



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 358 OF 2016

FREEDOM LIMITED.....PLAINTIFF

VERSUS

OMAR AWADH MBARAK.....DEFENDANT

JUDGEMENT

The Plaintiff avers that at all material times to this suit, the Plaintiff was and remains the registered proprietor of Plot No.1948 (Original No. 412/20) Section V Mainland North registered at the Land as No. 32564. The Plaintiff currently has possession of and occupies the suit property. Sometime in 2015, the Plaintiff applied for an Official Search for the suit property which the Registrar of Titles, for reasons best known to him, failed, refused and/or neglected to provide to the Plaintiff. The Plaintiff was later notified that an Official Search could not be issued as the Land Registry Records were allegedly unavailable which precipitated and compelled the Plaintiff to file a suit against the Registrar which was the Constitutional Petition No. 58 of 2015 (Freedom Limited vs- The Chief Land Registrar & 2 Others) in which after perusal of the documents in the plaintiff's possession the Land Registrar confirmed that the plaintiff was the proprietor of the suit property and a construction of the land registry records was decreed on the basis of the documents and records in the plaintiff's possession. It has now come to the Plaintiff's knowledge that the Defendant is wrongfully and unlawfully purporting to assert Plaintiff's property premised upon an alleged title which has no bearing on the Plaintiff's land and whose records are missing at the Land's Registry. The Plaintiff was registered as proprietor of the suit property on 12th November 2010 the same having been transferred to it by Mohamed Jaffer Abdulrasul Panju, Abdul Manan Abdul Rehaman Keher Qureshi and Dr. Naseem Chaudhry and the original title in respect thereof still remains in its possession since then the Plaintiff has had and enjoyed uninterrupted open possession and control in respect of the and has suit rights exercised property with its proprietorship all regard thereto without interference or hindrance from the Defendant. The Plaintiff avers that its title in respect of the suit property is indefeasible save for as provided in law and its proprietary and other rights are protected pursuant to the provisions of the Constitution. The Plaintiff avers that the Defendant has and continues to wrongfully, unlawfully and maliciously interfere with the Plaintiff's proprietary rights and interest including its rights of possession and occupation by preventing dealing and/or development with or on the suit property. By reason of the Defendant's aforesaid conduct, the Plaintiff has and continues to suffer loss and damage by being unable to develop and/or deal with the suit property and exercise all its proprietary rights in respect thereof as it would be able to were it not for the Defendant's wrongful and unlawful conduct.

The plaintiff prays for the following orders;

1. A declaration that the Defendant has no right or interest in or over the land comprised in the property known as Plot No.1948 (Original No. 412/20) Section V M. N. registered as C.R. No. 32564 which belongs to the Plaintiff.
2. A permanent injunction to restrain the Defendant whether by himself or through his contractors, employees, servants and/or agents or otherwise howsoever from interfering with the Plaintiff's proprietary rights and quiet occupation and possession of the property known as Plot No. 1948 (Original No. 412/20) Section V Mainland North and registered at the Land Titles Registry, Mombasa as C.R. No. 32564 or in any manner howsoever else dealing with the said property under the pretext that he has any right or interest therein.
3. Costs of and incidental to this suit;
4. Any other proper or other relief Court deems fit to grant.

The Defendant denies that the Plaintiff is the lawful and registered proprietor of all that land known as Plot No. 1948 (Original No. 412/20) Section V Mainland North registered as C.R. No. 32564 located in Mombasa. The Defendant states that his late grandfather Mbarak Awadh Salim purchased all that piece or parcel of land containing by measurement Nine Hundred and Eighty Three (983) acres or thereabouts known as Plot No. 287 of Section V situate in the province of Seyidie at S.E of Mazeras Station, more particularly described and delineated on Deed Plain No. 21108 on 2nd August 1978 from the then registered owner Mohamed Afzal Khan for a consideration of Kenya Shillings Eight Hundred and Seventy Eight Thousand (KShs. 878,000/=). The Defendant also avers that on that same day a transfer was executed by the Vendor (Mohamed Afzal Khan) and witnessed by U.K Doshi Advocate. The Defendant further states that property which was purchased by his grandfather namely CR 6302 and being Plot No. 287 of Section V has never been subdivided as it still contains by measurement 983

