



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 23 OF 2013

KAHINDI KAMBI MBITHA.....PLAINTIFF

=VERSUS=

POLA CHARO KANIKI.....DEFENDANT

J U D G M E N T

Introduction:

1. This suit was commenced by way of Originating Summons. In the Originating Summons, the Plaintiff is praying for the following orders:

(a) That this Honourable court be pleased to order that parcel Kilifi/Mtondia/1893 being a subdivision of original title Kilifi/Mtondia/63 be subdivided into 6 and 5 acres respectively and the six acres to be registered in the name of Kahindi Kambi Mbita the administrator for and on behalf of Kahindi Kambi Mbita, Kabibi Mwanginda Menza, Kache Kidhembe, Kazungu Kambi Kidembe and Tabu Kambi Chula who are beneficiaries of the Estate of Kithembe Mwaduna and the 5 acres to be registered in the name of Pola Charo Kaniki being the daughter of the second wife of the deceased Kithembe Mwaduna.

(b) That, in case by the time of conclusion of this case the suit property will have been disposed of or interfered with its records, this Honourable court be pleased to order that the said beneficiaries to be given their share of six acres and a title deed be issued in the name of Kahindi Kambi Mbita the administrator of the estate of Kithembe Mwaduna for and on behalf of other beneficiaries.

(c) That the Registrar of lands Kilifi be ordered to register and issue Kahindi Kambi Mbita a title deed of 6 acres and the Defendant Pola Charo Kaniki be issued with a title deed for 5 acres in execution of the orders herein.

(d) THAT, the Plaintiff be awarded costs.

2. The suit proceeded by way of viva voce evidence

The Plaintiff's case:

3. According to the viva voce and affidavit evidence of the Plaintiff, PW1, the deceased,

Kithembe Mwaduna, was the owner of the piece of land known as Kilifi/Mtondia/63 which was sub-divided to create parcel number 1894 and 1983 (the suit property) by the Defendant. Parcel number 1894 was then sold by the Defendant to a third party.

4. It was the evidence of PW1 that the deceased had two wives, Kadii thetha and Kadzo Fondo and that the Defendant was the only daughter of the second wife.

5. According to PW1, it is the deceased who cleared the bushes and cultivated the suit property and established his house on the land.

6. According to the Plaintiff, the court in Malindi HCCC No. 54 of 2007 observed that the suit property belonged to the late Kithembe Mwaduna; that the Defendant subdivided parcel number Kilifi/Mtondia/63 and sold one of the sub-divisions and that the Defendant has been harvesting and selling blocks from the suit property and using the proceeds alone for the past 25 years.

7. It is the evidence of the Plaintiff that all the beneficiaries of the estate of Kithembe Mwaduna should get the share of the suit property as beneficiaries of the estate of the deceased.

8. PW1 produced in evidence copies of the identity card of all the beneficiaries of the estate of the deceased, a copy of the title deed of Kilifi/Mtondia/1893, the judgment in Malindi HCCC No. 54 of 2007 and the consent allowing the Plaintiff to represent the beneficiaries of the estate of the deceased in this matter.

9. In cross-examination, PW1 stated that although he was the legal administrator of the estate of the deceased who was his grandfather, he had the consent of the beneficiaries of the estate of his grandfather to file the suit.

10. PW1 stated that his late grandfather had two wives and settled on the suit property with the said two wives.

11. According to PW1, him, together with the other family members stay in Mtondia and not on the suit property although they used to cultivate the suit property when his grandfather was alive. However, they stopped cultivating the land in 1970 when his grandfather died.

12. PW1 informed the court that the Defendant has been in possession of the suit property since 1994. Before then, the suit property was in possession of one Mr. Mukolwe who had grabbed it.

13. PW1 stated that it is the Defendant who filed a suit against the said Mr. Mukolwe for eviction and a title deed was subsequently issued to her.

14. The Plaintiff maintained that the suit property belonged to his late grandfather and that the Defendant gave him Kshs.50,000 when she sold a portion of the land. The Defendant also gave her other siblings some of the proceeds of the sale.

15. The daughter of the late Kithembe from the first wife, PW2, informed the court that before his father died, he gave her documents in relation to the suit property. By then the Defendant was not born. The witness produced the documents which were authored in 1970 and 1971 in evidence.

16. It was the evidence of PW2 that the beneficiaries of the estate of the late Kithembe are entitled to the suit property and that the Defendant had the suit property registered in her name fraudulently.

17. In cross-examination, PW2 stated that the Defendant is her step sister and that both herself and the Defendant are divorced.

18. According to PW2, a stranger took possession of the suit property from their late father after

the family left the land.

19. It was the evidence of PW2 that the land was eventually recovered by the Defendant and that it should have been registered in her name on behalf of the rest of the family members.

The Defendant's case:

20. The Defendant filed a long statement which she adopted in her evidence. The Defendant, DW1, informed the court that she is the daughter of the late Kithembe Mwaduna and that her mother was the second wife of Mr. Kithembe.

21. It was her evidence that her father's original home is in Shanguleni in vithengeni area, Kilifi measuring in excess of 50 acres and that is where all her family members stay.

22. According to DW1, she is the only daughter and the only remaining child of Mr. Kithembe's second wife; that her only brother passed away and that her father, the late Kithembe, died in 1970.

