



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 276 & 277 OF 2004 (CONSOLIDATED)

OMAR SAID MWATAYARI.....PLAINTIFF

VERSUS

VIPINKUMAR NATHALAL SHAH.....1ST DEFENDANT

SOUTH COAST BEACH PROPERTIES LIMITED.....2ND DEFENDANT

AND

COASTLAND PROPERTIES LIMITED.....NECESSARY PARTY

J U D G E M E N T

1. This file was reconstructed thus some parts were missing. I was unable to trace the handwritten evidence by the plaintiff other than where his advocate said this is the close of the plaintiff's case. I have therefore relied wholly on the written statement of the plaintiff that was available. This suit was consolidated with No. 277 of 2004.

2. The suit was filed on 22nd December 2004 against the 1st and 2nd defendants. The plaintiff was seeking a return of plot No. Kwale/Galy Kinondo/734 which the plaintiff alleged the defendants had caused to be sub-divided from plot No. Galu Kinondo/55 without his consent.

3. The plaintiff pleaded that there was no agreement between himself and the defendants to sub-divide and transfer his plot. That the same was done through collusion and fraud without following the laid down procedure. The particulars of fraud pleaded are;

(i) Causing the plaintiff's plot Galu Kinondo/55 to be subdivided.

(ii) Causing the said plot to be registered in its name.

(iii) Colluding with others to effect the transfer.

4. The plaintiff continued that he did not know about the transfer until sometime in 2004 when he visited the lands registry to report loss of title. He therefore filed this suit seeking cancellation of the 1st and 2nd defendants' title and he be substituted as the new registered owner.

5. The prayers sought against the 1st and 2nd defendants jointly and severally are;

(a) An order cancelling and revoking the 1st & 2nd defendants title.

(b) The plaintiff be registered as owner of Kwale/Galu Kinondo/734 and the Land Registrar to rectify the title to reflect the change.

(c) General damages for fraud.

(d) Costs and interests.

6. The plaintiff obtained default judgement which was set aside on application by the 1st and 2nd defendants. Upon the setting aside order made, the 1st and 2nd defendants through application dated 14th June 2006 sought to join Coastland Properties Limited. The request was subsequently granted as the plaintiff had sold the suit land to Coastland Properties Limited using orders obtained in the default judgment.

7. The 1st and 2nd defendant filed his statement of defence on 27/10/2009 pursuant to the order of 26th August 2005. The defence was amended on 18/7/2012 to include a counter-claim. The defendants pleaded that the 1st and 2nd defendant denied having caused the sub-division of Kwale/Galu Kinondo/55 without the consent of the plaintiff or any other person and they put the plaintiff to strict proof. The 1st and 2nd defendants denied there was fraud between them and other unknown persons. That they separately bought their plots and are bonafide purchasers for value without notice. That the claim of ownership by the plaintiff has no basis.

8. In their counter-claim, the 1st and 2nd defendants pleaded that the 3rd defendant colluded with the plaintiff and/or unknown persons to prepare and fraudulently register documents of transfer relating to Kwale/Galu Kinondo/55 to itself. The particulars of fraud levelled against the 3rd defendant include;

(a) The third defendant knowingly embarked on this exercise when a search on the Court's records would have shown that the plaintiff's default judgment was suspect and questionable.

(b) No presidential approval and/or Land Control Board's consent was obtained before the finalisation.

(c) The 3rd defendant refused to heed the Lawyer's notice and even Court Orders restraining it from continuing with further construction and even now they are still going ahead in total defiance.

(d) The 3rd defendant either in collusion with the plaintiff or on its own, caused the Land office records to go missing for a substantial period of time.

(e) Generally, to conduct itself in a manner as to unlawfully dispossess the 1st and 2nd defendants of their right to titles.

9. Wherefore the 1st and 2nd defendants pray for;

(a) The diversion of Plot Number Kwale/Galu Kinondo/55 to Kwale/Galu Kinondo 733 and 734.

(b) An order that Kwale/Galu Kinondo/734 be registered in the name of the 1st defendant.

(c) An order that Kwale/Galu Kinondo/733 be registered in the name of the 2nd defendant.

(d) The plaintiff's suit be dismissed with costs to the 1st and 2nd defendants.

(e) Costs of and incidental to this suit.

(f) The 3rd defendant do vacate and move out immediately from the respective plots.

10. The plaintiff filed a reply to defence and counter-claim by the 1st and 2nd defendants on 9/8/2012. The plaintiff denied that he ever applied to have his plot Kwale/Galu Kinondo/55 to be sub-divided into two and that nobody had authority to do it on his behalf. The plaintiff also denied selling the suit plots to the 1st and 2nd defendants. He added that the defendants' claim has been overtaken by events since the property has been transferred to the 3rd defendant using a valid court order. That the orders sought in the counter-claim are incapable of enforcement. The plaintiff urged that the counter-claim be dismissed with costs.

11. The 3rd defendant/Necessary Party filed a reply to the defence and counter-claim by the 1st and 2nd defendants on 2nd August 2012. It denied the facts set out in paragraphs 4 – 8 of the defence and put the 1st and 2nd defendants to strict proof. They pleaded that they purchased title No. Kwale/Galu Kinondo/55 from the plaintiff and subsequently sub-divided it into L.R Nos 1636, 1637, 1638 and 1639. That at the time of purchase, the suit was determined and not existing. The 3rd defendant pleaded that the counter-claim is defective. The 3rd defendant urged the court to order the counter-claim be struck out with costs.

12. The hearing of the suit commenced. In the witness statement of the plaintiff dated 10/8/2012 and filed on the same date, the plaintiff Omar said stated that he has never sold the suit title to anybody nor applied to have it sub-divided to plots Nos Kwale/Kinondo/733 and 734. He denied signing any agreement to the 1st and 2nd defendants. That what happened to title Kwale/Galu Kinondo/55 happened without his permission, knowledge or authority.

13. Mr. Omar continued that after he got judgment against the 1st and 2nd defendants, he proceeded to sell the property to the 3rd defendant and transfer the same once he was paid the entire purchase price. That he sold the land based on a valid court order. That the alleged transfers to the 1st and 2nd defendants were fraudulent. According to Mr. Omar, the 1st and 2nd defendants ought to answer the following questions;

(a) Who transferred plot No. 55 to them?

(b) Who applied for consent to transfer the same to them?

(c) Who ordered for sub-divisions of plot Nos 55 of two i.e. Nos. 733 and 734?

(d) Who applied for consent to sub-divide?

(e) Who was paid the purchase price?

14. That if these questions are answered, the 1st & 2nd defendants are left culprits of the fraud. The plaintiff attached a certificate of official search dated 15/10/2004 showing him as the registered owner of the plot No. 55 as at 15/11/1974 and land certificate issued. The search also show that the title was closed on sub-division to plot Nos 733 and 734. He also produced adjudication record dated 28/5/1974 showing him as the owner. The plaintiff further relied on the letter to the Land Registrar dated 26/10/2004 seeking to know how the title was closed on sub-division and details of the new owners. The land registrar replied on 1st November 2004 stating that according to their records, all the transactions were properly executed. That in case there was fraud, the plaintiff was at liberty to institute legal proceedings against the beneficiaries for an order to be issued cancelling the said registration.

15. The 1st and 2nd defendants called two witnesses. Samuel Johnson who said he is the general manager of the 2nd defendant testified as **DW1**. He adopted his witness statement dated 14/2/2013 as his evidence in chief. He stated that the 2nd defendant has been registered as owner of Kwale/Galu Kinondo/733 since 31/12/1979 and the company has the original title. The witness said there was no proper service of Summons to Enter Appearance on the company as the advertisement was placed on Kenya Times Newspaper which no one in the company reads. They were only made aware of the case by the 1st defendant in May 2006.

16. Mr. Johnson averred that the plaintiff caused himself to be registered as owner of plot 55 having abused the process of the Court in a bid to give sanctity to the fraudulent scheme to deprive them of their property. He therefore urged this court to allow the prayers contained in their counter-claim.

