



REPUBLIC OF KENYA



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**Ngao v Munga & 5 others (Environment & Land Case 64 of 2016)
[2024] KEELC 13862 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 64 OF 2016
MAO ODENY, J
DECEMBER 19, 2024**

BETWEEN

SULTAN CHAI NGAO PLAINTIFF

AND

HARRISON MUNGA 1ST DEFENDANT

NDORO CHAKA 2ND DEFENDANT

TSUMA CHAKA 3RD DEFENDANT

KATANA CHAKA 4TH DEFENDANT

ALI KARISA 5TH DEFENDANT

CHIZI CHARO KOMBE 6TH DEFENDANT

JUDGMENT

1. By a Plaint dated 10th April, 2013 and amended on 2nd May, 2013 the Plaintiff herein sued the Defendants jointly and severally seeking the following orders:
 - a. General damages to be assessed at the hearing of this suit.
 - b. An injunction restraining the Defendants, their agents, servants and/or employees from trespassing into digging trenches, constructing, farming alienating and/or dealing with the Plaintiff parcel of land in any other way that may adversely affect the Plaintiff's proprietorship rights therein.
 - c. Any other relief the court deems fit to grant.
 - d. The costs of this suit.



2. The 1st, 2nd, 3rd and 4th Defendants filed an amended statement of Defence and Counterclaim dated 26th July, 2021 where they urged the court to dismiss the Plaintiff's claim with costs and sought for revocation and/or cancellation of Title No. 1013/Kadzonzo/Madzimbani that was issued to the Plaintiff and a declaration that the defendants are the legal and bona fide owners of the entire parcel of land known as Title No. 1189/Kadzonzo/Madzimbani.

Plaintiff's Case

3. PW1 Sultan Chai Ngao adopted his witness statements dated 10th April, 2013 and 19th May 2021 as part of his evidence in chief together. He also filed a list of documents dated 10th April 2013 which he produced as PEX No 1 to 4 and a further list of documents dated 19th May, 2021 as PEX No 5 to 25.
4. It was PW1's testimony that the 2nd Defendant and his brothers got onto his suit land and sold part of the land to the 1st - 5th Defendants. He further stated that the 2nd Defendant's father was given temporary permission to stay on the land by his father.
5. PW1 also testified that the case commenced at the elders, then to the chief, the District Officer and finally later in court vide Mombasa SRMCC No. 13 of 1985, which was resolved. He stated that the boundaries were marked with sisal and another case arose after adjudication.
6. According to PW1 there was an objection No. 114 of 2010 which was dismissed and an order directed that the valley be deemed as a permanent boundary. That the Objectors were given 60 days to file an appeal to the Minister which they never did.
7. It was PW1's testimony that the court ordered that a survey be carried out. The report filed in court indicated that his parcel of land measuring 10,06 Ha was on Map Sheet No. 37 and the defendant's parcel No. 1189 measuring 3.22 Ha is on Map Sheet No 40 but the title shows that the Plaintiff's parcel is on Map Sheet No.44 measuring 2.7 Hectares.
8. PW1 prayed that the survey report be adopted as it shows the correct acreage on the suit parcel and the correct map sheet as No 37 and for the rectification of the title with costs. PW1 also prayed that the counterclaim be dismissed with costs.
9. The defendants even though served with a hearing notice, never gave any evidence therefore their case was closed and the counterclaim was dismissed with costs.

Plaintiff's Submissions

10. Counsel for the Plaintiff filed submissions dated 28th February, 2023 and identified the following issues for determination:
 - a. What is the permanent physical boundary between plot No. Kilifi/Kadzonzo/Madzimbani 1013 claimed by the Plaintiff and plot No. Kilifi/Kadzonzo/Madzimbani/1189 claimed by the Defendants?
 - b. What is the actual acreage of plot No. Kilifi/Kadzonzo/Madzimbani 1013 as claimed by the Plaintiff and plot No. Kilifi/Kadzonzo/Madzimbani/ 1189?
 - c. Whether plot Kilifi/Kadzonzo/Madzimbani/1013 is located in map sheet No 37 or map sheet No 44?
 - d. Whether plot Kilifi/Kadzonzo/Madzimbani/1189 is located in map sheet No 40 or map sheet No 44?



- e. Whether the Court could adopt the report dated 27th January, 2015 by C.S Kumaya together with its results?
 - f. Whether the Court should disregard the report dated 5th October, 2015 by Joseph Taura Bao Land Registrar?
11. Counsel submitted that this court should disregard the report by Joseph Taura Bao as the Land Registrar misdirected himself in his observation by claiming that the case was between parcels of land Kadzonzo/Madzimbani/1012 and Kadzonzo/Madzimbani/1189 instead of parcels of land Kadzonzo/Madzimbani/1013 and Kadzonzo/Madzimbani/1189. Counsel submitted that he did not consider the existence of the valley which forms the boundary and that the Registrar did not annex the Registry index map and /or Preliminary Index Diagram Sheet Nos 40 and 44 to support his claim. Further that the Map sheet No 44 is non-existent and that the Plaintiff who won both cases hence it was the 2nd Defendant who was dissatisfied to appeal.
 12. It was counsel's submission that the Plaintiff was issued with the demarcation certificate on 27th February, 2008 by the Demarcation Officer Mr. Kinuthia for plot No 1013 while the Defendants' father was issued with a demarcation certificate on 24th May, 2008.
 13. Counsel submitted that the Preliminary Index Diagram No 37, certified true copy of the original, clearly shows that as at 14th August, 2019 plot No Kilifi/Kadzonzo/Madzimbani/1013 falls squarely in this map sheet whereas the Preliminary Index Diagram sheet No 40 certified true copy of the original dated 14th August, 2019 also indicates that plot No Kilifi/Kadzonzo/Madzimbani/1189 falls squarely within it. In both Preliminary Index Diagram, the valley is clearly indicated and one can identify that plot 1013 is bigger than plot No 1189.
 14. Counsel urged that the court should issue orders for rectification of Title No 1013/Kadzonzo/Madzimbani issued in the Plaintiffs favor to reflect acreage of 10.06 Ha instead of 2.67 Ha, harmonization of the Preliminary Index Diagram sheet No 37 and 40 as per the letter written to the Land Registrar to authorize the Preliminary Index Diagram to be amended and a declaration that the Plaintiff is the legal and bonafide owner of the entire parcel of land known as Title No 1013/Kadzonzo/Madzimbani measuring approximately 10.06 Ha and a declaration that the two plots No 1013 and 1189 are separate with a permanent boundary marked by the valley.

