



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 206 OF 2014

JUSTINE KAZUNGU BAYA (Suing on his behalf and behalf

of the Estate of **BAYA MWANYULE JEFA** alias

BAYA YAA.....**PLAINTIFF**

VERSUS

1. ALBERT KALAMA NZARO

2. THE LAND REGISTRAR KILIFI

3. PETER K. KALAMA.....**DEFENDANTS**

JUDGMENT

BACKGROUND

1. By a Plaint dated and filed herein on 5th November 2014, Justine Kazungu Baya suing on his own behalf and on behalf of the Estate of Baya Mwanjule Jefa alias Baya Yaa (the Plaintiff) prays for: -

a) A declaration that the estate of Baya Mwanjule Jefa alias Baya Yaa is the lawful owner of the Plot No. 146/Kilifi/Kadzonzoo/Madzimbani;

b) An order that the 1st Defendant do deliver up to the Plaintiff and the 2nd Defendant the title deed for Plot No. 146/Kilifi/Kadzonzoo/Madzimbani issued on 8th August 2013 and the 2nd Defendant do cancel the same;

c) An order of a permanent injunction restraining the 1st Defendant either by himself or through his agents/servants and or employees from selling, charging, sub-dividing, taking possession or otherwise dealing in any manner with the said Plot No. 146/Kilifi/Kadzonzoo/Madzimbani;

d) A declaration that the Defendants actions violated and breach the Plaintiffs rights as provided for under Article 40 of the Constitution of Kenya;

e) General damages for violation of the Plaintiffs constitutional rights; and

f) Costs and interest at Court rates.

2. These prayers arise from the Plaintiff's contention that he is the duly appointed Administrator of the Estate of the late Baya Mwanyule Jefa alias Baya Yaa who passed away on 15th February 2012. It is the Plaintiff's case that at the time of his death, the deceased was the owner of the suit property- Plot No. 146/Kilifi/Kadzonzozo/Madzimbani measuring approximately 9.24 Ha.

3. The Plaintiff avers that sometime in 1996, the 1st Defendant herein filed *Kaloleni Land Disputes Case No. 10 of 1996*. The Tribunal went on to make findings in favour of the deceased which findings were later adopted by the Senior Resident Magistrates Court at Kaloleni in *Land Case No. 43 of 1997*. Thereafter, the 1st Defendant's son one Peter Kazungu Kalama (who later became the 3rd Defendant) appealed the decision in *Land Appeal Case No. 12 of 1997* but the appeal was equally dismissed.

4. The Plaintiff further states that on 23rd September 2014, he conducted a search at the Land Registry only to discover that the 1st Defendant had fraudulently obtained a title deed for the suit property in his name long after the ownership thereof had been determined in favour of the deceased.

5. The Plaintiff contends that the issuance of the title deed was fraudulent and that the 1st Defendant has not obtained a valid title. It is further his case that the 2nd Defendant acted illegally in issuing the title to the 1st Defendant and hence the orders sought in the Plaintiff.

6. In response to the claim, Albert Kalama Nzaro (the 1st Defendant) denies that the late Baya Mwanyule Jefa was the proprietor of the suit property as alleged or at all and he invites the Plaintiff to a strict proof thereof. He further asserts that all the tribunal cases were the subject of an appeal filed at the High Court at Mombasa.

7. The 1st Defendant asserts that he is the first registered proprietor of the suit property and that his registration arose from a successful land adjudication exercise. He therefore denies the allegations of fraud levelled against himself and the 2nd Defendant and asserts that the Plaintiff has no locus standi and is therefore not entitled to the orders sought herein.

8. In his Statement of Defence dated 8th October 2015, the Land Registrar Kilifi (the 2nd Defendant) equally denies the Plaintiff's claim and invites him to strict proof. The 2nd Defendant avers that as per the records held in their office, the 1st Defendant was duly registered as the proprietor of the suit property following a lawful adjudication exercise.

9. Shortly after the institution of this suit and by an application filed herein dated 18th November 2014, the said Peter Kazungu Kalama applied to be enjoined as the Interested Party herein. By a consent of the parties recorded herein on 11th February 2015, he was enjoined in these proceedings as the 3rd Defendant and thereafter proceeded to file a defence.

10. In his Statement of Defence dated 23rd February 2015, the 3rd Defendant denies that the Land award decisions gave the Plaintiff's deceased father ownership of the suit land.

11. By a way of Counterclaim, the 3rd Defendant avers that the Plaintiff's father trespassed upon the suit property having been accommodated there in 1989 by the Defendants. He accordingly urges the Court to enter Judgment against the Plaintiff for: -

a) An order for injunction (and) for vacant possession;

b) Damages; and

c) Costs of the Counterclaim.