17. The witness was put to cross-examination by Mr. Nyanga counsel for the 3rd defendant/Necessary Party. He answered that the title was acquired by the 2nd defendant's directors in 1979. He could not state how the suit title was acquired because he was not an employee then. That Omar never said he did not sell the land to 2nd defendant. Shown a document by the Necessary Party, the witness said he was not the author of that document so he did not understand it. The document did not show who the owner of 733 was. **DW1** said he joined the 2nd defendant in 1980. In re-examination, **DW1** said search for plot No. 733 shows the land is registered in 2nd defendant's name. He was also referred to the Land Registrar's letter dated 1/11/2004 sent to Oddiang'a & Co. Advocates which letter indicated all transactions were properly executed in respect of the subdivisions and the transfers.

18. Vipinkumar Shah the 1st defendant testified as **DW2**. He adopted his witness statement filed in Court on 31/3/2014 as his evidence. **DW2** stated that he and his later brother Bharatkumar Shah bought the plot No. 734 in 1984 and he has in his possession the title documents. **DW2** said he knew the owner of Plot No. 733 as they are friends. He urged the court to allow the prayers sought in the counter-claim.

19. **DW2** was asked questions in cross examination by the Necessary Party to which he answered that he did not know the seller because his late brother is the one who did the transactions. That his plot is a sub-division of plot No. 55. That the land belongs to them and they pay rates although he did not bring the receipts to court. In re-examination, **DW2** said the search dated 25/11/2004 shows they are the registered owners from 13/7/1984. This marked the close of the 1st and 2nd defendants case.

20. The Necessary Party/3rd defendant did not give any evidence as they had not filed witness' statements and application for leave to do so after the close of the defence case was objected to by the 1st and 2nd defendants which objection the Court upheld. The Court, then set timelines for parties to file their closing submissions. Only the 1st and 2nd defendants and the Necessary Party filed theirs.

21. The 1st and 2nd defendants submitted that there is sufficient evidence to show that the defendants lawfully acquired titles Kwale/Galu Kinondo/733 and 734 and their titles can only be defeated with cogent evidence of fraud and/or wrong doing on their part. That not an iota of evidence has been adduced to substantiate such purported allegations. The 1st and 2nd defendants proceeded to cite cases where the Court held that allegations of fraud must be strictly proved. For instance, they have cited **Jennifer Nyambura Kamau Vs Humprey Mbaka Nandi (2013) eKLR**. The 1st and 2nd defendants also cited the provisions of section 26 of Land Registration Act submitting that their title cannot be impeached because the plaintiff failed to plead and prove the particulars of fraud and misrepresentation.

22. The Necessary Party on its part submitted that on various dates between 1984 – 1986, the suit property was fraudulently sub-divided and unlawfully transferred to the 1st and 2nd defendants. That on 5/10/2005 through a court order issued in this case, the sub-divisions of plot Nos 733 and 734 was closed restoring the original No. 55 to the plaintiff's name. That on 6/4/2006, the Necessary Party purchased the land from the plaintiff for a sum of Kshs.22,484,000 after doing due diligence.

23. The Necessary Party submitted that its title can only be challenged as provided under section 26 (1) of the Land Registration Act 2012. It relied on the Court of Appeal decision in **Charles Karathe Kiarie & 2 others Vs Administrators of the Estate of John Wallace Mathae (deceased) & 5 others (2015) eKLR** where it was held that a registered proprietor who purchases land for valuable consideration the certificate of title issued thereon by the registrar in the absence of fraud is absolute and indefeasible evidence of registered ownership of land. That in view of the foregoing, the Necessary Party is the absolute and indefeasible proprietor of the said plot as the bonafide purchaser.

24. Having considered the pleadings filed, the evidence adduced and the submissions rendered, I frame the following questions as arising for my determination;

(a) Whether or not the plaintiff proved the allegations of fraud raised against the 1st and 2nd defendants?

(b) Whether or not the Necessary Party legitimately acquired its title as a bonafide purchaser for value without notice of any defects?

(c) What orders ought to be made in the circumstances?

