



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
LAND AND ENVIRONMENT DIVISION
HCCC NO. 52 OF 2013

1. KADENGE BAYA MWERO
2. BIBI FONDO KALAMA.....PLAINTIFFS
=VERSUS=
BARKA SWALEH AWADH
ZEINAB YUSUF.....DEFENDANTS

JUDGMENT

1. By a Plaint dated 28th March 2013 and filed herein on 2nd April 2013, the two Plaintiffs sought the following orders against the two Defendants:-

(a) A permanent injunction restraining the Defendants from cutting, harvesting, building and/or in any other way dealing with the suit property being Plot No. Kilifi/Ngerenyi/736 situated at Kokotoni, Ngerenya.

(b) Vacant possession of the suit property, Plot No Kilifi/Ngerenyi/736 situated at Kokotoni, Nyerenya.

(c) Costs of and incidental to the suit.

2. The Prayers were based on the fact that the 1st Plaintiff was said to be the bona fide owner of all that parcel of land known as Kilifi/Ngerenyi/736 comprising approximately 4.9 Hectare (hereinafter the suit property). It was the Plaintiffs case that the Defendants had houses on the suit property but did not own it.

3. According to the Plaintiffs, the 2nd Defendant's husband, one Ali (now deceased) had desired to purchase 4 acres of land at a price of Kshs 28,000/=. The said Ali then paid half the price being Kshs 28,000/= but had difficulties paying the balance. The 1st Defendant then came in and paid Kshs 28,000/= to compensate the said Ali. The two Defendants thereafter colluded and refused to vacate the suit property thus necessitating this suit.

4. The two Defendants filed separate defences and counterclaims against the Plaintiff. According to the 1st Defendant her husband one Shomari Juma Mohammed (now deceased) bought the 4 acres from the 1st

Plaintiff on 29th October 1990. They then built their residence thereon and have been in physical occupation and possession since. The 1st Defendant denies paying Kshs 28,000/= to compensate the 2nd Defendant as alleged by the Plaintiff. It is her case that the 1st Plaintiff has failed and/or neglected to sub-divide the property and transfer the 4 acres to her.

5. Accordingly in her counterclaim, the 1st Defendant prays for:-

(a) An order of Specific performance of the Agreement of Sale dated 29th October 1990.

(b) Costs of the suit and interest thereon.

6. On her part, the 2nd Defendant contends in her Written Statement of Defence and Counterclaims dated 28th May 2013 that the 1st Plaintiff is erroneously registered as the owner of the suit property since he sold and obtained the necessary consents to sub-divide and sell 8 acres of the suit property to the 2nd Defendant's husband who is now deceased.

7. The 2nd Defendant further denies that her husband was paid Kshs 28,000/= as claimed by the Plaintiffs and states that she has occupied the land since the 1980s. It is her case that the Plaintiff's suit offends the Limitation of Actions Act having been filed long after the alleged cause of action accrued.

8. In her Counterclaim, the 2nd Defendant prays for the dismissal of the Plaintiff's suit and prays for orders that:-

(a) The 2nd Defendant be declared as the rightful owner of 8 acres of Plot No. Kilifi/Ngerenyi/736.

(b) The orders prayed for in (a) above be registered against the Title of Plot No. Kilifi/Ngerenyi/736 pursuant to Section 38(2) of the Limitation of Actions Act and/or section 28 of the Land Registration Act. No. 3 of 2012.

(c) The 1st Plaintiff's interest on 8 acres of the suit property Plot No. Kilifi/Ngerenyi/736 has been extinguished and that the 2nd Defendant is entitled to the suit property by adverse possession and the 2nd Defendant be registered as proprietor of 8 acres of the suit property and the Registrar of Land Kilifi County do delete the entry in respect of the Plaintiff's proprietorship of the Suitland.

(d) Costs be awarded to the 2nd Defendant for the Counterclaim.

9. When the suit came up for hearing on 15th March 2017, neither the Plaintiffs nor their Advocates on record were present in Court. Being satisfied that the Plaintiffs had been given proper notice of the hearing date, this Court proceeded to dismiss the plaintiff's case for want of prosecution. The Defendants thereafter proceeded to give evidence in support of their respective Counterclaims.

10. In this regard the 1st Defendant Abarka Swaleh Awadh testified that she is a resident of Tezo, Mkokotoni Plot No. 736A. She testified that the Plaintiff sold a portion of the suit property to her husband Juma Mohamed who died on 8th August 2006. She produced a Grant of Letters of Administration (marked DW1-Exhibit 1) in support of her case. The 1st Defendant also produced a Sale Agreement dated 29th October 1990 (marked Exhibit D2) which shows that the land was bought for Kshs 50,000/=. In addition she produced four receipts (Defence Exhibit 3) showing payments and acknowledgments thereof by the 1st Plaintiff.

11. The 1st Defendant further testified that the 1st Plaintiff and her husband went to the Land Control Board and the Board gave its consent vide a letter dated 1/11/1990. She produced the letter in Court (marked DW1 Exhibit 4). They then built a house on the land where they stay to-date and carry out

farming thereon.

12. At the time they bought the land, it had no title. The Plaintiff later got the title and it was the 1st Defendant's prayer that she be given title for the four acres which her husband had bought.

13. The 1st Defendant further testified that she knew the 2nd Defendant as her neighbor. The 2nd Defendant owns 8 acres of the suit property on which she has built houses.

14. On her part the 2nd Defendant Zeinab Yusuf, also testified that she is a resident of Mkokotoni. It was her case that her husband Ali Gona (now deceased) bought the land – 8 acres from the 1st Plaintiff a long time back and they built their residence and started living on the land. She produced an agreement dated 1st June 1983 showing her husband bought 6 acres of land from the Plaintiff. It is her case that that was the first time. They then proceeded to the Land Control Board whose consent to sub-divide the land was given vide a letter dated 10th February 1988 which she also produced in her bundle of documents.

15. Later on her husband bought another 2 acres from the 1st Plaintiff and they went to the Board and were given consent vide the Board's Letter dated 17th May 1988- a copy of which she also produced. It is her case that they have never been issued with title for the 8 acres and since her husband is now dead, she would like to be issued with title in her name.

16. I have considered the two Defendants testimony and evidence which was not controverted by the plaintiffs. From the evidence adduced, it is clear that the two Defendants entered into separate Sale Agreements with the Plaintiff who agreed to sell to them certain portions of all that parcel of land known as Kilifi/Ngerenyi/736. At the time of sale, the land had been registered in the name of the Vendor. The 1st Plaintiff came to be registered as the owner thereof on 28th August 2006. The 2nd Plaintiff is a daughter of the 1st Plaintiff and it was not clear on what basis she brought the suit alongside her father.

17. It is also clear from the material placed before me that requisite consents from the Land Control Board were obtained for the various portions of land purchased by the two Defendants and the Board gave consent on 27th February 1987 for the land to be sub-divided into two portions referred to as 736/A measuring 4 acres and 736B measuring 8 acres.

18. From the material placed before me, I am further satisfied that the two Defendants had completed performance of their obligations under the two respective agreements of sale and it was therefore incumbent upon the 1st Plaintiff to complete his part by having the land sub-divided and transferring the respective portions to the two Defendants as nominees of the original purchasers.

19. Accordingly, I am satisfied that the two Defendants have each proved their Counterclaims as against the plaintiffs on a balance of probabilities and I hereby enter Judgment for the 1st and 2nd Defendants as prayed in their respective Counterclaims with costs.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE