REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 193 OF 2011

ELIZABETH KACHE CHAI.....PLAINTIFF

=VERSUS=

SAID IBRAHIM BAYA.....DEFENDANT

J U D G M E N T

1. The Plaintiff commenced this suit by way of a Plaint. In the Plaint, the Plaintiff has averred that she is the registered proprietor of the land parcel number Ngomeni/squatters settlement scheme 1812 (the suit property). The Plaintiff further explains that in or about 2001, the Defendant and members of his family made allegations implicating her of having caused the death of the Defendant's brother by the name of Joseph Charo Baya.

2. The deceased death was apparently said to have been caused by the Plaintiff. This was an outcome of a ritual that the Defendant forced the Plaintiff to undergo. In the aftermath of the said ritual, the Plaintiff was found guilty. In her plaint, the Plaintiff explains that she is a Christian who has never subscribed or believed in the ritual.

3. It is after this ritual that the Plaintiff 'lost' her land to the Defendant as compensation due to the outcome of the ritual. With the assistance of the local chief, the Defendant managed to take over the suit land. The Defendant has now been on the land for 10 years.

4. An award was also entered into by the local Magarini Land Disputes Tribunal against the Plaintiff after she failed to appear before the Tribunal.

5.

6. In the Counterclaim, the Defendant averred that the parcel of land known as Ngomeni/squatters settlement scheme/1812 was his and he had acquired the said parcel of land through an agreement made on 6th February 1998 after a ritual was done to establish the cause of death of his brother. The ritual showed that it is the Plaintiff who had caused his brother's death.

7. The Defendant in his defence and counterclaim stated that he lawfully entered into the suit land in execution of the conviction of the Plaintiff and the possession of the said land was by virtue of compensation made by the Plaintiff to him.

8. When this matter came up for hearing on 19th August 2013, neither the Plaintiff nor her advocate were

in court. I dismissed Plaintiff's case for non-attendance and the Defendant proceeded with his counterclaim.

9. The Defendant informed the court that the suit property is his land having bought it from the Plaintiff

10. The Defendant further informed the court that the Magarini Land Dispute Tribunal awarded him the suit property in land case number 18 of 1990 on “a willing offer willing receiver” basis.

11. In cross-examination, DW1 stated that the suit property initially belonged to the Plaintiff. The Defendant admitted that the suit property is still registered in the name of the Plaintiff although he is the one who is occupying it.

12. DW1 further informed the court that the Plaintiff was identified by a witchdoctor called Charo Chehe Karega as a wizard who had participated in the killing of Joseph Charo Baya. Consequently, a debt arose after the Plaintiff took an oath and was identified as the wizard who had killed the Defendant's brother.

Submissions

13. The Plaintiff's advocate submitted that the Defendant's counterclaim raises a claim which is outrageous and retrogressive.

14. Counsel submitted that through a practice which is repugnant to justice, morality and good order, the Plaintiff was allegedly adjudged to have bewitched the Defendant's brother. According to counsel, the Defendant's claim reeks of corruption and it is a scheme to dispossess the Plaintiff of her land.

15. Counsel finally submitted that so many people have been victimized in Kilifi County on allegations of being witchcrafts and driven out of their land.

16. On the other hand, the Defendant submitted that his claim is founded on an agreement made on 6th February 1998 and that the issues raised in this suit had been adjudicated upon by the Land Dispute Tribunal, Magarini.

Analysis and findings

17. The Plaintiff's claim was for a declaration that the process by which she was stripped of the land by the Defendant was repugnant to justice and morality and the subsequent proceedings of the Magarini Land Dispute Tribunal purporting to award the suit property to the Defendant was null and void.

18. The Plaintiff's suit was dismissed for non-attendance and want of prosecution.

19. The Defendant proceeded with his counterclaim.

20. In the counterclaim, the Defendant states that the Plaintiff entered into an agreement with him on 6th February, 1998 in execution of the compensation where the Plaintiff agreed to give the Defendant the suit property. The Defendant has sought for an order that he be registered as the absolute owner of the suit property.

21. The Defendant did not produce the alleged agreement of 6th February 1998 between him and the Plaintiff. Indeed, the Defendant's evidence was completely different from his pleadings.

22. According to the Defendant's testimony, the Plaintiff agreed to hive 5 acres of her land and give it to him after she was found “guilty” by a witchdoctor for having bewitched the Defendant's brother.

23. It was the evidence of the Defendant that after the witchdoctor declared the Plaintiff “guilty” of bewitching his brother, the Plaintiff moved out of her land in the presence of the Chief. Consequently,

the Defendant took possession of the said land. The Magarini Land Dispute Tribunal then went ahead and put the Defendant in possession of the suit property.

24. The Defendant admitted that the suit property is registered under the Registered Land Act. The only occasion that a title under the said Act can be cancelled is if it is found that the same was procured unlawfully, fraudulently or through misrepresentation. The Defendant's only claim over the suit property is that he is entitled to it because the Plaintiff was found to have bewitched his late brother. That is a weird claim that is not known in law. Indeed, the claim amounts to an unorthodox means by the Defendant to take the Plaintiff's property.

25. In the circumstances I find that the Defendant's claim over the suit property is outrageous, repugnant to justice and morality and flies in the face of the right of the Plaintiff to own the suit property.

26. For the reasons I have given above, I dismiss the Defendant's Counterclaim dated 12th November 2012 with costs.

Dated and delivered in Malindi this **5th** day of **September,** 2014.

O. A. Angote

Judge