25. It is trite law of evidence that he who alleges a fact must prove its existence. This is provided for in section 107 and 109 of the Evidence Act. Section 107 provides thus;

“109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

26. In the plaint filed before this Court, the plaintiff alleged that the 1st and 2nd defendants acquired the suit titles Kwale/Galu Kinondo/733 and 734 without his consent or authority. He denies selling the land to the said defendants and or obtaining consent to sub-divide and transfer the land. Before filing the case, the plaintiff through his advocate on record did a letter dated 26/10/2004 to the Land Registrar Kwale seeking to know the details of the sub-division of the suit land. The plaintiff stated that he learnt of the fraud when he went to report the loss of his title at the lands office. The plaintiff did not however disclose when he lost his title deed.

27. The Land Registrar responded to the letter on 1st November 2004 stating that according to their records the transactions were lawfully done. If the plaintiff felt there was fraud, the Land Registrar advised him to file a suit against the beneficiaries (its assumed against the beneficiaries of the fraud). The 1st defendant stated that they acquired their title in 1984 while the 2nd defendant acquired the title in 1979. The plaintiff's evidence is that he never subdivided or transferred the land to the 1st and 2nd defendants.

28. The question which required proof is whether or not the plaintiff subdivided plot 55 and later executed a transfer in favour of the defendants. In proving his case, the plaintiff produced the following documents;

(i) Certificate of official searches for plot No. 55, 733 and 734 dated 15/10/2004 and 25/11/2004 respectively.

(ii) Letter to the Land Registrar dated 26/10/2004.

(iii) Letter from the Land Registrar dated 1/11/2004.

(iv) Adjudication records dated 24/5/1974.

(v) Interlocutory judgment delivered on 16/9/2005.

29. From the onset, it is not in dispute that the suit title Kwale/Galu Kinondo/55 was originally registered in the name of the plaintiff. The dispute is how it changed from the plaintiff's name to the names of the 1st and 2nd defendants. According to the Land Registrar's letter produced by the plaintiff, that change/transfers were properly executed as per the records held in their possession. The plaintiff did not endeavour to request to be supplied with those records. The plaintiff is alleging fraud so the burden was upon him to strictly prove the details and or particulars of the fraud.

30. The 3rd defendant/Necessary Party showed DW1 a green card (item 3 on their list) for plot 55. Entry one dated 15/11/1974 had the plaintiff's name and it is crossed. There is also an entry for **“title closed on subdivision. There are New numbers 733 & 734”**. The sub-division was subsequently cancelled by the order of the Court issued earlier on in this case. The green card however does not specify who undertook the sub-division of plot 55. The plaintiff did not bring evidence of any mutation form to ascertain who signed for the sub-divisions and/or which of the defendants (1st and 2nd) participated in sub-dividing parcel No. 55. Therefore, his allegations that the 1st and 2nd defendants sub-divided the suit land without his consent remains unsubstantiated.

31. The plaintiff further denied ever selling or transferring the land to the 1st and 2nd defendants. The fact that the plaintiff denied selling or transferring the land to the 1st and 2nd defendants did not shift the burden on the said defendants to prove how they acquired the same. It was incumbent on the plaintiff to show that the document of transfer presented to the Land Registrar was a fraud. The plaintiff has not demonstrated how the 1st and 2nd defendants colluded with others to effect the transfer. The plaintiff wants this court to infer fraud from the facts i.e. by virtue of the fact that the 1st & 2nd defendants are registered as owners of the land he is claiming.

32 In the Case of *Vijay Morjaria Vs Nansingh Madhusing Darba & Ano (2000) eKLR* Tunoi JA (as he then was stated as follows; **“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett (1878) 7 Ch. D 473 at 489.* In my view the complaint by the appellant is well-merited since the plaint and the re-amended plaint were defective on their faces. The ground of appeal grounded on failure to specifically plead fraud must succeed.”** (underline mine for emphasis)

33. The standard of proof required is higher than that in Civil Cases. In the Case of *Martin F. Kangara Vs Samuel Macharia Kimani (2019) eKLR*, Kemei J quoted her decision in *Kinyanjui Kamau Vs George Kamau (2015)* where she expressed herself thus;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “... We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases....” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.” (underline mine)

34. The second question is whether or not the Necessary Party is a bonafide purchaser for value without notice of defects of the title. The Necessary Party pleaded that it purchased the land not pursuant to execution of the decree but on account of offer and purchase between the plaintiff and itself. That this was done after the suit was determined. I am alive to the fact that the Necessary Party did not call any evidence. However, because the orders of this Court is likely to affect her proprietary interest in the suit land, this Court is called to look at the documents they filed some of which were shown to the 1st and 2nd defendants during cross-examination of their witnesses.