The Plaintiff's Case

12. At the trial herein, the Plaintiff called two witnesses in support of his case.

13. PW1- Justine Kazungu Baya is the Plaintiff himself and a resident of Kaloleni. He told the Court that his father Baa Yaa passed away in the year 2012 and that he was issued with Letters of Administration in *Succession Cause No. 243 of 2014*.

14. PW1 testified that the suit property belonged to his later father. Prior to his death, his father had a dispute with the 1st Defendant

in *Land Case No. 10 of 1996*. His father won the case and the Defendants appealed to the Provincial Committee through the 3rd Defendant in *Case No. 12 of 1997*. PW1 told the Court that the 3rd Defendant lost the case and the Tribunal's decision was adopted in *Kaloleni SRMCC No. 43 of 1997*.

15. PW1 testified that his father died thereafter and was buried on the suit property. When title deeds were issued for the area however, the Plaintiff's family discovered that title for the suit property was issued in the name of the 1st Defendant. They only discovered this in 2013 when they conducted a search at the Registry. The Tribunal cases had ended in 2008 and they had won in all. They did not therefore understand how the title came out in the 1st Defendant's name.

16. On cross-examination, PW1 told the Court they did not find the Defendants on the land when they bought it. He told the Court they bought the land from one Chai who showed them the boundaries. PW1 further told the Court he was not a witness in any of the Tribunal cases. He could not remember any letter brought to them by the 3rd Defendant to stop the burial of their father in the suit property.

17. PW1 told the Court they never took any issues to the Land Adjudication Committee as their father was very unwell at the time. He could not recall who instituted *Objection Case No. 86 of 2011*.

18. On further cross-examination, PW1 told the Court their land was seven acres and that they had lived thereon since 1988. While there had been cases involving the land, they had never taken any of them to the Land Registrar for record purposes. He conceded that though the land adjudication was done in the area in 2011, they had not been registered as the owners of the land even though they still live on the land.

19. PW2- Charo Mtangi is a resident of Kadzozzo Madzimbani and a nephew of the Plaintiff. He told the Court when his grandfather bought the suit property from Chai, he had witnessed the transaction. The 1st Defendant later came and trespassed on the land. Subsequently, the 1st Defendant filed a case before the Land Disputes Tribunal. PW2 was a witness in that case and the Tribunal resolved in favour of the Plaintiff's father.

20. On cross-examination, he told the Court, the Plaintiff's father and the 1st Defendant bought different parcels of land. He told the Court the suit property was not made the subject of adjudication process as it had an on-going case. He however told the Court he was given a title for his own portion of land next to the suit property following the adjudication process. The Plaintiff's father had died by the time the adjudication exercise was carried out in the area.

The Defence Case

21. The Defence equally called two witnesses in support of their case and in opposition to the Plaintiff's claim.

22. DW1- Peter Kazungu Kalama is the 3rd Defendant and the son of the 1st Defendant. He told the Court he was also standing in for his father with his testimony herein. DW1 testified that his family was the first to purchase the suit property from Chai Maangi way back in 1989. The said Chai has since passed away.

23. DW1 told the Court that he was aware of *Land Disputes Tribunal Case No. 10 of 1996*. He testified that his father never lost the case at Kaloleni and castigated the decision of the Tribunal as being a wrong one. He told the Court the land was being taken away from his father who is now an old man and was not feeling well to come to Court.

24. DW1 testified that his family was dissatisfied with the Tribunal's decision and that they filed an appeal to the Provincial Land Disputes Tribunal. The Provincial Tribunal however declined to hear the case on account that DW1 did not have the proceedings of the earlier case. DW1 then instituted *Civil Appeal No. 187 of 2008 at the High Court at Mombasa*. That appeal is yet to be determined.

25. On cross-examination, DW1 told the Court he is the one who provided money for the purchase of the land although the title had come out in the name of his father. He did not however have the Sale Agreement in Court. He further told the Court they did not lose the case at the Tribunal. They however appealed because the Elders sitting at the Tribunal did not know what they were doing.

26. DW1 further told the Court he filed two appeals from the Tribunal's decision in Mombasa. The title in his father's name came

out in 2013, about a year before this suit was filed.

27. DW2- Ignatius Metric Sembeya works as the Land Adjudication Officer Kilifi, a position he has held for 17 years. He told the Court he was aware of the issues touching on the suit property. It was previously an adjudication Section, having been so declared on 10th August 2007.

