



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.77 OF 2010

MUDIGO WA KUWANGA.....PLAINTIFF

=VERSUS=

1. NGUMBAO KAZUNGU

2. KITSAO KAZUNGU.....DEFENDANTS

J U D G M E N T

Introduction

1. In the Plaint dated 30th June, 2010 and filed on 8th July 2010, the Plaintiff is seeking for the following orders:
 - (a) A mandatory injunction to order the Defendants jointly and severally to forthwith pull own and remove from the said land the said construction, dwelling and development, crops and remove all their property of whatever nature as well as their workmen, servants or agents from the Plaintiff's said property.
 - (b) An injunction to restrain the Defendants jointly and severally and by themselves, their servants or their agents or otherwise howsoever from preventing the Plaintiff from accessing his land and the Defendants should desist from trespassing into the Plaintiff's said property.
 - (c) An injunction to restrain the Defendants by themselves, their servants or their agents or otherwise howsoever from remaining on or continuing in occupation of the said land.
 - (d) Demolition of all illegal structures/buildings and uprooting all crops erected/planted on the Plaintiff's land by the Defendants.
 - (e) Costs incidental to this suit.
 - (f) Such other or further relief that this Honourable Court may deem fit to grant.

2. The Plaintiff has averred in the Plaint that him, together with his three colleagues, are the registered proprietors of land known as Kilifi/Kinani/233 measuring 16.0 Ha; that on or about the year 2005, the Defendants unlawfully entered into the suit property and that the Defendants have constructed several illegal structures on the land.
3. In their amended Defence and counterclaim, the Defendant averred that its their father, Kazungu Nzhoga Mwarogo, who was allocated the suit land in 1973 during the adjudication process; that in 1980, Kahindi Mure and Kalume Fondo encroached on the land as a result of which their father filed a case in Kaloleni court in 1982 and that the registration of the suit property in the name of the Plaintiff and three others was fraudulent.

The Plaintiff's case:

4. The Plaintiff, PW1, informed the court that the Defendants are brothers and that their father was known as Kazungu Muzhoga.
5. According to the statement of PW1 which he adopted as his evidence in chief, he is the registered proprietor in common of parcel of land known as Kilifi/Kinani/233 with the late Kahindi Kakenga and Rongo Mure and that he holds the title in trust for the beneficiaries of the late Kahindi Mure and Rongo Mure.
6. According to PW1, the late Kahindi Mure was involved in a land dispute with the Defendants' father in Land Adjudication Committee case number 22/78/79 over the suit property; that on 19th December 1978, the committee awarded the land to the late Kahindi Mure and that in 1979, the Defendants' father was charged in criminal case number 494 for trespass and was convicted and sentenced after pleading guilty.
7. It was the evidence of PW1 that in 1986, the Defendants' father instituted a suit in the Resident Magistrate's court at Mombasa in Land case number 16 of 1986 in respect to the suit property.
8. According to PW1, the suit was dismissed on the ground that the registration of the suit property in favour of the Plaintiff could not be challenged.
9. It is the Plaintiff's case that after the Ruling of the court, the Defendants' father together with his children moved from the suit property in the year 1987 until sometimes in 2005 when the old man died. The Defendants buried their father at Makomboani where they have land.
10. PW1 produced in evidence the proceedings of the Land Adjudication Committee and the proceedings in Criminal case number 494 of 1979.
11. PW1 also produced in evidence the title deed in respect of the suit property and the proceedings and Ruling in Mombasa RMCC No. 16 of 1986.
12. In cross examination, PW1 stated that the dispute in respect of the suit property was between his late father and the Defendants' father and that the land was never registered in the name of the Defendant's father.
13. According to PW2, the Defendants' father was only invited on the suit property by his father.
14. PW2 is the son of Kahindi Mure, one of the registered proprietors of the suit land. The evidence of PW2 was similar to the evidence of PW1.

The Defendants' case:

15. The 1st Defendant, DW1, informed the court that his late father settled on the suit property some time in 1960; that demarcation was done in 1973 and his father was registered as the proprietor of the suit property and that they were shocked when they found out that the name of their father had been cancelled and substituted with the names of Mdigo, Kahindi, Kakenga and Rogo Mure.
16. The evidence of DW2 is similar to that of DW1.
17. Written submissions were filed by both counsels. I have considered the said submissions.

Analysis and findings:

18. According to the title deed that was produced in evidence by the Plaintiff, the Plaintiff, together with Kahindi Mure, Kakenga Mure and Rogo Mure (all deceased) were registered as the proprietors of parcel of land known as Kilifi/Kinani/233.
19. The evidence produced in this court shows that during the adjudication process, a dispute arose

- between the Plaintiff's father and the Defendants' father. The said dispute was referred to the Land Adjudication Committee by Kahindi Mure in case number 22/78/79.
20. After hearing the witnesses, the committee decided the case in favour of Kahindi Mure in its findings dated 19th December 1978.
 21. Although the Defendants' father had the right of appeal against the decision, he never did so.
 22. Indeed, the Defendants' father was subsequently charged in Kaloleni Criminal Case Number 494 of 1979 for trespass on the suit property. The Defendants' father was subsequently convicted on his own plea of guilty and sentenced to serve 2 months E.M.P.E and in the alternative to pay a fine of Kshs.400. The decision of the criminal court was made on 11th July 1979.
 23. It is not clear from the proceedings what the Defendants' father was accused of, but from the facts which were read by the prosecutor, the Defendants' father refused to vacate the suit land thus the criminal case.
 24. The issue of ownership was conclusively dealt with by the Land Adjudication Committee. Having failed to appeal against the said decision and considering that the Defendants' father pleaded guilty of having trespassed on the suit property, the Defendants cannot at this stage argue that they are entitled to the suit property.
 25. Indeed, this court does not have the jurisdiction to question the adjudication process that was done in 1978 considering that the Land Adjudication Act is clear on how the disputes that arise in respect to the process are supposed to be settled. The Defendants or their father did not challenge the process.
 26. The failure to file an appeal to the Minister pursuant to the provisions of Section 29 of the Land Adjudication Act ousts the jurisdiction of this court to delve into the appropriateness of the adjudication process.
 27. For those reasons, I allow the Plaintiff's Plaint dated 30th June, 2010 as prayed.

Dated and delivered in Malindi this **18th** day of **September**, 2015.

O. A. Angote

Judge