



**Fernandes v Muthui (Environment & Land Case 444 of 2017)
[2023] KEELC 20109 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20109 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 444 OF 2017
NA MATHEKA, J
SEPTEMBER 28, 2023**

BETWEEN

ANGELA VALENTINE FERNDANDES PLAINTIFF

AND

JUMA MUTHUI DEFENDANT

JUDGMENT

1. The Plaintiff states that she is the Registered owner as proprietor of all that Parcel of Land known as LR NO 318/III/M.N. situate at Utange Mombasa County. The Plaintiff states that the Defendant has without authority trespassed onto the Plaintiff's said Parcel of Land and has commenced excavations and constructions works thereon. The Plaintiff further states that the Defendant's activities of invading and trespassing onto the Plaintiffs' said land are illegal, unreasonable and unwarranted and the same should be stopped by this Honourable Court. The Plaintiff's claim against the Defendant is for a permanent injunction restraining the Defendant either by himself, his agents, servants and/or employees, whomsoever, howsoever from trespassing onto the Plaintiff's Land LR NO 318/11/MN, and general damages for trespass. The Plaintiff prays for Judgment against the Defendant for;
 1. A permanent injunction restraining the Defendant either by himself, his agents, servants and/or employees, whomsoever, howsoever from trespassing and/or interfering in any manner with the Plaintiff's Parcel of Land LR NO 318/11/MN.
 2. General damages for trespass,
 3. Costs of this Suit.
2. The Defendant states that the parcel of land being LR No 318/111/MN does not belong to the Plaintiff. That the plot belonged to one Caraciolo Baotista Gomes who left the country in 1965 for Britain and never came back to Kenya. By RMCC No 2695 of 1997 one Zavier Remedios sued the said Caraciolo Baotista Gomes claiming a sum of Kshs 33,947.35 being land rates allegedly paid to



- the County Council in respect of the subject land on behalf of the said Caraciolo Baotista Gomes. The said suit was purportedly served upon the said Caraciolo Baotista Gomes by substituted mode through an address which was allegedly obtained from Municipal Council of Mombasa. Through the said purported mode of service, the said Xavier Remedios obtained a judgment in default of appearance and defence and proceeded to sell the subject parcel land in execution, and the same was ostensibly bought by the Plaintiff herein.
3. The Defendant, who was left together with his late father by the said Caraciolo Baotista Gomes as caretakers, only came to realize of the foregoing when the Plaintiff, who is his neighbor and a proprietor of a school within the locality, approached him and told him that the land was hers, and indeed showed him the vesting orders. This turn of things forced him to access the said court file, and upon perusal, he realized that the land was indeed sold to the Plaintiff through a public auction, and not being satisfied with the manner the said suit was conducted, he, through the firm of Ms Odongo B & Co Advocates applied, through an application date February 20, 2012 to have all the orders issued in the said suit, including the subject vesting orders, together with the said *ex-parte* judgment set aside, and by his ruling delivered on January 23, 2013, Honourable Kitagwa who heard the said application, did set aside all those orders and judgment, and directed that the Plaintiff therein do serve and prosecute his cases which prosecution was never done. The said order was served upon the Lands Office, Mombasa, and later after the establishment of National Land Commission the same was served upon them.
 4. This court has considered the evidence and the submissions therein. It is the Plaintiff's case that she is the registered proprietor of Land Parcel No LR 318/III/MN and that the Defendant has trespassed on it. The Plaintiff sought a permanent injunction restraining the Defendant from trespassing or interfering with the suit land as well as damages for trespass. The Defendant denied ever trespassing on the suit land and maintained that it belongs to one Caraciolo Baotista Gomes who left Kenya in 1965 never to return. The Defendant claimed that together with his late father they were left as caretakers of the suit land by the said Caraciolo and has been on the suit land ever since.
 5. The Defendant repudiated the Plaintiff's claim to the suit land, and argued that her purported purchase of the suit property from one Xavier Remedios, following judgement in default against Caraciolo in RMCC No 2695 of 1997 Xavier Remedios vs Caraciolo Baotista Gomes does not stand. He averred that the said Xavier sold the suit land to the Plaintiff in execution of a judgement in default against Caraciolo following the suit where he had sued Caraciolo claiming Kshs 33,947.35 being the land rates paid to the County Council in respect to the suit land. The Defendant maintained that the judgement in default was set aside vide a ruling dated January 23, 2013 in an application dated February 20, 2012, and the court orders that the Plaintiff, Xavier to serve and set the matter for hearing in 60 days, but the Plaintiff therein abandoned the suit and never prosecuted his case. The Defendant served the orders to the National Land Commission, and after carrying out inquires, the Commission recommended on August 20, 2016 the suit land be given to the Defendants, which was supported by the County Government of Mombasa vide a letter dated August 23, 2016.
 6. It is evident that the Plaintiff got registered as the proprietor of the suit property pursuant to a Vesting Court order dated February 21, 2007 in Civil Suit No 2695 of 1997, on February 26, 2008, and obtained a Provisional Certificate of title dated May 28, 2008. The Plaintiff testified that it was her mother Olinda Fernandes who filed Mombasa RMCC 2695 of 1997 against Caraciolo Baotista Gomes for recovery of Kshs 35, 947.35 and obtained judgement against him. In order to recover the said amount, the suit land was sold in a public auction, where her mother purchased it and the Plaintiff was registered as proprietor. The Plaintiff can trace the root of her title in the said court order, however the Defendant has refuted the sanctity of the Plaintiff's title and urged court to find was illegally obtained. How the Plaintiff obtained title to the suit land is a fact with her personal knowledge and where the



same is challenged, its incumbent that she proves how she acquired it. This was stated by the Court of Appeal in *Munyu Maina vs Hiram Gathiba Maina* (2013) eKLR that:

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted in the register."