28. DW2 testified that there was one objection to the Register raised in regard to the suit property during the exercise. They heard the objection and made a determination in the name of the 1st Defendant, as the original owner. He further told the Court that no appeal was filed in regard to their determination.

29. On cross- examination, DW2 conceded that when one lodges an objection, they pay a sum of Kshs 500/-. He did not however have any receipt in Court showing such a payment was made. He further conceded that before an objection is dismissed, there has to be hearings and minutes. He did not however have any evidence of such proceedings.

30. DW1 testified that from their records, the Objection was filed by one Justin K. Mbaya and conceded that their records did not show the Identify Card Number of the Objectors whose name appeared different from that of the Plaintiff herein. He further told the Court he was not aware that as at the time they issued title to the Defendants, they had filed two cases in Mombasa.

Analysis and Determination

31. I have perused and considered the pleadings herein, the testimonies of the witnesses and the evidence produced at the trial. I have equally perused and considered the detailed submissions and authorities placed before me by the Learned Counsels for the parties.

32. The dispute herein has certainly seen its fair days in Court. It began in the 1990s and has remained in the corridors of justice to-date. As will shortly become clear, the period taken in the corridors of justice is not solely attributable to the slow manner in which the wheels of justice grind in this country but also, and more substantively, to the determination of some of the parties herein to have everything their way.

33. The main protagonists before me today are but the scions of the original disputants who failed to agree over a one- acre piece of land in the mid-1990s. While Albert Kalama Nzaro (the 1st Defendant) as one of those in the dispute remains alive, his son, the 3rd Defendant told the Court that he is now old and unwell and hence his inability to come and testify in these proceedings.

34. The Plaintiff herein is the son and the Administrator of the Estate of Baya Mwanyule Jefa alias Baya Yaa. From the material placed before me, the said Baya Mwanyule Jefa passed away on 15th February 2012, some two years before this suit would be filed. Prior to the filing of this suit, the Plaintiff obtained a Limited Grant of Letters of Administration ad Litem on 14th August 2014 in ***Mombasa High Court Probate and Administration Cause No. 243 of 2014.***

35. It was clear from the testimonies of the witnesses herein that both parties were not the original owners of the land but claimed to have purchased the suit property from one individual by the name Chai Maangi. From the material placed before me, both parties, the Plaintiff's father and the 1st Defendant claimed to have been the first to purchase the same in the 1980s. Both parties while claiming they were shown boundaries by the Vendor, do agree that there were no survey and or measurements carried out to indicate how much they were buying.

36. Ultimately the parties started squabbling over the boundaries of their respective parcels of land. In this respect, the Plaintiff told the Court that in the year 1996, the 1st Defendant sued his father Baya Mwanyule Jefa claiming the piece of land in dispute. He further told the Court that the 1st Defendant lost the case as the Tribunal awarded the disputed parcel to his father.

37. The Plaintiff further told the Court that following the determination, the 3rd Defendant herein, lodged an appeal on behalf of his father (the 1st Defendant) but the said Appeal was similarly dismissed. Thereafter, the decision of the Tribunal was adopted as an order of the Court and the Plaintiff told the Court that they were therefore surprised to learn that the 1st Defendant came to be registered as the proprietor of the suit property.

38. The 1st and 3rd Defendants did not deny the existence of the said case. Testifying before this Court during cross-examination on

his own behalf and on behalf of his father, the 3rd Defendant denied that they lost the case at the Tribunal. Asked why he had appealed the decision if they did not lose the case, the 3rd Defendant told the Court that they appealed the decision because the Elders sitting at the Tribunal did not appear to know what they were doing.

39. From the material placed before me, it is evident that on or about 19th January 1996, the 1st Defendant herein instituted ***Kaloleni Resident Magistrates Award Case No. 10 of 1996*** against the Plaintiff's father before the Land Tribunal. Extracts of those proceedings produced by the Plaintiff as Pexh 2 reveal the following in the opening two paragraphs: -

“The dispute is about wrong boundary where the complainant claims approximately one- acre piece of land the defendant had gone inside his shamba.

The Plaintiff showed the Committee that piece which was unlawfully taken by the Defendant whilst the Defendant objected by showing the Plaintiff the correct boundary. After that was done we sat to record their statements.”

40. The Tribunal then proceeded to record the 1st Defendant's Statement on the genesis of this dispute as follows: -

“Mr. Albert K. Nzaro the Plaintiff had this to say: -

I approached my brother by the name Chai now deceased being the landlord of all shambas around us, that I wanted to buy a few acres to establish another home across the main road Kibao-Kiche Mariakani ie opposite Kibao Kiche Primary School. This was 1980. The price agreed was Kshs 16,000/- of which I have been paying by instalments, but unfortunately I have not completed paying the total amount.

