



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 126 OF 2012

JOSEPH MLANDI.....PLAINTIFF

=VERSUS=

1. JOSPHAT KARISA

2. DERRICK RINGI.....DEFENDANTS

J U D G M E N T

Introduction:

1. In the Plaint dated 31st July 2012 and filed on 2nd August 2012, the Plaintiff is seeking for a declaration that he is the lawful owner of plot number 14 situated at Mtomondoni/Mikanjuni, Kilifi (the suit property).
2. In the Plaint, the Plaintiff has averred that on 20th November 1994, he entered into an agreement of sale of the suit property measuring approximately 3 ½ acres. That after he purchased the land from one Gumbo, a dispute arose in 1999 between Gumbo Chibunga and Tedeu Petro who was claiming ownership of the trees on the suit land and that after deliberation, the area Chief and the village elders ruled in favour of Mr. Gumbo.
3. The Plaintiff has further averred in the Plaint that the said Gumbo Chibungu had also sold another portion of land adjacent to the suit property to one Baya, deceased, who later sold it to the 1st Defendant. However, after the death of Mr. Baya, the 1st Defendant claimed that Mr. Baya had also sold to him the suit property and proceeded to sell it to the 2nd Defendant, thus this suit.
4. In their joint Defence and counterclaim, the Defendants averred that the 2nd Defendant bought the land where he is now constructing a house from the 1st Defendant for valuable consideration.
5. In the Counterclaim, the Defendants have averred that the 2nd Defendant is the owner and proprietor of the undivided portion of plot number 14 measuring about 100 feet by 40 feet and that the Plaintiff has no legal right whatsoever over it.

The Plaintiff's case

6. The Plaintiff, PW1, informed the court that he purchased the suit property from one Mr. Gumbo

- Chibunga in 1991. It was the evidence of PW1 that the property he purchased was a portion of a bigger piece of land. The Plaintiff produced the sale agreement dated 21st May 1991 as PEXB 1.
7. According to PW1, Mr. Gumbo had planted cashewnuts on the land which he used to harvest.
 8. After purchasing the land, it was the evidence of PW1 that Mr. Petro started claiming that the said land belonged to him. However, the Chief decided the dispute in favour of Mr. Gumbo after visiting it.
 9. It was the evidence of PW1 that next to the land that he had acquired, there was a Mr. Baya who had land abutting his. It was his evidence that Mr. Baya, now deceased sold his portion to the 1st defendant.
 10. According to PW1, the 1st Defendant took him to the Chief claiming that the land he had bought from Mr. Gumbo actually belonged to him. The issue was escalated to the District Officer after the Chief ruled in favour of PW1.
 11. It was the evidence of PW1 that although the DO agreed with the Chief the subsequent DO revisited the issue and held that the suit property belonged to the 1st Defendant. It was his evidence that the decision of the DO was based on the evidence of the Chief and the village elders who were new in the area.
 12. PW1 produced photographs showing the suit property. It was his evidence that he has sunk a well on the property.
 13. It was the evidence of PW1 that the old boundary is shown by the existing cashew-nut trees and that after the decision of the DO, the Defendants demolished the house that he had started constructing.
 14. According to the Plaintiff, the 1st Defendant bought a different piece of land from Mr. Baya; that he waited until after the demise of Mr. Baya to claim the suit property and that the whole land measures 91.4 acres otherwise known as plot number 14.
 15. In cross examination, PW1 stated that the whole land belongs to the government and that the land he was claiming measures 3 ½ acres.
 16. It was the evidence of PW1 that the suit property is identifiable by way of a natural fence and that it is Mr. Gumbo who sold another portion of land abutting the land he bought to Mr. Baya.
 17. Mr. Gumbo Chibungu, PW2, informed the court that he sold land measuring 3.5 acres to the Plaintiff in 1994 at a cost of Kshs.20,500 having sold another adjacent portion to Mr. Baya, deceased.
 18. It was the evidence of PW2 that Mr. Baya sold his portion of land to the 1st Defendant. According to PW2, the suit property belongs to the Plaintiff and not to the 1st and 2nd Defendants.
 19. According to PW2, he took possession of the suit property in 1995 although he has never been given a title deed.
 20. In cross examination, PW2 informed the court that all the people on the portion of land measuring 95 acres are squatters.
 21. It was his evidence that the said squatters usually identify their portions of land by way of hedges.
 22. Charles Mwatsuma, PW3, informed the court that he witnessed the sale agreement between the Plaintiff and Mr. Gumbo in respect of the suit property and that he is aware of the existing boundaries.
 23. According to PW3, the suit land belongs to the Plaintiff. It was the evidence of PW3 that the land that the 1st Defendant purchased from the late Mr. Baya was different from the suit property; that the late Mr. Baya never had any dispute with Mr. Gumbo and that Mr. Gumbo was all along his neighbour.
 24. PW4, Charo Mwabui, stated that he was the village elder when a dispute arose between Mr. Gumbo and the late Mr. Baya.
 25. According to PW4, him, together with the Chief visited the suit property but the claimant refused to take an oath.
 26. It was the evidence of PW4 that the 1st Defendant purchased his land from Mr. Baya later on and that Mr. Gumbo never sold to Mr. Baya the 3 ½ acres piece of land.

