



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 32 OF 2013**

**1. VUE TAURA**

**2. TSORI CHIWAI SUDI.....PLAINTIFFS**

**=VERSUS=**

**FELIX TSORI CHIVATSI.....DEFENDANT**

**J U D G M E N T**

**Introduction**

1. This matter was commenced by way of an Originating Summons dated 14<sup>th</sup> February 2013 and filed on 27<sup>th</sup> February 2013.
2. In the Originating Summons, the Plaintiff is seeking for an order that Kilifi/Vyambani/93 be subdivided into nine (9) acres and 41.025 acres and a vesting order be issued registering the title deed of the nine acres to Vue Taure Vue, the 1<sup>st</sup> Plaintiff and the 41.025 acres to Tsori Chiwai Sudi, the 2<sup>nd</sup> Plaintiff. The Originating Summons is also seeking for a permanent injunction restraining the Defendant from selling, renting, hiving, clearing and cutting trees on the suit property.
3. The Summons were filed by the Plaintiff in person thus the incoherence in the orders being sought.
4. The Respondent filed a Replying Affidavit in opposition to the summons. The court directed that the matter proceeds by way of viva voce evidence.

**Plaintiffs' case**

5. According to the joint affidavit of the Plaintiffs, the Plaintiffs were parties in Kilifi Land Case Number 29 of 2007 in which the land tribunal ordered that the disputed parcel of land should be registered in the names of the two Plaintiffs and the registration that was subsisting be cancelled.
6. The Plaintiffs deposed in their Supporting Affidavit that during the adjudication and demarcation of the Kauma area and particularly on the day the suit land was adjudicated and demarcated, the Plaintiffs left their national identity cards with the Defendant so that he could have their parcels of land registered in their names; that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are neighbours and that during the demarcation process, the 2<sup>nd</sup> Plaintiff had hosted the Defendant.
7. It is the Plaintiffs' case that the 1<sup>st</sup> Plaintiff owned 9 acres while the 2<sup>nd</sup> Plaintiff owned 41.025 acres of the suit property.
8. The Plaintiffs subsequently filed case number 60 of 2007 with the Bahari Land Disputes Tribunal which was heard and determined in their favour. The order by the Tribunal was subsequently

- adopted by the Resident Magistrate as an order of the court on 23<sup>rd</sup> August 2007. The Plaintiffs now seek for a vesting order to enable them have the suit property sub-divided and titles issued in their respective names.
9. The 1<sup>st</sup> Plaintiff (PW1) testified and reiterated the averments in the affidavit which I have reproduced above.
  10. It was PW1's evidence that the suit property does not belong to the Defendant although it is registered in his name. The Plaintiff produced the Tribunal's proceedings as exhibit number 1.
  11. According to PW1, the Tribunal decided that he should be allocated 9 acres while the 2<sup>nd</sup> Plaintiff was to get more than 48 acres of the suit property. The 1<sup>st</sup> Plaintiff produced as exhibit number 3 the order by the Magistrate's court adopting the Tribunal's decision.
  12. In cross examination, the 1<sup>st</sup> Plaintiff stated that he was not aware of the Appeal that was filed by the Defendant in Mombasa challenging the decision of the Tribunal.
  13. PW1 further stated that the title that is being held by the Defendant should be cancelled by this court. According to the witness, the suit property belonged to his father who has since died and that he was around during the adjudication process.
  14. The 2<sup>nd</sup> Plaintiff, PW2, informed the court that the suit property was bought by his father which was registered in the name of the Defendant. The Plaintiff reinstated the evidence of PW1 and stated that PW1 was entitled to 9 acres and the rest of the land was his.
  15. In cross-examination, PW1 informed the court that his father owned another land being number 1026 and that he (PW2) was not present during the demarcation and adjudication of the suit property.

### **Defendant's case**

16. The Defendant filed his grounds of opposition and a Replying Affidavit on 1<sup>st</sup> July 2013.
17. According to the Defendant, there is a pending appeal in the Provincial Land Disputes Tribunal filed as appeal number 6 of 2007 at Mombasa against the decision of the District Land Dispute Tribunal.
18. It is the Defendant's averment that the Originating Summons is a non-starter and that it is not enabled by any law and should be dismissed with costs. The Defendant attached on his Replying Affidavit a Title Deed that was issued to him on 3<sup>rd</sup> November 2005 in respect to the suit property. The Defendant also annexed on the affidavit a letter dated 18<sup>th</sup> September 2007 from the Provincial Administration. In a nutshell, the letter was acknowledging the fact that the Defendant had filed an Appeal against the decision of the District Land Disputes Tribunal.
19. The Defendant, DW1, informed the court that he is the registered owner of the suit property. It was the evidence of DW1 that the land originally belonged to Chiwai Shugi's family and that he is a member of that family. According to the witness, he has been staying on the disputed land since 1963 when his father moved to the land.
20. The Defendant further testified that the suit property was allocated to him during the adjudication process and that he is staying with his brothers on the land; that he is holding the land on his own behalf and on behalf of his brothers who did not have identity cards during the adjudication process.
21. The Defendant gave a detailed history of how the Plaintiff's father was allocated another land which is not relevant in the present suit.
22. The Plaintiffs' and Defendant's counsels filed written submission which I have considered.

### **Analysis**

23. The only issue that I am supposed to determine in this suit is whether this court can grant to the Plaintiffs a vesting order as prayed in the Originating Summons.
24. The Plaintiffs prayer in the Originating Summons is for a declaration that Kilifi/Vyumbani/92 be subdivided into two parcel of land. The 1<sup>st</sup> Plaintiff is seeking for 9 acres while the 2<sup>nd</sup> Plaintiff wants to be given 41.025 acres of the sub-divided suit property.
25. The only ground that the Plaintiffs are relying on for the sub-division and registration of the suit property in their names is that the District Land Disputes Tribunal ordered that the suit property

- should be registered in their names in the proportion mentioned above.
26. I have perused the award of the Tribunal which was signed by the Chairman and the members on 24<sup>th</sup> July 2007. The award was adopted on 23<sup>rd</sup> August 2007 by the Resident Magistrate. In the award, the Tribunal ordered that the registration of the suit property in the name of the Defendant be nullified and each of the two owners be issued with a title deed according to one's share to be determined by the land officials on the ground.
  27. The Defendant filed an appeal with the Provincial Appeals Committee. That appeal is still subsisting and will never be heard by that Committee because the Land Disputes Tribunals Act, Cap 303 was repealed by the Environment and Lands Court Act, No. 19 of 2012.
  28. Consequently, all the appeals which were pending in the Provincial Appeals Committee, should, by operation of law, be forwarded to this court for hearing and determination.
  29. In view of the pending appeal filed by the Defendant, this court cannot grant to Plaintiffs the orders they are seeking until the said appeal is heard by this court.
  30. In the circumstances, and considering that it is this court which is supposed to hear the appeal, I shall not at this stage, express my views on the legality or otherwise of the decision of the District Land Disputes Tribunal.
  31. For the reasons I have given above, I strike out the Plaintiffs' Originating Summons dated 27th February 2013.
  32. Considering that this is a dispute amongst family members over the suit property, and the fact that the Plaintiffs were not aware of the pending appeal, each party shall bear his own costs.

Dated and Delivered in Malindi this **8<sup>th</sup>** day of **November**, 2013

**O. A. Angote**

**Judge**