



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 161 OF 2009

RAMADHAN MOHAMED MWAMATEZO & ANOTHER.....PLAINTIFFS/APPLICANTS

VERSUS

SALIM RAMADHAN MWAMATEZO & OTHERS.....DEFENDANTS/RESPONDENTS

JUDGEMENT

1. The two plaintiffs are brothers being the sons of the late Mohamed Ramadhan Mwamatezo. They have sued the 7 defendants for a claim of a share of land parcel No Kwale/Ukunda/703. The 1st to 6th defendants are paternal cousins of the plaintiffs. In the plaint dated 2nd June 2009, the plaintiffs seek judgement against the defendants for orders :-

- a) *The subdivisions of plot No Kwale/Ukunda/703 as per paragraph 21 of the plaint.*
- b) *An injunction to issue against the 2nd defendant to the 6th defendant barring them from interfering with the plaintiff's peaceful enjoyment and possession of the portion of Land plot No Kwale/Ukunda/703.*
- c) *Costs of the suit.*

2 The 1st – 6th defendants entered appearance on 15th June 2009 through Gunga Mwinga & Co advocates, Mombasa. I have not seen any statement of defence filed on behalf of these defendants. The A. G filed appearance for the 7th defendant on 16th June 2009. He did not file any statement of defence.

The suit proceeded without the defences on record. The plaintiff proved evidence of service of the hearing upon the advocate for 1st – 6th defendants on 30th April 2015. The suit against the 2nd defendant was withdrawn as the plaintiff informed Court the 2nd defendant is deceased. The 7th defendant participated in the proceedings.

3. On 28th May 2015, the 1st plaintiff testified as PW 1. He said that he is a fisherman. He stated that he knows all the defendants as they share a grandfather. His late father Mohamed Mwamatezo had sued the 1st – 6th defendants before the Msambweni LDT who decided in their father and ordered that the suit land be divided into two. The proceedings and award of the Msambweni LDT was produced as Pex 1. PW 1 continued that the defendants successfully appealed to the Lands Appeal Committee of the Coast Province. The witness also produced the appeals tribunal proceedings and judgement in case No 166 of 2001 as Pex 2. PW 1 stated further that the 1st - 6th defendants appealed to the High Court in High Court

at Mombasa Civil appeal No 164 of 2007. This appeal has never been prosecuted to date.

4. PW 1 continued that the suit land has a title deed whose copy he produced as

Pex 5. The title is registered in the names of :

- i) Omar Mohamadi
- ii) Said Mwambwe
- iii) Bakari Momhamed Mpambwa
- iv) Salim Ramadhani
- v) Hasani Mohamadi

According to PW 1, the land should have been registered in the name of his father, his uncle and the Kisuses. He stated they live on their share. When the case commenced, the defendants began encroaching on their land. The title issued after the death of their father omitted their father's name. PW 1 testifies that the 1st defendant was registered on their behalf as he does not have a family. He stated that the Kisuses while encroaching on their share, drilled a well on their portion yet the boundaries were marked according to how they were farming the land. PW 1 produced the photographs as Pex 6 a – c showing a house built by the Kisuses along time ago. The witness continued that he reported them to the provincial administration who wrote to the defendants to stop. He produced the bundle of letters written to the defendants as Pex 7. PW 1 stated that the defendants are still using their share which they have encroached. He concluded by saying that he thinks their share of the suit land is about 5.6 acres and urged the Court to make an order that each family to get their share of the land. He also prayed for costs of the suit.

5. From the evidence produced, this Court was not told whether the decisions of the Msambweni Land disputes tribunal or the Lands Appeal Committee, Coast Province were ever adopted as orders of the Court as was required under section 8 of the LDT Act (repealed). In the absence of such confirmation, this Court will treat both proceedings as evidence and not decrees. Since there is nothing presented by the defendants to challenge the version given to this Court by the 1st plaintiff, this Court will go by this evidence. The only responsibility remaining for this Court to do is determine whether based on this evidence, the plaintiffs have established a case and therefore entitled to the orders sought.

6. The green card shows the suit land is registered in the names of 5 people as proprietors in common in equal undivided shares of 1/5 each. The total acreage is 5.2 ha with a provision of 10 metres road passing through the plot.

The five are :-

- i) Salim Ramadhani Mwamateso – 1st defendant
- ii) Omar Mohamadi
- iii) Said Mwambwe
- iv) Bakari Mohamadi Mpambwa
- v) Hasan Mohamed

According to the plaint filed, the plaintiffs claim their land was amalgated with a neighbouring plot belonging to the the family of Ali Kisuse during adjudication and registered as one plot. Their father's name was omitted but their uncle's name Salim Ramadhan Mwamatezo was included. He also said that

their boundaries were clearly marked out. In paragraph 12 of the defence he pleads the other registered owners i.e Omar Mohamad, Said Mwambwe, Bakari Mohamad Mpamba and Hasan Mohamed are all dead. Further that in paragraph 17, the plaintiffs pleaded that the 2nd – 6th defendants are encroaching on their share of the land on the basis that the title deed bears the name of their father. Lastly in paragraph 21, the plaintiffs urged the Court to order the land be divided into two i.e the Mwamatezo family and the Kisuse family.

7. I have considered all the issues raised by the plaintiffs and the evidence adduced in support thereof. The evidence shows the land in dispute is ancestral land. Both the plaintiffs and the defendants are living on this land.

Besides the 1st defendant all the co – registered owners are deceased. The law provides that where the property is held in common, when the co – owners died, their shares passes on to the beneficiaries of their estate. It appears no letters of administration have been taken out in respect of the other four registered owners of the suit property by their beneficiaries. Legally the 2nd – 6th defendants have not taken any steps to get a stake in the suit property. They are not administrators of the deceased registered owners and hence they have no right to interfere with the proprietorship of the suit land. In the circumstances it may be difficult for this Court to grant prayer (I) of the plaint as regards subdivision of the land into two.

8. I am indeed satisfied that the plaintiffs have proved that they have a share in land parcel No Kwale/Ukunda/703. That share comprises in the half share belonging to the Mwatezo family as per the existing ancestral boundaries. The 1st defendant is still alive and is entitled to do whatever he wishes with his share once he acquires the title deed for it. Without deceased estate's having administrators, it will be difficult for the plaintiff to get their land. In order for this to happen, I direct the plaintiff to cite the families of :-

- i) Omar Mohamad
- ii) Said Mwambwe
- iii) Bakari Mohamed Mpamba
- iv) Hasan Mohamed

To take out letters of administration for the administrators to secure titles in their names and execute documents signing the land into plaintiffs name. In default, the plaintiffs can apply to the High Court to be declared the administrators of the estates of the said persons and on receipt of the certificate of grant, they be at liberty to carry out subdivision of land parcel No Kwale/Ukunda/703 to secure a title in their names. As regards prayer (2) on injunction, I have found the 2nd – 6th defendants have no rights to interfere with plaintiffs occupation as they do not have a title deed. Further since the plaintiffs have proved that they are entitled to a share in this land, I find the prayer is merited and do hereby make an order permanently restraining the 2nd - 6th defendants, their kin, servants or any persons claiming through them from interfering with the plaintiffs' use and occupation of a portion of land comprised in land Kwale/UKunda/703. Costs of this suit to be borne by each of the parties. There is no award as against the 7th defendant.

Judgement dated and delivered at Mombasa this **16th** day of **September, 2015**

A. OMOLLO

JUDGE