He said that Baya M. Jefa present is a relative who came to join me at my new shamba and stayed there for one year, then later decided to move and built 200 yards, within my shamba. I thought he decided on his own to do so and since he is a relative, I left him to stay, but unfortunately he had another mind altogether.

He Baya Mwanyule Jefa claimed that he bought a shamba from the deceased Chai Nzaro whereby he owned the whole piece of his home including another outside my boundary. That is how the dispute started.”

41. The Plaintiff's father did not contest the fact that he had joined his relative on the land. Given a chance to state his story, this is what the Tribunal captured him to say at page 3 of those proceedings: -

“When I came, I joined him for a month, I was to stay longer but I could suspect family arguments hence I had to buy my own shamba from Chai Nzaro the deceased. Chai had a large shamba which had been given to him as his share by his clan members. Since I also had need to buy, I approached and he sold me a shamba inclusive my home of which my friend is claiming today. Although Chai passed away, his own son was present that day of surveying, he knows our correct boundary between us all. The price was Kshs 9,000/-.

When I left to build (a) home where I am today, Mr. Albert did not raise any Objection. In fact he has even extended his boundary to Chai's shamba which is still at large on the western side without his permission. Chai died before their dispute was sorted out.”

42. Having so- recorded the Statement and after hearing witnesses, the Elders awarded the disputed parcel of land to the Plaintiff's father. On 8th October 1996, the parties appeared before the Kaloleni Resident Magistrate the Honourable D.T. Kariamburi who made orders as follows: -

“Order

Judgment entered in terms of the elders award as given under Section 7 of the Land Disputes Tribunals Act.

Right of Appeal within 30 days.”

43. It was also clear to me that the 1st Defendant did not appeal the decision within the 30 days as ordered by the Court. Instead, his son, the 3rd Defendant herein commenced another fresh case a year later on 3rd August 1997 between himself and the Plaintiff's father being *Kaloleni Land Disputes Tribunal Case No. 98 of 1997*.

44. An extract of the proceedings in this new case attached to the 3rd Defendant's Replying Affidavit filed herein on 24th February 2015 reveal that he told the Tribunal he is the one who purchased the suitland from Chai Nzaro Maangi in 1986. The hearing was not attended by the Plaintiff's father and it was unclear whether he had been summoned to attend the proceedings. Having heard the evidence of the 3rd Defendant and his one witness, this Second Panel decided as follows: -

“AWARD

Having a considerable time to think and discovered that who should get the ward (sic). Following how the land purchase processing (sic) it was realized that PETER K KALAMA is the legal owner of that piece of land. He should pay the balance of Kshs 3,800/- to the son of Chai Maangi who inherited from his father.”

45. Armed with this new award in his favour, the 3rd Defendant moved to the Senior Resident Magistrates Court at Kaloleni in *Land Case No. 43 of 1997* seeking to have the award in his favour adopted as an order of the Court. However, when the parties appeared before the Honourable Kimweli Muneeni D.M II on 15th December 1997, the Plaintiff's father appeared and produced the Award earlier adopted in *Land Award Case No. 10 of 1996*. On that account, the Learned Magistrate ordered as follows: -

“Accordingly as there is no appeal against that award the said award stands. The purported second award under Section 7 is a nullity. I therefore decline to read the award.

Right of Appeal within 30 days.”

46. Aggrieved by the refusal of the Magistrate to read and adopt the Award in his favour, the 3rd Defendant turned to the Coast Provincial Land Appeal Committee where he filed *Land Appeal Case No. 12 of 1997*. Again having heard the 3rd Defendant and the Plaintiff's father, the Provincial Land Appeal Committee in a determination rendered on 25th September 2008 rendered itself as follows: -

“DECISION OF THE TRIBUNAL

Having heard and considered the representation of the parties and having considered all the documents submitted to us we hereby decide as follows: -

Background Facts

The Appellant claims that the Magistrate Kaloleni refused to read the decision of the elders.

Findings/Discussions and Reasons

The Appellant did not enclose the elders' decision for this Committee to peruse and verify the elders decision. This land had a case vide Land Award No. 10 of 1996 at Kaloleni Resident Magistrates Court between Albert K. Nzaro –vs- Baya Mwanyule. The Appellant was a witness of Albert K Nzaro who was defeated.

