the 1st Defendant was registered as the proprietor of plot no. 99 in 1989, I find that the Plaintiffs have not proved their claim in respect to those two plots.

68. The evidence by the 1st Defendant was that plot number 78 Forodhani is one of the sub-division of plot number 77 which belonged to that late father; that the said plot was sub-divided and distributed amongst himself and his other two brothers.

69. The 1st Defendant informed the court that he was allocated plot numbers 78 and 99 while his two brothers took plot numbers 77 and 79.

70. It was the evidence of DW1 that plot number 78 and 99 were then registered in his name. He produced the original Title Deed which shows that he was registered as the proprietor of Plot number 78 Kilifi/Forodhani on 3rd April, 1989.

71. DW2 produced in evidence the adjudication record which shows that the 1st Defendant was recognized as the owner of Plot No. 78 on 6th October, 1983.

72. It would appear that the Plaintiffs never raised any objection as required under the provisions of the Land Adjudication Act since 1983.

73. In the absence of evidence to show that the 1st Defendant had plot No. 78 Kilifi/Forodhani registered in his favour fraudulently or by misrepresentation, I decline to issue the orders sought in the Plaint in respect to the said plot.

74. The Adjudication record shows that it is the 1st Defendant who was registered as the owner of plot number 140/Kilifi/Chauringo on 1st November, 1982. Again, there was no dispute in respect to that registration. A Title Deed was issued to the 1st Defendant on 5th June, 1987.

75. The Plaintiff did not adduce any evidence to show that plot number 140 belonged to the Mkangi family and that the 1st Defendant was registered as the owner of the said land in trust for the family.

76. As for plot numbers 48 Kilifi/Kinunguna and 67 Kilifi/Chauringo, the Plaintiffs did not adduce any evidence to show that those plots are registered in the names of the 1st Defendant.

77. The totality of my analysis of the evidence that was adduced shows that the Plaintiffs have not proved on a balance of probabilities that the 1st Defendant fraudulently or by misrepresentation or mistake had the suit properties registered in his favour.

78. In fact, the Plaintiffs did not even plead the particulars of fraud in the Plaint contrary to the provisions of Order 2 Rule 10(1)(a) of the Civil Procedure Rules.

79. For those reasons, I dismiss the Plaintiffs suit with costs.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O. A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J. O. OLOLA

JUDGE