



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 132 OF 2010

1. **KARISA KITUNGA JEFA**
2. **KAINGU KITUNGA JEFA**

(suing as the Administrator of the Estate of Kitunga Jefwa
Kitunga**PLAINTIFFS**

=VERSUS=

1. **SAID BWANA MKUU**
2. **MARGARET SAID.....DEFENDANTS**

JUDGMENT

Introduction:

1. The Plaintiff commenced this suit by way of a Plaint. In the Plaint, the Plaintiffs have averred that they are the administrators of the Estate of Kitunga Jefwa Kitunga; that by virtue of an Agreement dated 14th August 1989, their father, Kitunga Jefwa Kitunga sold a parcel of land measuring $\frac{3}{4}$ of an acre of the then Gede/Kirepwe “B”/43 to the Defendants for Kshs. 15,000 and that without consulting them, the Defendants engaged a private surveyor who carried out the sub-division of Gede/Kirepwe “B”/43.
2. During the sub-division of Gede/Kirepwe “B”/43, it was been averred that the Defendants allocated themselves a whole 0.471Ha, which was more than the $\frac{3}{4}$ of an acre that they purchased.
3. It is the Plaintiffs’ contention in the Plaint that the Defendants carried out the sub-division of Gede/Kirepwe “B” /43 without the consent of the Land Control Board or that of the Plaintiffs’ family; that the Defendants obtained a Title Deed without a Transfer being executed by the Plaintiffs and that the Defendants presented to the District Land Registrar forged documents to secure registration and issuance of a Title Deed.
4. The Plaintiffs are claiming for a declaration that the Title Deed for Gede/Kirepwe “B”/118 was fraudulently obtained and a declaration that the Plaintiffs are entitled to the excess portion of 0.1710 Ha which was irregularly acquired by the Defendants.
5. In their Defence, the Defendants stated that they acquired a title to the suit property on 24th April, 1997 procedurally and lawfully and that the suit is time barred.

The Plaintiff's case:

6. According to the 1st Plaintiff, Pw1, the Defendants purchased from their late father $\frac{3}{4}$ of an acre of land and an agreement was prepared and signed to that effect. Pw1 produced the agreement dated

- 14th August 1989 as an exhibit.
7. It was the evidence of Pw1 that the whole land measured $1\frac{1}{4}$ of an acre. After the sale to the Defendants, $\frac{1}{2}$ an acre remained. However, the 1st Defendant subsequently obtained a title deed for the whole land instead of $\frac{3}{4}$ acre of an acre that he had purchased.
 8. It was the evidence of Pw1 that the 1st Defendant took the original title deed from their mother after the death of their father and proceeded to have the suit property registered in his name.
 9. According to Pw1, they went to the Land Control Board and agreed that $\frac{3}{4}$ of an acre of their land should be sold to the 1st Defendant and not the whole land.
 10. In cross-examination, Pw1 stated that before his father died, he had agreed to sell part of their land to the Defendants and that the initial land was known as parcel number Gede/Kirepwe "B" / 43.
 11. Pw1 admitted that their late father sought for the consent of the Board for the sub-division of Plot No. Gede/Kirepwe "B" /43 which created plot NO. Gede/Kirepwe "B"/120 and 118 amongst others. Plot No. 120 is the one that was sold to the Defendant by the Plaintiff's father. Pw1 further admitted that his late father also sold the other sub-division being plot no. 118 and that he was present when the agreement for the sale of the two parcels of land to the were done.
 12. It was the evidence of Pw1 that he was aware that the Land that the 1st Defendant purchased from his father was plot no. 120 before he exchanged it with another purchaser known as said Kadir. Mr. Kadir's parcel of land was plot No. 118. Pw1 acknowledged that it was his father who sold to Mr. Kadir plot no. 118 which measured $1\frac{1}{4}$ of an acre.
 13. In re-examination, Pw1 stated that he was aware that the 1st Defendant and Mr. Kadir exchanged their parcels of land after his father's death and that plot number 118 which was sold to Mr. Kadir was bigger than plot No. 120.
 14. According to the 2nd Plaintiff, Pw2, they have sued the Defendants because their father only sold to him $\frac{3}{4}$ of an acre but they are now claiming for 1 acre, being the difference that was not sold to the Defendants by their father.
 15. It was the evidence of Pw 2 that Gede/Kirepwe "B" 43 was sub- divided into four portions although he could not recall the portion that was sold to the Defendants. Pw 2 produced the search for plot no Gede/Kirepwe 118 as PEXB 4.