The Defendant's case:

27. The 2nd Defendant Derrick Ringi, 2DW1, informed the court that he is the owner of plot number

- 14/IV/MN having purchased it from the 1st Defendant on 14th May 2012. 2DW1 produced the sale agreement as DEXB1.
28. According to 2DW1, he built a Swahili house with 12 rooms whereafter he received a notice requiring him to stop construction.
29. It was the evidence of 2DW1 that he never investigated if indeed the suit property belonged to the 1st Defendant and that he has spent over Kshs.900,000 to develop the land.
30. In cross-examination, 2DW1, stated that he does not know the Plaintiff and that he never involved the area Chief when he bought the suit property.
31. It was the evidence of 2DW1 that the Plaintiff was already staying in his portion of land when he purchased the land from the 1st Defendant.
32. 2DW1 stated that when he purchased the land, there were no boundaries and he was not aware of the acreage of the land that the Plaintiff was already occupying.
33. The 1st Defendant did not testify.

Submissions:

34. The Plaintiff's advocate submitted that the current dispute arose after the demise of Mr. Baya, the proprietor of the parcel of land adjacent to the suit property; that the said Mr. Baya sold a different parcel of land to the 1st Defendant and that all the witnesses of the Plaintiff corroborated the Plaintiff's evidence.
35. The Defendants' advocate submitted that in the absence of a title deed for plot number 14, the Plaintiff's suit is a mirage and that he is basically a squatter on plot number 14.
36. Consequently, it was submitted, Gumbo Chibugu could not pass any title to a portion of plot number 14 to the Plaintiff considering that the land is registered in favour of Moses Mbugu Mwangi.
37. Counsel submitted that the 2nd Defendant is a purchaser for value without notice from the 1st Defendant and that the 2nd Defendant is now in possession of the suit property.
38. The Defendants' counsel finally submitted that the Plaintiff has no enforceable interest over plot number 14 and the suit should be dismissed with costs.

Analysis and Findings:

39. Both the Plaintiff and Defendants do not have title documents over the suit property. Indeed, both parties, amongst others, are squatting on the suit property.
40. The evidence before this court shows that one Gumbo Chibugu, PW2, is the one who sold to the Plaintiff a portion of plot number 14 measuring approximately 3 ½ acres. The said Gumbo Chigugu, PW2, was also a squatter who opted to transfer his rights to the Plaintiff for valuable consideration. The Plaintiff produced in evidence the agreement of sale dated 31st May 1991 in respect to the said land.
41. The agreement of sale that was entered into between the Plaintiff and Gumbo Chibungu was witnessed by three people including PW3.
42. PW3 informed the court that he was the Plaintiff's neighbour and he witnessed the sale of the land to the Plaintiff by Mr. Gumbo.
43. The evidence of PW1, PW2 and PW3 was corroborated by the then village elder, PW4.
44. The 2nd Defendant's evidence was that he purchased the same land from the 1st Defendant for Kshs.400,000. The 2nd Defendant produced the agreement of sale dated 14th May, 2012 which was witnessed by four people. None of the people who witnessed the signing of the agreement, including the 1st Defendant, testified to support the claim that the land that the 2nd Defendant purchased is the same land that the Plaintiff is claiming.
45. Indeed, the failure by the 1st Defendant to testify with a view of informing the court how he acquired possessional rights over the suit property renders the Defendants' case a non-starter.
46. On the basis of the evidence before me, I am satisfied that it is the Plaintiff who has possessional rights vis-a-vis the Defendants' over the suit property. PW2, PW3 and PW4 confirmed that it is the Plaintiff who has been in possession of the suit property since 1994 and consequently the 1st

- Defendant could not transfer it to the 2nd Defendant.
47. In any event, the 2nd Defendant acknowledged that he did not consult with the area Chief before purchasing the land from the 1st Defendant. He could not therefore have confirmed if the Plaintiff was the one in possession of the suit property before he purchased it. He cannot at this stage claim to have been an innocent purchaser for value without notice if he never made those inquiries.
48. Although the suit property is said to be registered in the name of a third party, the claim before me is one of possessional rights of the parties herein. Consequently, I find and hold that it is the Plaintiff who is entitled to the suit property and not the Defendants.
49. For those reasons, I allow the Plaintiff's Plaint dated 31st July 2012 in the following terms.

(a) A declaration be and is hereby issued that the Plaintiff is entitled to exclusive and unimpeded right of possession, use, occupation and quiet enjoyment of a portion of land measuring approximately 3 ½ acres of plot number 14 situated at Mtomondoni/Mikanjuni within Kilifi District.

(b) An order of permanent injunction be and is hereby issued restraining the Defendants by themselves, their agents or servants or otherwise howsoever from trespassing upon and or in any manner whatsoever interfering with the Plaintiff's use, possession and quiet enjoyment of portion of land measuring 3 ½ acres of plot no. 14 situated at Mtomondoni/Mikanjuni within Kilifi District.

(c) For avoidance of doubt, this judgment does not in any way determine the rights of the registered proprietor of plot number 14 viz-aviz the rights of the Plaintiff.

(d) The Defendants to pay to the Plaintiff the costs of the suit

Dated and delivered in Malindi this 6th day of February, 2015.

O. A. Angote

Judge