



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT NO. 110 OF 2009

SYLVESTER NYANJE KARISA.....1ST PLAINTIFF

GILBERT KARISA.....2ND PLAINTIFF

FRANCIS CHARO.....3RD PLAINTIFF

VERSUS

MWANGIRANI PEMBE.....1ST DEFENDANT

NICHOLAS KOMBE PEMBE.....2ND DEFENDANT

ROBERT KITSAO (*son and personal representative of Estate of the late*

PEMBE MUROGO KITHI).....3RD DEFENDANT

THE DISTRICT LAND REGISTRAR, KILIFI.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

JUDGMENT

1. In the Complaint dated 3rd December, 2009, the Plaintiffs are praying for the nullification of the Title Deed of parcel of land number 876/Kaloleni/Vishekeini on the basis that they have occupied the said land since 1970s.
2. The Plaintiffs have averred in the Complaint that in the year 2003, the portion of land occupied by them was adjudicated alongside another portion of land occupied by the 1st Defendant and his family and given the same parcel number but in the name of the 1st Defendant's father.
3. According to the Plaintiffs they were not aware that the 3.5acres they were occupying had been registered in the name of the 1st Defendant's father until the year 2009 when they conducted an official search.
4. It is the Plaintiffs' case that the registration of the suit in the name of the 1st Defendant was done by mistake and that 3.5acres they are occupying should be registered in their favour.
5. In his Defence, the 1st Defendant averred that the family of Pembe Murogo is on the suit property; that

the Plaintiffs have never cultivated any portion of the suit land and that the Plaintiffs are not entitled to the land.

6. The 1st Defendant averred that in 1970, Plot number 538 was adjudicated in favour of his father and that the said land was sub-divided into plot numbers 876, 877 and 878 in the year 2003. It is the 1st Defendant's case that all disputes were settled prior to the issuance of a Title Deed for plot number 538 in 1981.

7. The Attorney General filed a Defence on behalf of the 2nd Defendant and denied the Plaintiffs allegations.

8. The Plaintiff filed an amended Plaintiff on 27th July, 2011 and joined the 2nd and 3rd Defendants in the suit.

THE PLAINTIFFS' CASE.

9. The 1st Plaintiff, PW1, informed the court that in 1970, Ndugu Mukaya sold to their father a portion of the suit land; that they bought 3 ½ acres and that the land was used for cultivation of maize.

10. According to PW1, his father was not informed of the adjudication process and that it was not until the year 2009 that he did a search just to discover that the land was registered in favour of the 1st Defendant's father.

11. PW1 informed the court that he has been using the land without any interference from the 1st Defendant.

12. In cross-examination, PW1 stated that it was his father who bought the land; that his father died between 1986-87; that he does not have the letters of administration and that everybody has his Title Deed in that area.

13. According to PW1, the place where they stay and the suit property is separated by a road and that when the adjudication was done in 1974, he was nine years old.

14. PW1 stated that the land they are now occupying has no dispute and that it is his young brother who planted trees on the suit land and it is them who have been cultivating the suit land.

15. It was the evidence of PW1 that he started using the suit land from 1990 until the year, 2008; that his father entered into an agreement of sale and that all his neighbours obtained that Title Deeds in 1990.

16. In re-examination, Pw1 stated that he inherited the suit land from his father; that his home is situated in a different scheme from where the suit land is and that he was a child during the adjudication process.

17. The Defendants did not adduce evidence.

SUBMISSIONS

18. The Plaintiff's advocate submitted that PW1 testified to have cultivated the disputed land; that the Defendants did not disprove rebut that evidence; that there is evidence that the Plaintiff's father purchased the suit property and that the Plaintiff's family has been living on the land harmoniously.

19. Counsel submitted that although the Plaintiffs do not have letters of administration, they have sued the Defendants because they have beneficial interest in the land; that they have been cultivating the land for long and that they lived with their father on the said land.

20. The 1st Defendant's counsel submitted that the Plaintiffs had a duty imposed by law to prove each

and every allegation in the Plaint; that the Plaintiffs failed to discharge that duty and that the Plaintiffs did not have the locus standi.

21. Counsel submitted that there is no evidence of any objection of any kind lodged by either the Plaintiffs or their father who was present during the adjudication process; that the adjudication process cannot be contested in these proceedings and that there was no evidence of any mistake that was committed.

Analysis and findings

22. The Plaintiffs are praying that the Title Deed in respect of parcel of land known as 876/Kaloleni/Vishekeini should be nullified on the ground that the same was issued to Pembe Murogo Kithi by mistake.

23. The Plaintiffs particularized the alleged mistakes as follow: Allocating 3.5 acres to the Defendant yet the same was being occupied or utilized by the Plaintiffs; registering the 3.5 acres as part of plot 876; failure to consult the occupants of the 3.5 acres and ignoring the presence of the Plaintiffs on the land.

24. The 1st Plaintiff, PW1 informed this court that his late father purchased the 3.5 acres and that they have been living on the land.

25. The 1st Plaintiff produced the alleged agreement dated 24th September, 1972 between Kidogo Mkenyi and Kavise was Mushage.

26. The said agreement does not state the acreage that brought or even the location of the land.

27. If the Plaintiffs' claim is that they are entitled to the suit property due to purchase, then the claim cannot succeed because they do not have the legal standing to represent the Estate of their late father.

28. The burden of proving that the Title Deed was issued to the Defendant's father by mistake lay with the Plaintiffs.

29. The mere fact that the Title Deed was issued to the Defendant's father adjudication when the Plaintiffs were utilizing the said portion of land cannot in itself amount to a mistake.

30. I say so because Pw1 admitted in evidence that the adjudication process in the area was done in 1974.

31. Pw1 did not inform the court if there was any objection during the adjudication process either from his father or himself to enable the court hold that the Title Deed for plot number 538, before the same was sub-divided, was issued by mistake.

32. If the Plaintiff's claim is that he is entitled to the land because of the long usage of the same, then he should have sought for an order of being registered as the proprietor of the land by way of adverse possession. However that is not the claim before the court.

33. Having admitted that the adjudication process was done in 1970s, the Plaintiffs have not discharged their burden of prove that the Title Deed was issued to the Defendants father by mistake in 1980.

34. Notwithstanding the fact that the Defendants did not call any evidence, and considering that the Plaintiff's houses are on a different parcel of land, I find that the Plaintiffs have not proved their case on a balance of probabilities.

35. For those reasons, I dismiss the Plaintiffs' suit with no order as to 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