The Defendants' case:

16. The 1st Defendant, Dw1, informed the court that the 2nd Defendant is his wife. According to Dw 1, he entered into an agreement with the Plaintiffs' father on 10th August 1990 for the purchase of part of Gede/Kirepwe "B" 43 for Kshs. 15,000. The agreement was produced as DXB1. Later on, and with the consent of the Board, the Plaintiff's father sub- divided the land into four portions, to wit, 117,118,119 and 120. The mutation form showing the sub-division was produced as DEXD 2.
17. It was the evidence of Dw1 that the land he bought was parcel of land number Gede/Kirepwe "B" /120 after the Plaintiffs father obtained the consent of the Board. The Application for consent of the Board and the consent were produced as DEXB3 and 4 respectively. The land he bought measured 0.44Ha (approximately 1 acre). The property was then transferred to Dw1 by virtue of the transfer dated January, 1991 which was produced an DEXB 5.
18. Dw1 stated that another person purchased from the Plaintiff's father parcel of land number Gede/Kirepwe "B"/118. He agreed with the person who had bought portion number 118 to exchange with him the two plots. The said exchange was duly approved by the Board. The consent for the exchange of the two plots was produced as DEXB7 and a title deed for plot number 118 was duly registered in his name. Dw1 denied knowledge of an agreement dated 14th August 1989 which shows that he purchased $\frac{3}{4}$ of an acre and not 1 acre.

Submissions:

19. The Plaintiffs' advocate did not file his submissions. The Defendants' advocate filed his submissions and reiterated that the Defendants purchased from the Plaintiffs' father parcel of land number Gede/Kirepwe "B"/120 which they later exchanged it with a Mr. Kadir who had

- purchased Gede/Kirepwe “B” /118.
- 20.The Defendants’ counsel submitted that the evidence of Pw1 and Pw2 is insufficient and unreliable and that in any event the Plaintiff's suit is time barred.

Analysis & Findings:

- 21.The Plaintiffs’ claim is for a declaration that the title deed for Gede/Kirepwe “B”/118 was fraudulently obtained and that the said title should be nullified by this court.
- 22.The evidence by Pw1 and Pw2 was that their late father sold to the Defendants $\frac{3}{4}$ of an acre of land. However, the Plaintiffs were not aware that the parcel of land that they want this court to nullify was initially sold to a Mr. Kadir before Mr. Kadir exchanged it with the Defendants’ land.
- 23.Indeed, the Plaintiffs in their evidence admitted that they are aware that their later father subdivided parcel of land Gede/Kirepwe “B” /43 into four portions of land, to wit 117,118,119 and 120. The Plaintiffs admitted that one of the sub divisions was sold by their father to Mr. Kadir and the other one to the Defendants.
- 24.The Plaintiff produced an agreement dated 14th August, 1999 between their late father and the Defendants. The agreement shows that the Defendants bought $\frac{3}{4}$ of an acre of Gede/Kirepwe “B” 43. The 1st Defendant denied that he signed that agreement. However, a further agreement that was produced by the 1st Defendant as DEXB1 acknowledges the fact that he paid to the Plaintiffs’ father Kshs. 15,000 on 14th August 1989. This latter agreement confirmed that an agreement dated 14th August 1989 produced by Plaintiffs’ existed.
- 25.The Plaintiffs did not however show the nexus between the portion of land that the Defendants bought from their father which was Gede/Kirepwe “B”/120 and plot No. 118 which the Defendants exchanged with Mr. Kadir.
- 26.The Defendants produced in evidence the Mutation form showing the sub-division of Gede /Kirepwe “D”/43 which gave rise to plot numbers 117,118,119 and 120. The Defendants further produced in evidence the consent of the Malindi Land Control Board for the transfer of plot “B”/120 measuring 0.444ha from the Plaintiffs’ father to the Defendants and the transfer document of the plot dated 3rd January, 1991.
- 27.Whether the agreement that was entered into between the Plaintiffs’ father and the Defendants was for $\frac{3}{4}$ of an acre and not for 0.44 ha is irrelevant considering that the Plaintiffs’ father signed the transfer document for plot number Gede/Kirepwe 120 after sub-division. The land was eventually registered in favour of the Defendants.
- 28.The Defendants further showed how they came to own plot number Gede/Kirepwe “B” 118 which had been sold to Sayed Hassan Kadir by the Plaintiffs’ father. The Defendants produced the Transfer document being the “Transfer by way of exchange with plot number Gede/Kirepwe “B” 120”. The said Transfer was between the Defendants and the said Sayed Hassan Kadri. The title deed to plot no. 118 was eventually transferred from Sayed Hassan Kadri to the Defendants and a Title Deed was issued on 24th April 1997.
- 29.It is with the above chronology of events in mind that I hold that there is no correlation between the Plaintiffs’ claim and the transfer of plot no. 118 to the Defendant.
- 30.The transfer of plot number Gede/Kirepwe 118 to the Defendants was done lawfully and the Plaintiffs’ claim fails on that account. I will not even consider if the Plaintiff's claim is time barred or not.
- 31.For the reasons I have given above, I dismiss the Plaintiff’s Plaintiff with costs.

Dated and delivered in Malindi this 4th day of **July**, 2014.

O. A. Angote

Judge