



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL APPEAL NO. 17 OF 2014
(Formally Mombasa ELC Appeal No. 2 of 2008)

1. KADII MBELE BULUSHI

2. KABIBI KIRABA NZAI

3. SIDI YERI CHARO.....APPELLANTS

=VERSUS=

KATANA BAYA MZANZU.....RESPONDENT

J U D G M E N T

1. This Judgment is in respect to the Appeal that was filed by the Appellant from the award of the Malindi Land Disputes Tribunal in Land case No. 28/11 of 2006 and the Judgment of the Senior Principle Magistrate.
2. The Appeal is premised on the ground that the trial court erred in finding that the Respondent had proved his case against the Appellants; that the trial court failed to analyse the evidence adduced and that the trial court relied on extraneous and unrecorded testimony of people who had not been called as witnesses.
3. The Appeal proceeded by way of written submissions.
4. The Appellants' counsel submitted that the evidence adduced by the Respondent and his witness and that of the Appellants' and their witnesses shows that the suit properties being plot no.274 and 622, Gongoni Settlement Scheme, belong to the Appellants.
5. Counsel submitted that the Respondent admitted in evidence that he registered himself as the owner of the suit properties during the demarcation of the plots; that the Respondent admitted that he tried to refund the purchase price to the Appellants for one of the plots which request was rejected by the Appellant and that the Respondent's witness testified that one of the portions of land was owned by the Appellant's late husband, Bimbo Baya.
6. The Appellant's advocate submitted that no evidence was adduced to show that her husband sold one of the suit property.
7. The Appellants' advocate finally submitted that there was evidence before the trial court to show that

the family had deliberated on the matter and resolved that the suit properties belonged to the Appellants; that the trial court did not at all analyse the evidence before it and that although the court purported to rely on the evidence of the neighbours during its site visit, the said neighbours did not testify.

8. The Respondent's advocate did not file his submissions.

9. This dispute was commenced in the Lands Dispute Tribunal at Magarini Division pursuant to the Land Disputes Tribunal Act (repealed). The Respondent herein was the claimant while the Appellants were the Objectors.

10. The Respondent informed the Tribunal that the land in dispute was distributed amongst three people: himself, Bimbo Baya and Katana Baya; that Mr. Hamisi Baya was not present during the distribution of the land and that he (the Respondent) later on agreed to give a portion of his share to Hamisi Baya.

11. It was the testimony of the Respondent that later on, Hamisi Baya informed him that he had managed to secure his land and abandoned the cashew nuts that he had cultivated on the land.

12. During the adjudication process, it was the testimony of the Respondent that he had the portion that Hamisi had abandoned registered in his name; that later on, Hamisi went back and demanded the said portion of land and that that is the suit property.

13. The evidence of the Respondent was that when the Appellants' husband, Mr. Bimbo chased away Hamisi from the suit property, he called a family meeting to arbitrate over the issue; that the Chief asked the Appellant the documents for the demarcation in respect to the said land and that he got annoyed and abandoned the arbitration process.

14. The Respondent's witness, Kitsao Baya Karegerege informed the Tribunal that he was the first squatter in the area; that his elder brother, Bimbo and the Respondent found him on the land and that they cultivated the land collectively.

15. It was the evidence of the Respondent's witness that later on, they sub-divided the land amongst the three of them; that the Appellants sold the portion of land belonging to Mr. Bimbo and that his portion of land and that of the Respondent are intact.

16. In cross-examination, the Respondent's witness stated that the Appellants never involved him in the sale of Mr. Bimbo's land.

17. The 1st Appellants informed the Tribunal that she was the wife of Mr. Bimbo; that it is Mr. Bimbo who settled in the area under dispute as a squatter; that later on Hamisi joined them and after a while, Hamisi sold his portion of land to Kabibe Kirage, Sidi Yeri, Nyevu Wanje, Bendera Thuva, Nyevu Konde and Jumwa Unde.

18. It was the evidence of the 1st Appellant that later on, there was a dispute between the purchasers on the one hand and Hamisi on the other hand.

19. The Appellant informed the court that later on, the Respondent started cultivating the land that had been apportioned to her husband; that she escalated the dispute to the elders who after deliberation decided the dispute in her favour.

20. When the members of the Tribunal visited the site on 3rd March, 2007, they observed as follows-

“The aforementioned neighbours to the disputed plot confirm that the plot belongs to the Claimant.”

21. The Tribunal went further to observe that the three objectors are not bona fide owners of plot numbers Gongoni Settlement Scheme 274 and 622 because the two parcels of land are registered under the name

of the Claimant, Katana Baya Mzanzu.

22. The Tribunal, in my view, cannot be faulted in arriving at its decision just because they did not analyse the evidence that was before them in the Judgment.

23. What is critical is that the Appellants and the Respondent were given a hearing by the Tribunal whereafter the Tribunal found that “the Claimant Katana Baya Msanzu has proved his case beyond reasonable doubt and thereafter has won the case”. The members of Tribunal must have considered the evidence before them, including the observations they made, when they visited the site, thus the decision.

24. The evidence by the Appellants and the Respondent was that they were squatters on the parcel of land after clearing what was otherwise a vacant piece of land.

25. Neither the Appellants did not produce evidence to show that the suit property was Trust Land so as to show that they were entitled to it by way of customary law as recognised by the repealed Constitution and the repealed Trust Land Act.

26. Indeed, the documents that were produced in evidence shows that the Respondent was allocated plot numbers 274 and 622 by the Settlement Fund Trustee on 31st August, 1997.

27. The letter of allotment shows that the two parcels of land were allocated to the Respondent by the Government within a Settlement Scheme.

28. That being the case, the Appellants cannot claim that they had a better claim over the suit property considering that the land belonged to the Government.

29. If indeed the Appellants are the ones who were “squatting” on the land as squatters in the area, then they should have applied to SFT to be allocated the said land. No evidence was produced to show that they made the Application.

30. The long and short of the above analysis is that the members of the Tribunal were right when they found that the Appellants never disputed the allocation of the two parcels of land to the Respondent.

31. Pursuant to the provisions of Section 3(1) of the Land Dispute Tribunal Act, the jurisdiction of the Tribunal was limited to civil cases involving the division of, or the determination of boundaries to land or trespass to land.

32. Considering that the land was allocated to the Respondent by SFT, the Tribunal had no jurisdiction to vary the said allocation. The issue that was before the Tribunal was on who owns the two parcels of land, which was beyond its jurisdiction.

33. Considering the haphazard evidence by the 1st Appellant and her witness, I cannot fault the Tribunal for having found that the suit property was rightfully registered in the name of the Respondent by the Settlement Fund Trustee.

34. In the circumstances, I dismiss the Appellants' Appeal with costs.

Dated, signed and delivered in Malindi this 4th day of **November**, 2016.

O. A. Angote

Judge