



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 116 OF 2011

NDERITU WACHIRA MURIUKI.....PLAINTIFF

-versus-

THE HON. ATTORNEY GENERAL..... 1ST DEFENDANT

BRITANA OILS LIMITED..... 2ND DEFENDANT

JUDGEMENT

1. This suit was filed by the Plaintiff on 4th May 2011 against the two Defendants herein claiming that he, the Plaintiff, had purchased from the 2nd Defendant a piece of land known as L.R 10172 (hereinafter “the suit property”) at Kshs. 12,000,000.00 (Kenya Shillings Twelve Million). According to the Plaintiff, the Ministry of Lands had, through searches conducted at the Lands Registry, confirmed the ownership and title of the suit property to belong to the 2nd Defendant. The Plaintiff averred that upon such confirmation, he purchased the suit property and the Commissioner of Lands through the Lands Registrar, transferred it to him and issued him with Certificate of Title for the same on 12th May 2010.
2. The Plaintiff alleged that he commenced the process of developing holiday homes on the suit property and that he therefore engaged structural professionals in drawing up plans for the intended holiday homes at a total cost of Kshs. 1,159,600.00 and a further Kshs. 1,517,439.68 in related expenses for travel approvals and preparation of development.
3. The Plaintiff sought judgment for the purchase price of Kshs. 12,000,000.00, Kshs. 1,159,600.00 for legal and professional fees and Kshs. 1,517,439.68 on account of disbursements. The Plaintiff also sought interest on the said amounts, exemplary damages for anguish suffered and costs of the suit.
4. On 13th July 2011, the Plaintiff requested for judgment against the 2nd Defendant in default of appearance and defence. Judgment was entered against the 2nd Defendant as requested by the Plaintiff, on 28th July 2011 by the Deputy Registrar of this Court.
5. On 13th July 2011, the Plaintiff filed a Notice of Motion Application dated 7th July 2011 seeking leave for interlocutory judgment in default of appearance and defence as against the 1st Defendant. The Application was heard and judgment entered against the 1st Defendant as prayed by Mureithi, J. on 10th October 2011.
6. On 3rd November 2011, the 1st Defendant filed a Chamber Summons Application dated 2nd November 2011 seeking to set aside the default judgment. The application was heard by Mwongo, J. who in his ruling delivered on 23rd November 2011 allowed the same and granted the 1st Defendant leave to

file its defence within 14 days of the ruling date. I did not see the 1st Defendant's Defence on record. However, it appears the same was filed and only misplaced because there is a reply to it by the Plaintiff on 9th December 2011.

7. PW 1, JUSTUS MURIUKI NDIRITU testified for the Plaintiff on 4th December 2014. He stated that the Plaintiff is his son living in New York and had donated to him the power of attorney to represent him in this case.

8. PW 1 testified that he learnt of the suit property from an agent called Mr. Mwangara who took him to view the same and later to a lawyer called Abdulswanad Abeid of A.A Said & Company Advocates whom the parties appointed to act for the Plaintiff and the 2nd Defendant in the sale transaction. That the said advocate did a search dated 26th October 2009. That the transfer in favour of the Plaintiff was registered on 26th June 2009.

9. PW 1 testified that sometime in December 2011 when he and the Plaintiff went to view the property, they realised that somebody was constructing a perimeter wall around it. That upon inquiry, PW 1 was informed that the person who was constructing the wall was one Ashok Doshi. The witness stated that he conducted a search at Mombasa Land Registry during which two files surfaced showing that the suit property has two different titles but both referring to the same property. The witness produced in evidence a bundle of documents in support of the Plaintiff's case. He was not cross examined by counsel for the 1st Defendant who was present in court.

10. DW 1, DICK SAFARI, the Registrar of Titles, Mombasa, testified before court on 22nd April 2015. He testified in relation to the two titles in dispute namely; CR 22493 LR. No. 16123 which he stated was registered on 29th August 2002 and CR 45738 L.R No. 10172 registered on 26th June 2009. He told court that CR 22493 is registered in the name of Sigma Developers Limited while 45738 is currently registered in the name of the Plaintiff but was first registered in the name of the 2nd Defendant. He testified that the two titles are different but on the ground they both refer to the same parcel which he described as an anomaly.

11. The documents the plaintiff produced in support of his case included inter alia the following :-

- i) Agreement for sale dated 10th September 2009 between himself and the 2nd defendant
- ii) Certificate of official search
- iii) Rates clearance certificate for the suit title for the year 2009
- iv) Payment receipt to A. A Said & Co Advocates for a sum of Kshs 414600/=
- v) Receipts for payments made to the 2nd defendant
- vi) Receipt for payment of stamp duty dated 30.10.2009
- vii) Contract agreement between the plaintiff & project Architects.
- viii) Payment receipts for land rents.

12. DW 1 continued in testimony that the deed plans for the two parcels are the same. That the deed plans were forwarded to his office from the Directorate of Surveys in Nairobi and his office's role was limited to registration only. He therefore stated that the best person to explain the anomaly was the Director of Surveys.

13. On cross-examination, DW 1 explained that the deed plan for CR 45738 came earlier as the same is dated 3rd November 1988 compared to the deed plan for CR. 22493 which is dated 7th April 1992. He stated that he was unable to explain why the deed plan for Sigma Developers Limited came later yet its

title was issued earlier than that of the 2nd Defendant. He told court that he could not verify which deed plan was genuine and which one was not.

14. DW 2, ANTONY MUNYASI, Regional Surveyor, Mombasa County, testified on 23rd July 2015. He stated that LR No. 10172 was a result of allocations done in 1958 and deed plans done in 1988 for several plots ranging from 10161 to 10177. He also stated that the map in the Registry contains plot no. 10172.

15. The witness told court that there was a re-arrangement of plots from No. 10161 after which the plots were given new numbers. That the re-arrangement affected plot no. 10172. That the new map is file Reference No. 115/88 which created plot nos. 12068 to 12076. That however, the new plan does not show plot no. 16123. The witness stated that he needed more time to trace the file reference for 16123 which has no indication that its number had changed.

16. On cross-examination, DW2 stated that the subsequent survey of 155/88 altered part of the initial survey from 10161 to 10172 but it did not cancel the initial survey as it only affected part of it. He testified that records relating to the deed plan of 1992 did not exist in the Registry.

According to the witness, it was not possible to have two deed plans for one plot. That one had to be canceled. That there was no cancellation of the 1988 deed plan.

17. The evidence presented by the 1st defendant shows there exist two deed plans and two certificates of titles in respect of the same plot. The Land Registrar and the Regional Surveyor told the Court that it is only the Director of Surveys who could explain this anomaly. Before the plaintiff filed this suit, he knew about the existence of the parallel title since this is what made him file the suit. In fact, he stated that when he went to visit the plot he found a wall was being constructed. He made enquiries who was building the wall and was told that it was Ashok Doshi.

18. When he filed this suit, he did not enjoin the said Ashok Doshi or Sigma Developers Ltd whose name appears in the second title. Neither did he sue the director of survey. I have also perused the plaint and find that he has not assigned any blame on the owner of this second title. Instead he has blamed the 1st defendant inter alia for misleading him to believe that the 2nd defendant had land in CR 45738/1 which he could sell. In his evidence, he stated that the government guarantees the sanctity of title.

19. The plaintiff in the oral evidence attempted to say that he wanted the Court to determine who is the valid owner of the land and in case he lost the land, he prayed for compensation for costs of legal and professional fees incurred. The pleadings did not ask the Court to determine who is the valid owner of this land and under the Civil Procedure Rules Order 18 provides that parties a bound by their pleadings and claims must be specifically pleaded. The plaintiff in the plaint prayed for :

- i) Damages amounting to Kshs 14,677,039.68/=
- ii) Interest on (i)
- iii) Exemplary damages
- iv) Costs of this suit

20. The plaintiff vide his submissions filed has relied on Section 23 of the Registered Titles Act (repealed) and Section 25(1) & 26(1) of the Land Registration Act which provides of the sanctity of title and the effect of registration. The plaintiff's advocate submitted further that since the deed plan No 16123 issued in 1992 to Sigma Developers Ltd four years after the plaintiff's could only have been obtained by an illegality, unprocedurally or by a corrupt scheme was therefore not capable of conferring a good title. The government was thus in breach of its cardinal duty to guarantee the title acquired by the plaintiff. He asked the Court to exercise its inherent powers under article 159(1) (d) of the Constitution and order that the plaintiff's title is valid and or the government be ordered to compensate the plaintiff to the tune of Kshs 14,677,039.60 plus interest as prayed in the plaint.

21. In view of the fact no claim and prayer was made for a declaration as to who is the owner of the suit land. And in view of the fact that the owner of the parallel title was not made a party to these proceedings, it would go against the rules of natural justice for this Court to declare the second title as invalid without giving the holder thereof a hearing. The result is, the circumstance of the case before me does not permit me room to cancel any of the titles as no such prayer was made and not all necessary parties were joined. Further no clear evidence was provided as to which of the titles should be cancelled. The Court cannot exercise inherent powers without any justification and or basis,

22. Now to the prayers for compensation in case the land is lost, the plaintiff has proved through his bundle of documents that he has paid the entire purchase price. He also incurred legal expenses and other professional charges towards acquiring certificate of title and or developing the plot. The 2nd defendant did not enter appearance to challenge these payments. The 1st defendant was non-committal on the cause of the anomaly. I am in agreement with the plaintiff that had the 1st defendant exercised the duty of care it is statutorily owes the citizens then the plaintiff's interest would have been protected. The 1st defendant is therefore liable to also pay the plaintiff compensation for keeping in his custody two parallel files for the same plot of land thus making it hard for the members of public to know which of the two is the genuine title. The 1st defendant's witness did not offer any explanation to excuse them from this blame

23. Consequently, I am satisfied that the plaintiff has proved his case as regards prayer (a) of the plaint and enter judgement in his favour forthwith jointly and severally against the defendants plus interest at Court rates from date of filing this case till payment is made in full. On the prayer for exemplary damages, the plaintiff has not indicated what pain or damage he has suffered as a result of the defendants action beyond the monetary loss pleaded thus this claim fails. The costs of the suit is also awarded to the plaintiff.

24. Once the plaintiff is paid his money in full, he must surrender his title back to the 2nd defendant. I make this order because it will be wrong for the plaintiff to receive both the money and also the keep the title in his name.

Judgement dated & delivered in Mombasa this 27th day of November 2015.

A. OMOLLO

JUDGE