Decision/Determination

We do not have the tribunal proceedings of Case No. 43 of 1997. This Appeal Committee has no powers to force the Magistrate to confirm the award. The second case by the Land Dispute Tribunal was wrong as they have no jurisdiction to arbitrate Case No. 10 of 1996 which had already been confirmed by the Magistrate Kaloleni on 8/10/1996. The Land Dispute Tribunal Kaloleni had no mandate to re arbitrate the case for the 2nd time; between the Appellant Peter K Kalama –vs- Baya Mwanyule. The land in dispute belongs to the Respondent. This Appeal is dismissed. The decision of the District Land Tribunal Case No. 10 of 1996 is upheld.

The Appellant to pay costs of this Appeal.

Any party that is not satisfied with this decision has the right of appeal to the High Court on a point of law within 60 days from the date of this decision.”

47. As would now be expected, the 3rd Defendant proceeded on 21st November 2008 and lodged *Mombasa High Court Civil Appeal No. 187 of 2008* against the decision of the Provincial Land Appeals Committee. It was not clear from the testimony of the 3rd Defendant herein what became of this Appeal.

48. In the meantime, and with the time lapse, the 3rd Defendant decided to revisit the proceedings *in Kaloleni SRM's Land Case No. 43 of 1997*. By an application dated 15th September 2010, the 3rd Defendant moved the Court to review, set aside and vary the orders of the Honourable Kimweli Muneeni made on 15th December 1997 declining to read and adopt the Award arising from *Land Disputes Tribunal Case No. 98 of 1997*.

49. In a Ruling delivered on 25th November 2010, the Honourable Silvia Wewa, SRM found as a fact that the parties in *Land Award Case No. 10 of 1996* and *Land Award Case No. 43 of 1997* were the same and that hence *Land Award Case No. 43 of 1997* was res judicata. The 3rd Defendant's application for review was thus dismissed with costs.

50. Not one to give up, the 3rd Defendant again lodged an appeal against the dismissal of his application *in Mombasa High Court Civil Appeal No. 257 of 2010* on 24th December 2010. As with *Civil Appeal No. 187 of 2008* however, the 3rd Defendant was not forthcoming at the trial herein as to what has become of this second appeal.

51. What was clear to me was that as at the time the 2nd Defendant declared the Kadzonzo/Madzimbani Area an Adjudication Section on 10th August 2007, there was a valid Court Order which had decreed that the suit property belonged to the Plaintiff's father. The 2nd Defendant must have been aware of that position given the protracted dispute as borne from the long analogy hereinabove. That must be the reason DW2- Ignatius Metric Sembeya who told the Court he had worked in the 2nd Defendant's Kilifi Office for the past 17 years could not produce the records or minutes of the Objection proceedings in regard to the suit property.

52. It was also crystal clear to me that when the 1st Defendant was registered as the proprietor of the suit property on 8th August 2013, there was a valid Court decision that had already awarded the suit property to the Plaintiff's father and that this was a matter fully within the knowledge of the 1st and 3rd Defendants who had tried in vain to circumvent those orders.

53. Arising from the foregoing, it was evident that the 1st Defendant acquired the title to the suit property either through misrepresentation or fraud and collusion with the 2nd Defendants. Given the foregoing history of the suit property, there was no valid registration that was done on 8th August 2013 and the resulting title issued in the 1st Defendant's name had no legal basis whatsoever.

54. In the premises, I am persuaded that the Plaintiff's case has merit and that he has proved his case to the required standard. It was evident to me that the 3rd Defendant's Counterclaim had no basis whatsoever and that the title issued to the 1st Defendant was contemptuous and in abuse of the powers of the 2nd Defendant.

55. Accordingly, I hereby dismiss the Counterclaim and enter Judgment for the Plaintiff as follows: -

a) A declaration is hereby issued that the Estate of Baya Mwanyule Jefa alias Baya Yaa is the lawful owner of Plot No. 146/Kilifi/Kadzonzo/Madzimbani;

b) An order is hereby issued that the 1st Defendant do deliver up to the Plaintiff and the 2nd Defendant the title deed for Plot No. 146/Kilifi/Kadzonzo/Madzimbani issued on 8th August 2013 and the 2nd Defendant do cancel the same within 45 days from today.

c) An order of a permanent injunction is hereby issued restraining the 1st and 3rd Defendants either by themselves or through their agents, servants and /or employees from selling, charging, sub-dividing, taking possession or otherwise dealing in any manner with the said Plot No. 146/Kilifi/Kadzonzo/Madzimbani; and

d) The Plaintiff shall have the costs of this suit and those of the Counterclaim with interest at Court rates.

Dated, signed and delivered at Malindi this 29th day of January, 2021.

J.O. OLOLA

JUDGE



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