acres or thereabouts. The Defendant states that his grandfather died before the suit property could be formally transferred to him and that he only became aware of the transaction between his late grandfather and Mohamed Afzal Khan in the year 2012. The Defendant states that upon discovery of the transaction he attempted to register the transfer dated 2nd August 1978 but the same could not be registered as he had not obtained letters of administration for the estate of his late grandfather. The Defendant avers that he filed Succession Case Number 68 of 2013 pursuant to Article 170 (5) of the Constitution of Kenya, Section 5 of the Kadhi Court Act, Cap 11 and Section 48(2) of the Law of Succession Act Cap 160 and the Honourable Court issued and confirmed the order/grant. Defendant further avers that upon obtaining the said Order from the Kadhi's Court he proceeded to have the same registered against the title as entry number 15 which could not be registered as it was said that Lands Office file had gone missing and the same could not be traced. The defendant states that his late grandfather is the lawful proprietor of the suit property known as CR 6302 which has never been subdivided having being purchased in the year 1978. Therefore, the Plaintiff ought to have carried out its due diligence at the time the suit property was allegedly being transferred to it, as the property registered as CR 6302 has never been subdivided and it is still registered in the name of the Vendor Mohamed Afzal Khan. The Defendant counter claims as against the Plaintiff herein for vacant possession of the suit property and prays for the following orders;

1. A mandatory injunction to compel the Plaintiff by itself, its agents, servants and/or any other person under instructions of the Plaintiff to give vacant possession of the suit property and to demolish the structures constructed thereon and to remove all the materials falling and/or in the alternative the structures be demolished and removed at his cost.
2. A declaration that the purported transfer effected on the 12th November 2010 in respect of the sale of Plot No. 1948 (Original No. 412/20) Section V Mainland North registered as C.R. No. 32564 was fraudulent, illegal, null and void as Title Deed Number 6302 has never been sub-divided.
3. A declaration that the title deed issued in favour of the Plaintiff is null and void.
4. That an order do issue directing the Land Registrar Mombasa to cancel the purported title issued to the Plaintiff in respect of ALL that piece or parcel of land containing by measurement Nine Hundred and Eighty Three (983) acres or thereabouts known as Plot No. 287 of Section V situate in the province of Seyidie at S.E of Mazeras Station, more particularly described and delineated on Deed Plain No. 21108.
5. A declaration that the estate of the late Mbarak Awadh Salim is the true, genuine and lawful owner of ALL that piece or parcel of land containing by measurement Nine Hundred and Eighty Three (983) acres or thereabouts known as Plot No. 287 of Section V situate in the province of Seyidie at S.E of Mazeras Station, more particularly described and delineated on Deed Plain No. 21108.
6. A declaration that the estate of the late Mbarak Awadh Salim is the beneficial owner of ALL that piece or parcel of land containing by measurement Nine Hundred and Eighty Three (983) acres or thereabouts known as Plot No. 287 of Section V situate in the province of Seyidie at S.E of Mazeras Station, more particularly described and delineated on Deed Plain No. 21108.
7. Such other relief as this Honourable court may deem fit to grant.
8. General damages
9. Costs of this suit and interest at Court rates.

This court has considered the evidence and submissions therein. PW1, Harji Govind Ruda the Director of the plaintiff adduced evidence of how Plot No. MN/V/1948(original No. 412/10), CR.32564 is a derivative of the mother plot MN/V/287 CR.6203 as evidenced by entry No. 53. And that it was issued to Mohamed Jaffer Abdulrasul Panju, Abdul Manan Abdul Rehman Keher Qureshi and Abdul Sultani Chaudhry. The Plaintiff was registered as proprietor of the suit property on 12th November 2010 the same having been transferred to it by Mohamed Jaffer Abdulrasul Panju, Abdul Manan Abdul Rehman Keher Qureshi and Dr. Naseem Chaudhry. The defendant is claiming the same property except his mother title reads Plot MN/V/287 SE MAZERAS CR.6302 and claims it has never been subdivided. The deed plan numbers on both titles is the same No.21108, both are in the Province of Seyidie District of Mombasa locality to S.E of Mazeras station. Both refer to Plot No. 287 Section V Mainland North and are certified by Phineas Earnest Wolf. The plaintiff adduced evidence that the suit property was compulsorily acquired by the Government in 1955 by a gazette notice dated 25th January 1955. All relevant entries were made in the plaintiff's mother title. The gazette notice clearly shows 6.1 acres of Plot 287 Section V Mainland North being acquired by the Government