7. The Plaintiff's title though absolute and indefeasible is subject to the provisions to indefeasibility of title as provided in Section 26 (1) of the *Land Registration Act*, the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –
 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party, or
 - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.
8. We begin by tracing the root of the Plaintiff's title in order to make a determination whether the same was obtained legally, formally and is free of any encumbrances, that can be considered by the court as an innocent title holder to be protected by the indefeasibility of title. The issue began with a civil suit RMCC No 2695 of 1997 Olinda Fernandes vs Caraciolo Baosta Gomes, where Olinda, the Plaintiff's mother sued Caraciolo the then registered proprietor of the suit land for Kshs 35,947.35 being the land rates paid to the then Municipal Council of Mombasa at the request of Caraciolo. The plaint was later amended and Olinda Fernandes was substituted with her son-in-law one Zavier Remedios, who then requested for judgement in default on January 31, 2005. After obtaining the judgement in default, Zavier Remedios proceeded to attach the suit land for sale by public auction vide a Notification of Sale dated May 9, 2005. The Plaintiff herein, Angela Valentine Fernandes purchased the suit land in a public auction on September 2, 2006 and made an application dated May 25, 2007 for a vesting order to facilitate the registration of the suit land.
9. The first contradiction that I do find in the Plaintiff's title is in the said vesting order that issued by the court to enable her registration as the proprietor of the suit land. In RMCC No 2675 of 1997, the Plaintiff made an application dated May 25, 2007 seeking court to issue a vesting order to enable her registration as the proprietor of the suit land. However, entry No 13 in her certificate of title was to the effect that her registration is pursuant to a vesting order dated February 21, 2007, which vested the suit land in her name. The Plaintiff did not produce the said order dated February 21, 2007 to establish to this court the circumstances under which the said orders were obtained. The application which has been seen by the court that sought vesting orders was dated May 25, 2007, and from the Defendant's application dated February 20, 2012 stated that the vesting orders were issued on October 9, 2007 (pursuant to the application dated May 25, 2007). The Plaintiff has failed to clarify to court the specific date that the vesting orders were issued and whether or not the same were issued before or after the application seeking vesting orders was made before court.
10. Further to that, the Plaintiff's evidence was inconsistent, she testified that the suit land was sold in a public auction and her mother, Olinda Fernandes purchased the suit land on her behalf pursuant to



a power of attorney. However, in her affidavit in support of her application dated May 25, 2007, she stated that she purchased the suit land in a public auction. The Plaintiff did not clarify to court how she really purchased the suit land, is she the one who bought it in the public auction as stated in the said application or through her mother who had her power of attorney as she had testified. The Plaintiff did not produce the said power of attorney that supposedly gave her mother the authority to purchase the suit land on her behalf.

11. After the Plaintiff became the registered proprietor of the suit land, the Defendant made an application dated February 20, 2012 seeking to set aside the vesting orders which the Plaintiff used to register the suit land in her name. The trial court allowed the application on January 23, 2013 and set aside the vesting orders issued on October 9, 2007, and directed the suit to be fixed for hearing in the appropriate court within 60 days. Essentially, the court had set aside the vesting orders that had put the Plaintiff as the registered proprietor of the suit land. The Defendant wrote to the then District Land Registrar Mombasa on June 11, 2014 forwarding the said issued on March 11, 2013. The said letter was received by the Land Registrar on June 19, 2014.
12. It is my considered view that the Plaintiff did not discharge the evidential burden to rebut the testimony of the Defendant, that the vesting order which placed her in registration was set aside and her title to the suit land is null and void. These orders that set aside the said vesting orders were served onto the Land Registrar, who confirmed receipt of the letter forwarding the said orders on 19th June 2014. It was therefore a matter that was made known to the Land Registrar, the maker of the certificate of title. As stated, where a title is under challenge it is not sufficient to dangle the instrument of title as proof of ownership. The Plaintiff ought to have taken the extra step to demonstrate to court that the process she undertook to acquire the suit land was legal, formal and free of any encumbrances. It is also strange as well as suspicious how the Plaintiff conveniently bought the suit land in a public auction, through her mother, who was a previous party in a suit, while the judgement creditor is her brother in law. The process in which the Plaintiff claimed to have purchased the suit land is full of contradictions and inconsistencies with no documents in support.
13. Having considered the evidence on record, the court is satisfied that the certificate of title held by the Plaintiff was procured unprocedurally. The court finds that the Plaintiff has failed to prove her case on the balance of probabilities and the same is dismissed with costs to the Defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