23. It was the evidence of Dw1 that by the time her father died, he was staying on the suit property with her mother, although he was buried in a different parcel of land in Munarani and her mother moved out of the suit property.

24. After her mother moved out of the suit property, it was the evidence of DW1 that their neighbour, a Mr. Mukolwe, grabbed the land. When she became of age and with the advice of the former PC, it was the evidence of DW1 that she entered the suit property and had to content with many suits that were filed by Mr. Mukolwe to have her evicted from the land.

25. After the suit with Mr. Mukolwe was concluded in her favour, it was the evidence of DW1 that she had to apply to be allocated the land, which she did. The Defendant informed the court that she was eventually allocated the suit property and a title deed was issued in her name. To recoup the money she had spent during the court process, she sub-divided the land and sold one acre.

26. In cross-examination, DW1 stated that her late father was staying on the suit property with her mother before he died. It was her evidence that her late father never paid for the land and that she is the one who was allocated the land after she successfully defended the suit that had been filed by Mr. Mukolwe.

27. The parties filed their respective submissions and reiterated the evidence adduced in court. I have considered the said submissions.

Analysis and findings:

28. The evidence adduced in this court is that the suit property was once known as plot number 60 within Mtondia Settlement Scheme which later changed to plot number 63.

29. According to the letter dated 30th May 1970 authored by the Director of Land Adjudication and Settlement and addressed to the disputants' father's advocate, Kithembe Mwaduna was recognised as the person who had been identified as a squatter on parcel of land number 63.

30. It was the evidence of PW1 that all along, it was his father who was utilising the suit property until 1970 when he died. After his death, his neighbour, Moses Mukolwe, took possession of the land and constructed some houses on the land.

31. While the Defendant agrees that indeed it is her father who was occupying the suit property, it was her evidence that the suit property is not ancestral land.

32. According to DW1, her father and his second wife, who was her mother, occupied the suit

property while the first wife occupied their ancestral land which measures over 50 acres.

33. However, before her father could obtain the letters of allotment and after his death, her mother vacated the land thus giving Mr. Mukolwe an opportunity to grab the land.

34. The evidence of DW1 was that when she became an adult, she moved onto the suit property with her then husband, Mr. Ngala, forcing Mr. Mukolwe to sue them for vacant possession. The Judgment in respect of Malindi HCCC No. 54 of 2007 was produced in evidence.

35. According to the Defendant, none of the Plaintiff's siblings or relatives assisted her in litigating with Mr. Mukolwe in HCCC No. 54 of 2007 and that after the suit was decided in her favour, the government allocated her the land after issuing her with a letter of offer dated 15th December 2011.

36. It is not in dispute that the suit property was government land and the same was registered in favour of the Settlement Fund Trustee. It is also not in dispute that the Defendant's father was a settler on the said land before he died in 1970. Evidence was produced to show that before the Defendant's father died in 1970, he had made attempts to have the suit property allocated to him

37. According to the evidence that was adduced in Malindi HCCC 54 of 2007, Fredah Kimanani Vs Pola Ngala and two others and the proceedings of the panel of elders which were captured in the Judgment of the court, Mr. Kithembe Mwaduna is the one who was staying on the suit property with his wife and the Defendant. In the matter, the court agreed with the recommendations of the panel of elders that it was the Defendant, being the only daughter of the deceased, who should take possession of the suit property together with her husband and not Mr. Mukolwe.

38. After the Judgment, the Settlement Fund Trust issued to the Defendant a letter of offer and transferred the suit property to the Defendant on 25th May, 2012. The title deed in the name of the Defendant was then issued on 7th June 2012.

39. All along, the Plaintiff, or the other beneficiaries of the estate of the late Mr. Kithembe did not participate in the proceedings between the Defendant and Mr. Mukolwe.

40. The reason for the disinterest in the suit between the Defendant and Mr. Mukolwe by the Plaintiff and his siblings is obvious: they already had another land measuring over 50 acres where they were born and brought up. The suit property was all along occupied by the Defendant's mother while his step mother, uncles and aunts occupied a different parcel of land all together.

41. In view of the fact that by the time the Defendant's father died in 1970 he had not been issued with a letter of offer and the title document, it cannot be legally right for the Plaintiff to claim the said land on behalf of the estate of his late grandfather considering that after the death of Mr. Kithembe, the SFT was entitled to allocate the land to the person who was in physical occupation of the land or to any person for that matter. The SFT could not issue a letter of offer to someone who was already dead.

42. It is on that basis that the Defendant, being the daughter of Mr. Kithembe's second wife, and who had occupied the suit property for many years, that she was allocated the suit property.

43. The SFT cannot be faulted for that allocation considering that the suit property had not legally passed to the Plaintiff's grandfather, and cannot therefore form part of the Estate of Mr. Kithembe.

44. In any event, the Plaintiff and the other beneficiaries of the estate of the late Kithembe have already inherited what belonged to Mr. Kithembe. They have no legal right over the suit property considering that it was lawfully allocated to the Defendant.

45. For those reasons, I find and hold that the Plaintiff has not proved his case on a balance of

probabilities.

46. The Plaintiff's Originating Summons is therefore dismissed with costs.

Dated and delivered in Malindi this **28th** day of **November**, 2014.

O. A. Angote

Judge