The Defendant states that his late grandfather Mbarak Awadh Salim purchased all that piece or parcel of land containing by measurement Nine Hundred and Eighty Three (983) acres or thereabouts known as Plot No. 287 of Section V situate in the province of Seyidie at S.E of Mazeras Station, more particularly described and delineated on Deed Plain No. 21108 on 2nd August 1978 from the then registered owner Mohamed Afzal Khan for a consideration of Kenya Shillings Eight Hundred and Seventy Eight Thousand (Kshs. 878,000/=) (DEX1 is the sale agreement). The Defendant also avers that on that same day a transfer was executed by the Vendor (Mohamed Afzal Khan) and witnessed by U.K Doshi Advocate (DEX2 is the transfer). The Defendant further states that property which was purchased by his grandfather namely CR 6302 (DEX3 is the certificate) and being Plot No. 287 of Section V has never been subdivided as it still contains by measurement 983 acres or thereabouts. The Defendant states that his grandfather died before the suit property could be formally transferred to him and that he only became aware of the transaction between his late grandfather and Mohamed Afzal Khan in the year 2012. What the court finds curious is that the defendants documents state that his grandfather Mbarak Awadh Salim died in the year 2000. However, the plaintiff has attached a gazette notice stating that Mbarak Awadh Salim died on the 15th June 1967. If the latter is true then how did he enter into a sale agreement in 1978?

In the case of Munyu Maina vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Appeal Court held that;

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

The Court of Appeal in *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs. Attorney General & 4 others (2017) eKLR*, in determining who a *bona fide* purchaser for value without notice is cited the case of *Katende vs. Haridar & Company Limited (2008) 2 E.A 173* where the Court of Appeal held as follows:

“For a purchaser to successfully rely on the bona fide doctrine,... he must prove that:-

- a. he holds a Certificate of Title;*
- b. he purchased the property in good faith;*
- c. he had no knowledge of the fraud;*
- d. he purchased for valuable consideration;*
- e. the Vendors had apparent valid title;*
- f. he purchased without notice of any fraud;*
- g. he was not party to any fraud.”*

In the case of **Samuel Kamere vs Lands Registrar, Kajiado Civil Appeal Number 28 of 2005** the Court of Appeal held that;

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

I find that the plaintiff has established the root of the title they hold and are bona fide purchasers. The acquisition was gazetted way back in 1955 and the land subdivide hence the reason why the defendant still holds an original mother title. It is on record that after the file went missing in the registry the plaintiff filed petition No. 58 of 2015 Freedom Limited vs Chief Land Registrar & Others and the court issued the decree dated 29th June 2016 to reconstruct the Lands Registry records which was done. The defendant further submitted that the Power of Attorney by Dr. Naseem Chaudry was never registered. In the case of **Francis Mwangi Mugo vs David Kamau Gachago (2017) eKLR** where Munyao J held that a power of attorney dealing with immovable property must be registered and had this to say:

“I do not think capacity is a technicality curable under Article 159 of the Constitution, 2010. It is either YOU have it or YOU do not. YOU do not gain capacity retrospectively. At the time of filing suit, Francis Mwangi Mugo in my view did not have capacity because he had not registered the power of Attorney. I therefore, have no option but to strike out the suit with costs which shall be paid by the said Francis Mwangi Mugo.”

Section 9 of the Registration of Documents Act Cap 285 provides that every document the registration whereof is compulsory shall be registered within two months after its execution, and if executed outside Kenya it shall be registered within two months after its arrival in Kenya. I have perused the same on page 33 of the Plaintiff's bundle of documents and find that it was executed in England on the 14th July 2002 and later Registered in Kenya on 20th August 2002. I find the defendant has failed to prove his counterclaim on a balance of probabilities and I dismiss it with costs. From the evidence on record I find that the plaintiff has proved its case on a balance of probabilities and I grant the following orders;

1. A declaration that the Defendant has no right or interest in or over the land comprised in the property known as Plot No.1948 (Original No. 412/20) Section V M. N. registered as C.R. No. 32564 which belongs to the Plaintiff.
2. A permanent injunction to restrain the Defendant whether by himself or through his contractors, employees, servants and/or agents or otherwise howsoever from interfering with the Plaintiff's proprietary rights and quiet occupation and possession of the property known as Plot No. 1948 (Original No. 412/20) Section V Mainland North and registered at the Land Titles Registry, Mombasa as C.R. No. 32564 or in any manner howsoever else dealing with the said property under the pretext that he has any right or interest therein.
3. Costs to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF JANUARY 2022.

N.A. MATHEKA

JUDGE