



Abdalla v Sheikh (and in Counter Claim) Sheikh v Abdalla (Environment & Land Case 76 of 2013) [2023] KEELC 22004 (KLR) (6 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22004 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 76 OF 2013
SM KIBUNJA, J
DECEMBER 6, 2023**

BETWEEN

ZUBEIDA SAID ABDALLA PLAINTIFF

AND

MOHAMED SOUD SHEIKH DEFENDANT

AND

MOHAMED SOUD SHEIKH PLAINTIFF

AND

ZUBEIDA SAID ABDALLA DEFENDANT

JUDGMENT

1. The main suit was commenced by the plaintiff against the defendant through the plaint dated and filed on the 26th April 2013, claiming for permanent and mandatory injunctions over MN/Section 1/341 Utange Mombasa, general damages for trespass and costs.
2. The defendant denied the plaintiff's claim through the statement of defence and counterclaim dated and filed on the 11th June 2013 seeking for the suit to be dismissed with costs. The plaintiff's suit was dismissed for lack of evidence/ want of prosecution on the 28th February 2019. In his counterclaim, the defendant averred that he is the bona fide owner of the 5/8 share of MN/Section I/341, Utange, the suit property, and that if the plaintiff has been registered as proprietor, then it was through fraud. That he has been in possession of the suit land for 47 years. The defendant has set out the particulars of fraud attributed to the plaintiff at paragraph 5 and seeks for the following prayers:
 - a. A declaration that the transfer of the 5/8 share of MN/Section 1/341 from the defendant to the plaintiff was wrongly, illegally and fraudulently obtained and therefore the same is null and void.



- b. a declaration that the defendant is the rightful registered owner of 5/8 share of MN/Section 1/341.
 - c. Costs of the counterclaim.
3. The plaintiff responded to the counter claim through her reply to defence and defence to the counterclaim dated 16th September 2013. The plaintiff reiterated the averments in the plaint and denied those in the counterclaim. She prayed for the counterclaim to be dismissed with costs and her claim be allowed as prayed.
4. In support of the counterclaim, the defendant testified as DW1 and adopted the contents of his statement filed on 11th June 2013 as his evidence in chief and produced the thirteen documents in the list dated 11th June 2013 as exhibits. It is his evidence that he bought 5/8 share of the suit property in 1966 from Abdalla Mohamed as per the transfer entry number 10 in the title document and took possession. That he has been in occupation of the plot but on 17th June 2004 some people attacked him on the land and injured him. That after this suit was filed, the son of the plaintiff came there with six police officers and other people relying on a fake court order and demolished his houses and other structures on the plot forcing him to leave. He testified that the original title document for the said land has 17 entries, and his ownership of 5/8 share is registered at entry number 12. That entry number 13 & 15 are of the loan he had obtained from AFC and entries 16 & 17 are for discharge of charge of the two loans. That the copy of the title the plaintiff had relied on with 20 entries and the transfer document in Arabic are forgeries. That he does not know the plaintiff and that she has never come to court. He added that he had a two-storey building on the suit land that is captured in the photographs filed by the plaintiff, which she demolished on the strength of a fake court order. He prayed for an order confirming that the land was his, plaintiff registration to be cancelled, damages and costs. During cross examination, DW1 testified that his work and schooling documents were among those stolen when his houses were demolished by the plaintiff. That the original title and transfer documents were not stolen as they were then with AFC. That entry number 14 was about Abudulasiz taking the share of his late father and was made when he released the original title document to Salim who later returned it to him. That the land was later subdivided to three parcels in 1981 but the deed plans were never registered. That he was not involved in transactions relating to entries number 18 and 19 in the title document filed by the plaintiff. That if Abdulasiz had transferred his share to the plaintiff, he would have come for the original title document from him for the entry to be made. That the entries made after entry number 17 of the document of title filed by the plaintiff could not have been made on the original document because the plaintiff never went for it from him. That the plaintiff has not filed documents to confirm payment of the purchase price to him and Abdulasiz and has declined to come to court.
5. The learned counsel for the defendant filed their submissions dated the 2nd August 2023 in support of the counterclaim which the court has considered.
6. The issues for the court's determinations are as follows:
 - a. Whether the defendant has established a legal and or beneficial ownership of the 5/8 share of the suit property.
 - b. Whether the defendant is entitled to the two declaratory orders sought.
 - c. Who pays the costs?
7. The court has carefully considered the pleadings filed, the evidence tendered by DW1, submissions by the learned counsel, superior court decision cited thereon and come to the following findings:



- a. That from the evidence tendered by DW1, the suit property has not been formally subdivided even though some process had started and deed plans prepared. The deed plans have not been registered and the suit property therefore is under one original title document held by the defendant.
 - b. That the plaintiff did not attend the court or present witness to testify in support of her averments in the reply to the defence and defence to the counterclaim. Therefore, the plaintiff's averments in her pleadings are in law mere allegations without evidence in support and incapable of rebutting or challenging the defendant's evidence that he is the legal and beneficial owner of 5/8 share of the suit property as per the entries in the original title document that contains only seventeen (17) entries that is in his possession.
 - c. That the defendant's evidence that the copy of the title document filed by the plaintiff containing twenty (20) entries is a forgery, as entries numbers 18 to 20 were made without the original title document in his possession, is unchallenged and is on all fronts, probable. The registration of the plaintiff with the suit property or any share thereof made after entry number 17 was made without consent of the defendant who owns 5/8 share and was therefore fraudulent.
 - d. That the defendant has therefore established his claim against the plaintiff in the counterclaim, and as under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs follow the events unless for good cause otherwise ordered, the defendant is awarded costs.
8. In view of the findings above, the court comes to the determinations that the defendant has established his counterclaim against the plaintiff on a balance of probabilities. That judgement is therefore entered for the defendant against the plaintiff in the following terms:
- i. That a declaration is hereby issued that the transfer of five-eighth (5/8) share of plot Number 341/Section 1/Mainland North from the defendant to the plaintiff was wrongly, illegally and fraudulently obtained and therefore is null and void.
 - ii. A declaration is hereby issued that the defendant is the rightful registered owner of five-eighth (5/8) share of Plot Number 341/Section 1/Mainland North.
 - iii. That the plaintiff to pay the defendant's costs in the counterclaim.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 6TH DAY OF DECEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff: Mr. Abubakar.

Defendant: Mr. Ondieki for Shimaka.