Analysis And Determination

15. The issue that arises for determination is whether the Plaintiff is entitled to the orders sought in the amended plaint dated 2nd May, 2013.
16. It is the Plaintiff's case that he is the registered proprietor of all that parcel of land known as Plot No 1013/Kadzonzo/Madzimbani Adjudication section and that the defendants have encroached on his parcel of land by erecting structures and farming illegally on the suit parcel of land.
17. The plaintiff testified that the illegal activities by the defendants on his parcel of land amount to trespass and has adversely affected the use and enjoyment of his land thereby occasioning loss and damage.
18. On 14th February, 2023 when the matter came up in court, counsel for the Plaintiff informed the court (in the absence of the Defendants' counsel) that the hearing date was taken by consent on 24th November, 2022. The court subsequently closed the Defendants case and directed parties to file submissions.



19. On 23rd May 2013 the Late Hon. Mukunya J. issued an order by consent of the parties and adopted as an order of the court in the following terms:
- a. That the District/County Land Surveyor do visit the suit premises and determine the boundaries of land parcel 1189/Kadzozzo/Madzimbani Adjudication Section and Plot No 1013/Kadzozzo/Madzimbani Adjudication Section.
 - b. That the Land Surveyor to file his report in court within sixty (60) days.
 - c. That the costs of the Surveyor to be shared equally between the Plaintiff and the Defendant.
 - d. That the matter be mentioned in court on 25th July, 2013 for further orders.
 - e. That the interim Orders herein are extended.

20. The County Surveyor filed a Report dated 8th May, 2014 (KILIFI/KALOLENI/GANZE DISTRICT) in respect of the court order dated 23rd May, 2013 and the findings were as follows:

- a. Both parties were present.
- b. Plot No 1013/Kadzozzo/Madzimbani and 1189 Kadzozo/Madzimbani fall on PID (Preliminary Index Diagram) Nos 37 and 40 respectively.
- c. The boundary of 1013 Kadzozo/Madzimbani as pointed out by the owner slightly differs with the boundary on PID 37.
- d. The owners of 1189 claims to own approximately the whole parcel named 1013.
- e. No relationship exists between sheet No 37 that has plot No 1013 and sheet No 40 that has plot No1189.
- f. The two plots are separate.

The County surveyor recommends a re-survey of the disputed area with the aim of harmonizing the two PIDs (Preliminary index Diagram).

21. This is a case that has been in court for many years and it is a dispute, which should have been resolved by the Surveyors, and the Land Registrar as it seems that the mistakes emanated from the two offices hence a need for rectification. The report produced by the Surveyor recommends a re-survey of the disputed area with the aim of harmonization of the two Preliminary Index Diagrams.
22. It is also not disputed that the measurements on the ground of the Plaintiff's title are at variance. The ground measures 10.06 Ha and the title 2.67Ha which should be rectified to reflect a true position.
23. In the case of Judith Achieng Omondo v June Nyaingo Hossei & another; Francis Macharia (Third Party) [2021] eKLR the court held as follows:

“I am persuaded the appropriate remedy was to have the boundary between the two parcels of land reestablished and if necessary readjusted to conform with the ground measurements. That was the intent of section 18 and 19 of the *Land Registration Act*, 2012; to have disputed boundaries established and fixed. The Land Registrar and the Surveyor having carried out their statutory mandate as envisaged under the said provisions, the court is bound to accept their findings as the technical experts entrusted with the statutory authority.”

24. I have considered the pleadings, the evidence on record and the submissions by counsel and find that the plaintiff has proved his case against the defendants and is entitled to the rectification of the title



No 1013/Kadzonzo/Madzimbani issued to him to reflect acreage of 10.06 Ha instead of 2.67 Ha, the harmonization of the Preliminary Index Diagram sheet No 37 and 40 as per the letter written to the Land Registrar to authorize the Preliminary Index Diagram to be amended.

25. I also find that the Plaintiff is the bonafide owner of the entire parcel of land known as Title No 1013/Kadzonzo/Madzimbani measuring approximately 10.06 Ha and a declaration is hereby issued that the two plots No 1013 and 1189 are separate with a permanent boundary marked by the valley as per the Survey report which is adopted as an order of the court.
26. On the issue of general damages. I find that the plaintiff is not entitled as the mistakes arose from the land office which has recommended a rectification of the same. The court also grants the Plaintiff an order of a permanent injunction restraining the Defendants, their agents, servants and/or employees from trespassing into digging trenches, constructing, farming alienating and/or dealing with the Plaintiff's parcel of land in any other way that may adversely affect the Plaintiff's proprietorship rights therein.
27. Defendants to pay costs of the suit to the Plaintiff. The Defendants' counterclaim is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF DECEMBER 2024.

M. A. ODENY

JUDGE