35. It is not in dispute that the Necessary Party purchased the land title No. 55 after the registration was restored in the name of the plaintiff. This is confirmed by **DW1** when he said that they were called by **DW2** when someone went to survey the suit land. On investigations they confirmed the property had been illegally transferred to the 3rd defendant/Necessary Party. The green card also shows registration into the Necessary Party's name after the title was reverted into plot 55 and registered in the plaintiff's name.

36. The Necessary Party submitted that their registration is indefeasible as no fraud was alleged or proved against them. The 1st and 2nd defendants alleged fraud and abuse of the court process against the plaintiff which then brings to question whether the plaintiff had a good title to pass to Necessary Party.

37. The plaintiff obtained exparte judgment on 16/9/2005 after the matter proceeded on formal proof. The 1st and 2nd defendants applied on 3/5/2006 to have the judgment set aside before the High Court which application was refused. The 1st and 2nd defendants appealed the ruling vide MSA Civil Appeal No. 46 of 2008. The Court of Appeal on 16th October 2009 allowed the said appeal and issued the following orders;

(a) Judgement of Mwera J. delivered on 16/9/2005 be and is hereby set aside.

(b) Ruling of Serгон J. dated 30/3/2007 and subsequent orders be and are hereby set aside.

(c) The exparte judgement against the 2nd Respondent is also set aside and 2nd Respondent to file defence within 15 days thereof.

38. What then was the position of the parties pursuant to the decision rendered by the Court of Appeal? My understanding is that it reverted the parties to their status before the suit was filed. That is to say that the 1st and 2nd defendants remained as registered owners of L.R Nos 733 and 734 and for parties to prove their case. The Necessary Party's rights as a purchaser from a person who acquired title through a court order which was subsequently set aside was indeed vitiated. The Necessary Party participated in the proceedings before the Court of Appeal and became aware of the outcome of that case and its repercussions.

39. Further the Necessary Party did not file any witness statement to support her claim that it was a bonafide purchaser for value without notice of any defects of the suit title Kwale/Galu Kinondo/55. Their attempt to adduce such evidence through submissions must be resisted. I will therefore not consider the case law cited in regard to rights of a bonafide purchaser for value without notice since there was no evidence offered to support the line of submission.

40. What orders ought this Court to make? In light of the analysis given, I come to the following conclusions;

(i) The plaintiff did not prove fraud against the 1st and 2nd defendants. Consequently, the plaintiff's suit as against the 1st and 2nd defendants fails and is hereby ordered dismissed.

(ii) The Necessary Party's title was vitiated by the decision of the Court of Appeal which set aside the judgment of 16/9/2004 eventually restoring the defendants titles.

(iii) The Necessary Party/3rd defendant failed to prove that it was a bonafide purchaser for value without notice.

41. Consequently, judgement be and is hereby entered for 1st and 2nd defendants as prayed in the counter-claim that;

(a) An order is made that the 1st defendant be and is the registered owner of Kwale/Galu Kinondo/734.

(b) An order be and is hereby given that L.R No. Kwale/Galu Kinondo/733 be registered in the name of the 2nd defendant.

(c) The 3rd defendant/Necessary Party do vacate the suit premises within 90 days of delivery of this judgment.

(d) In default the 1st & 2nd defendants be at liberty to evict the necessary party and or persons claiming through it using lawful means.

(e) Costs of the suit and the counter-claim awarded to the 1st and 2nd defendants.

Judgement dated & signed at Busia this 16th Day of September 2020

A. OMOLLO

JUDGE

And delivered electronically via email to the parties' advocates this 21st Day of September 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE