



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 42 OF 2010

MATHEW LEKAOTA SINTERIA PLAINTIFF

VERSUS

FRANCIS SIALO MEMANTIKI & 2 OTHERS DEFENDANT

JUDGMENT

1. The plaintiff and the defendant are residents of Osinoni sub-location Isampin location, Keyian division in Trans-mara District. Osinoni sub-location was declared an adjudication section in the year 1990 or thereabouts. During the adjudication and demarcation of land in the area, the parcel of land known as Plot No. 30, Osinoni Adjudication section was demarcated in favour of the plaintiff. The said parcel of land is hereinafter referred to as “Plot No. 30”. The defendant was aggrieved with the demarcation of Plot No. 30 in favour of the plaintiff as aforesaid and lodged an objection to the same pursuant to the provisions of the Land Adjudication Act, Cap 284 Laws of Kenya. This was objection No. 5 of 1991, Francis Memantiki vs. Ole Sinteria Mathew. The objection was determined on 22nd December 1992 in favour of the defendant.

2. It was ordered that Plot No. 30 be divided between the plaintiff and the defendant with the plaintiff retaining parcel number 30 and the portion that was awarded to the defendant from the said Plot No.30 being assigned parcel number 149 (hereinafter referred to as “**the suit property**”). Both parties were not satisfied with the decision that was made in the objection proceedings with regard to the ownership of Plot No. 30. They both preferred an appeal to the Minister for Lands pursuant to the provisions of section 29 of the Land Adjudication Act, Cap 284 Laws of Kenya (hereinafter referred to as “the Act”). Whereas the defendant lodged Appeal No. 157 of 1998 Francis Sialo Memantoki vs. Mathew Lekaota Sinteria (hereinafter referred to only as “Appeal No. 157 of 1998”) contesting the award of a portion of Plot No. 30 to the plaintiff, the plaintiff lodged Appeal No. 167 of 1998, Mathew Lekaota Sinteria –vs- Francis Sialo Memantiki (hereinafter referred to as “Appeal No. 167 of 1998” challenging the award of a portion of Plot No. 30 that had now been assigned parcel number 149 (“the suit property”)to the defendant. The plaintiff and the defendant’s appeals to the Minister for Lands were heard and determined. The plaintiff’s appeal (Appeal No. 167 of 1998) was determined on 21st April 2004 while the defendant’s appeal (Appeal No. 157 of 1998) was determined on 22nd April 2004.

3. The plaintiff’s appeal against the award of the suit property to the defendant was allowed. The Minister who was represented by the District Commissioner, Trans-Mara District one, J. M Mathenge ruled that the suit property belongs to the plaintiff and should be registered in his name. On the other hand, the defendant’s appeal was dismissed. The Minister held that the defendant was not entitled to any portion of Plot No. 30. The defendant was aggrieved with the decision of the Minister for lands (hereinafter referred to only as “the Minister”) and decided to challenge the same by way of judicial review. The defendant’s application for judicial review in the nature of certiorari and mandamus that was

brought through Kisii High Court Misc. Civil App. No. 246 of 2004 was struck out by the court on 22nd September 2009 as incompetent. In the said application, the defendant sought the quashing of the decision of the Minister in the defendant's appeal no. 157 of 1998. The defendant also sought an order of mandamus to compel a different District Commissioner to hear the defendant's said appeal.

4. While the appeals by the plaintiff and the defendant were still pending hearing and determination before the Minister, the adjudication process at Osinoni was completed and Plot No. 30 was registered in the name of the plaintiff while the suit property was registered in the name of the defendant in accordance with the decision in the objection case No. 5 of 1991 that was still subsisting. A restriction was however registered against the title of the suit property pending the outcome of the appeal by the plaintiff to the Minister aforesaid. After the determination of the appeals by the plaintiff and the defendant as aforesaid, the restriction that had been registered against the title of the suit property was removed, the title of the defendant cancelled and the suit property registered in the name of the plaintiff as the owner thereof on 23rd December 2009 in compliance with the decision of the Minister in the plaintiff's appeal aforesaid.

5. Following the striking out of the defendant's judicial review application and the registration of the plaintiff as the proprietor of the suit property the plaintiff filed this suit on 16th February 2010 seeking; an order for the eviction of the defendant from the suit property, a permanent injunction to restrain the defendant from trespassing onto the suit property and general damages for trespass. The plaintiff has contended that following the decision of the Minister that the suit property belongs to the plaintiff and the subsequent registration of the suit property in the name of the plaintiff, the defendant had no other alternative but to vacate and handover the suit property to the plaintiff. The plaintiff has contended that the defendant's continued occupation and use of the suit property amounts to trespass. The defendant filed his statement of defence to the plaintiff's suit on 29th March 2010. The defendant amended the said defence and brought a counter-claim against the plaintiff on 1st February 2011.

6. In his defence to the plaintiff's claim, the defendant contended that the appeal's that were lodged by the plaintiff and the defendant to the Minister against the decision in the objection proceedings pursuant to which the plaintiff was registered as the proprietor of the suit property were heard and determined by a person who had no jurisdiction to do so. The defendant contended further that the decisions in the said appeals are contradictory. In his counter-claim, the defendant contended that the District Commissioner Trans-Mara presided over the appeals which the defendant and the plaintiff had filed against the decision in the objection proceedings before he was gazetted to do so by the Minister for Lands. The defendant contended that the plaintiff was wrongfully, unlawfully and fraudulently registered as the proprietor of the suit property. The defendant sought as against the plaintiff, the land registrar Trans-Mara District and the Attorney General who were joined as parties to the counter-claim; a declaration that the decisions of the Minister in Appeal No. 157 of 1998 and Appeal No. 167 of 1998 are contradictory and not capable of being enforced, a declaration that the registration and issuance of a title deed for the suit property to the plaintiff is null and void, a declaration that the defendant is the rightful and bona fide proprietor of the suit property, a permanent injunction restraining the plaintiff from entering and/or interfering in any manner with the suit property and an order for the rectification of the register for the suit property by the cancellation of the names of the plaintiff.

7. When this suit came up for hearing, the plaintiff and the defendant gave evidence and called no witnesses. The plaintiff in his evidence gave the history of the dispute between the plaintiff and the defendant over Plot No. 30 and the suit property the details of which I have set out at the beginning of this judgment. I think that no useful purpose would be served by reproducing the same. In summary, the plaintiff testified that Plot No. 30 was adjudicated and demarcated in his favour. The defendant objected to the demarcation. The defendant's objection was upheld and it was ordered that Plot No. 30 be divided between the plaintiff and the defendant. The plaintiff retained the portion of Plot No. 30 with the same parcel number while the defendant's portion of Plot No. 30 was assigned parcel number 149 (suit property). The plaintiff and the defendant appealed the decision made in the objection proceedings to the Minister. The plaintiff appeal was allowed while the defendant's appeal was dismissed.

8. The Minister ordered that the suit property that had been awarded to the defendant in the objection

proceedings be registered in the name of the plaintiff. The defendant's attempt to quash the Minister's decision through judicial review failed. The suit property was subsequently registered in the name of the plaintiff after the cancellation of the defendant's name. The plaintiff produced as exhibits copies of the proceedings in objection No. 5 of 1995 (Pexh. 1), the proceedings in Appeal No. 157 of 1998 (Pexh. 2). Proceedings in Appeal No. 167 of 1998 (Pexh. 3), ruling in Kisii HC Misc. Civil App. No. 246 of 2004 (Pexh. 4), certificate of official search for the suit property dated 5th November 2009 (Pexh. 5), certificate of official search for the suit property dated 15th February 2010 (Pexh.6), title deed for the suit property dated 23rd December 2009 (Pexh.7), a letter dated 16th October 2009 by Bosire Gichana & Co. Advocates (Pexh. 8), a letter dated 26th October 2009 by the firm of Oguttu-Mboya & Company Advocates (Pexh. 9) and a letter dated 13th November 2009 by the firm of Oguttu Mboya & Co. Advocates (Pexh. 10).

9. In his evidence, the defendant stated that Plot No. 30 and the suit property are side by side and that he has occupied the two parcels of land since he was born. He stated that he has developed the two parcels of land and that the plaintiff entered the two parcels of land in the year 1985 and asked the defendant's father to allow them to occupy a portion of the same temporarily. However during the adjudication process in the area, the plaintiff laid a claim to the land which is now comprised in Plot No. 30 and the suit property and he was awarded the same by the adjudication committee. The defendant objected successfully to the demarcation of the land that was then Plot No. 30 in favour of the plaintiff. In the said objection, it was ordered that Plot No. 30 be divided between the plaintiff and the defendant. The plaintiff's portion was registered as Plot No. 30 while the defendant's portion was registered as Plot No. 149 ("the suit property"). The suit property is not comprised solely of the parcel of land that was awarded to the defendant in the objection proceedings between the plaintiff and the defendant.

10. A portion of the suit property was awarded to the defendant in another objection proceeding between the defendant and another person known as Lempurruo Ole Morui. That objection concerned Plot No. 32. The suit property therefore comprises of the portions of land that the defendant was awarded in objection No. 5 of 1991 with the plaintiff and objection No. 59 of 1991 with Lempurruo Ole Morui. The defendant corroborated the evidence of the plaintiff to the effect that both the defendant and plaintiff were not satisfied with the outcome of objection No. 5 of 1991 and as such both appealed against the same to the Minister. The defendant also corroborated the evidence of the plaintiff as to the outcome of both appeals by the plaintiff and the defendant to the Minister. The defendant testified that arising out of the success of the plaintiff in his appeal to the Minister the plaintiff ended up with both Plot No. 30 and the suit property and that his attempt to challenge the decision made in favour of the plaintiff in his appeal through judicial review failed.

11. The defendant testified that he came to know that he had been registered as the proprietor of the suit property in the year 2010 when the plaintiff sent him a demand letter to vacate the same. A copy of the register of the suit property that he obtained from the land registry revealed that his name had been cancelled and the name of the plaintiff inserted. The defendant stated further that the restriction on the title of the suit property was removed before his name was cancelled. The defendant urged the court to dismiss the plaintiff's suit and allow his counter-claim. The defendant produced in evidence the same documents that were produced by the plaintiff save for the proceedings in objection No. 59 of 1991 (Dexh.2), a letter addressed to the permanent secretary Ministry of Lands by the Attorney General (Dexh.7), and a copy of the register for the suit property (Dexh.6). Upon the close of the defendant's case, the advocates for the parties agreed to make their closing submissions in writing. The plaintiff filed his submissions on 31st January 2014 while the defendant did so on 31st March 2014.

12. I have considered the pleadings filed herein, the evidence tendered by both parties and the parties closing submissions. The parties did not agree on issues for determination by the court. From the pleadings filed and the evidence tendered, the following in my view are the issues that arise for determination in this suit, namely;

- i. Whether the District Commissioner Trans-Mara District had the jurisdiction to hear and determine the defendant's Appeal No. 157 of 1998 and the plaintiff's Appeal No. 167 of 1998?
- ii. Whether any rights accrued from the determination of the said appeals?

- iii. Whether the plaintiff is lawfully and legally registered as the owner of the suit property?
- iv. Whether the plaintiff is entitled to the reliefs sought herein?
- v. Whether the defendant is entitled to the reliefs sought in the counter-claim?
- vi. Who is to bear the costs of this suit and the counter-claim?

13. Issue No. I;

It is common ground that both the plaintiff and the defendant herein lodged appeals to the Minister against the decision of the adjudication officer in objection No. 5 of 1991. The defendant filed the first appeal that was assigned number 157 of 1998. Thereafter the plaintiff also lodged his appeal that was assigned number 167 of 1998. The two appeals were filed under the provisions of section 29 of the Land Adjudication Act, Cap 284 Laws of Kenya (“the Act”). Section 29 (4) of the Act provides that the Minister may delegate by notice in the gazette his powers to hear appeals to any public officer by name or to any person for the time being holding public office specified in such notice and that the determination, or order and acts of any such public officer shall be deemed for all purposes to be that of the Minister. The appeals by the plaintiff and the defendant were heard and determined by one, J. M. Mathenge who was then the District Commissioner, Trans-Mara District. There is no doubt that as a district commissioner J. M Mathenge was a public officer and as such could be delegated the duty of hearing the said appeals by the Minister.

14. The defendant’s contention is that the Minister did not delegate his powers of hearing appeals under section 29 of the Act to J. M Mathenge and as such J. M Mathenge had no jurisdiction to preside over and to determine the said appeals. It is trite law of evidence that he who alleges has the duty to prove. The onus was therefore upon the defendant to lay evidence before the court to the effect that the Minister had not delegated the duty of hearing and determining appeals arising out of objection proceedings J. M Mathenge. The defendant did not place such evidence before the court. The defendant made the claim in his defence and counter-claim but tendered no evidence of whatsoever nature at the trial in proof of the same. I therefore have no evidence before me that J. M Mathenge was not authorized by the Minister to hear and determine the subject appeals. The defendant’s contention that J. M Mathenge the then District Commissioner Trans-Mara District had no jurisdiction to determine the said appeals is therefore without any basis.

15. Related to this issue of jurisdiction was the defendant’s contention with respect to which the defendant’s advocate submitted at length that the two appeals were time barred and as such should not have been entertained by the Minister who in this case was represented by J. M. Mathenge the then District Commissioner, Trans-Mara. This issue is not pleaded in the defendant’s defence and counter-claim. It is trite law that issues for determination by the court cannot be raised in the submissions. They must arise from the pleadings and the evidence tendered by the parties. Order 2, rule 4 of the Civil Procedure Rules, 2010 provides that a party must plead any relevant statute of limitation that he alleges to make any claim or defence of the opposite party not maintainable. The defendant was therefore under an obligation to plead specifically, his contention that the appeals that the defendant and the plaintiff had lodged with the Minister had been lodged out of time and as such were not maintainable. The issue having not been pleaded, I am not obliged to determine the same. Even if I was to determine the same, I would have altogether determined it against the defendant.

16. It is common ground that the decision of the Adjudication officer in objection No. 5 of 1991 that was the subject of the two (2) appeals to the Minister was made on 22nd December 1992. Section 29 (1) provides that whoever is aggrieved by the decision may appeal against the same within sixty (60) days from the date of the decision. The defendant has contended that the two appeals were field out of time. The defendant did not however tender any evidence as to when the appeals were lodged. The defendant could have easily done this by presenting to court the receipt for the filing fees for the two appeals. I think that even the receipt for the filing fees paid for the defendant’s appeal alone would have sufficed. Since the defendant’s appeal was filed earlier, if it was filed out of time then the plaintiff’s appeal that was lodged subsequently would automatically be out of time.

17. In the absence of any proof, I have no basis for finding that the two (2) appeals before the Minister

were filed out of time. To lay the issue to rest, I would wish to add that the issue of time bar was not raised before the Minister. The Minister who had in his possession the full records of the two appeals would have been in a better position to determine the issue. I do not think that it is open to the defendant to challenge the decision of the Minister on an issue that was never raised before the Minister and on which the Minister made no determination. For the foregoing reasons, I find no merit in the defendant's allegation that the two (2) appeals to the Minister were filed out of time. For the foregoing reasons it is my finding that J. M Mathenge, the then District Commissioner Trans-Mara District had jurisdiction to hear and determine the appeals that were presented before him by the plaintiff and the defendant.

18. I am of the view that even if the said District Commissioner had no jurisdiction to determine the said appeals, I would not have had the power in these proceedings to reverse his decision. In making the decisions complained of, the said District Commissioner was exercising a statutory power and discharging a quasi-judicial function. This court can only interfere with his decision in exercise of its supervisory powers of judicial review. The defendant herein has not invoked the said powers in these proceedings. There is no basis therefore upon which this court can declare the decisions aforesaid by the District Commissioner to have been made without jurisdiction and as such null and void. In any event, such declaration has not even been sought by the defendant. As it was held by the Court of Appeal in the case of **Julia Kaburia –vs- Manene Kabeere & 5 Others, Nyeri Court of Appeal Case No. 340 of 2002** (Unreported), that was cited by the plaintiff, the said decisions by the then District Commissioner, Trans-Mara District shall subsist and remain valid under the Land Adjudication Act, Cap.284 Laws of Kenya unless and until the same are quashed through judicial review.

19. Issue No. II;

As I have held above, the appeals by the plaintiff and the defendant were properly before the District Commissioner Trans-Mara District who heard the same on behalf of the Minister. The decisions by the said District Commissioner were therefore valid and determined and conferred rights upon the parties to the said appeals.

20. Issue No. III;

The defendant has contended that the suit property was registered in the name of the plaintiff fraudulently and unlawfully and as such the title held by the plaintiff is null and void. The defendant contended that it was improper for the restriction that had been registered against the title of the suit property to be removed, the name of the defendant cancelled and the suit property registered in the name of the plaintiff. The plaintiff's position is that his appeal to the Minister was allowed. The Minister ordered that the suit property that was hitherto registered in the name of the defendant be registered in his name. The plaintiff has contended that what the chief land registrar and the land registrar, Trans-Mara did were no more than complying with and enforcing the order of the Minister.

21. In the Court of Appeal Case of **Viram t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Company Ltd [2004] 2KLR 269**, it was held that fraud is a serious quasi criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. In his evidence, the defendant had testified that the illegalities and fraud pleaded in his defence and counter-claim are self-evident on the register of the suit property. The defendant contended that the manner in which his title was cancelled and the plaintiff registered as the proprietor of the suit property shows a clear case of fraud. I have looked at a copy of the register for the suit property that was produced in evidence by the defendant as D.exh.6. It shows that the suit property was registered in the name of the defendant on 20th July 2000 and on 7th August 2000 the defendant was issued with a title deed.

22. On 18th December 2000, a restriction was entered in the register prohibiting the registration of any dealing with the suit property save with the order of the chief registrar. On 23rd December 2009, there is an entry in the register to the effect that "Appeal removed by the Chief Registrar". On the same day, the plaintiff was registered as proprietor of the suit property and a title deed issued to him. There is a cancellation of entries 1, 2 and 3 that concerned the registration of the defendant as proprietor of the suit property, the issuance of the title deed to him and the registration of a restriction on the title. From my

analysis of this register, what I get is the following; the defendant was registered as the proprietor of the suit property and issued with a title deed while the appeals that had been lodged by the plaintiff to the Minister against the decision in objection No. 5 of 1991 that had awarded the suit property to the defendant was pending. To forestall any dealing with the said parcel of land while the said appeal was pending, the chief land registrar put a restriction on the title. After the plaintiff's appeal was determined and an order made for the registration of the plaintiff as the proprietor of the suit property, the registration of the defendant as the proprietor of the suit property was cancelled, the restriction removed and the property registered in the name of the plaintiff.

23. From what I have stated above, I am unable to see any irregularity or fraud that was committed either by the plaintiff or the land registrar. Under the Land Adjudication Act, Cap. 284 Laws of Kenya and the Registered Land Act, Cap. 300 Laws of Kenya (now repealed) under which the suit property was registered, the pendency of an appeal to the Minister does not prevent the finalization of the adjudication register and the issuance of titles to persons in whose favour land was adjudicated and demarcated in an adjudication section or area. When the director of land adjudication forwards the completed adjudication register to the Chief Land Registrar under section 27 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) the same is supposed to be accompanied by a list of all appeals if any pending before the Minister. Pursuant to the proviso to section 28 of the Act, the Chief Land Registrar is under a duty to enter a restriction in the register of all parcels of land in respect of which appeals are pending until such appeals are heard and determined. This explains the restriction that was entered in the register of the suit property by the Chief Land Registrar.

24. Once the appeal is determined, the Chief Land Registrar is supposed to alter the register to accord with the determination of the appeal. This is what happened in this case. The defendant was registered as the proprietor of the suit property while an appeal to the Minister was pending. When the appeal was determined and the suit property awarded to the plaintiff, the Chief Land Registrar removed the restriction that he had registered against the title of the suit property, cancelled the defendant's registration and title and registered the suit property in the name of the plaintiff. The whole process was provided for in law. The same was therefore regular and lawful. Due to the foregoing, I am satisfied that the plaintiff was lawfully and legally registered as the proprietor of the suit property. The defendant has failed to prove the allegations of fraud and irregularities which he claimed to have tainted the plaintiff's title.

25. Issue No. IV;

The plaintiff has proved that he is the registered proprietor of the suit property and that he acquired the suit property lawfully. The registration of the plaintiff as the proprietor of the suit property confers upon the plaintiff the absolute ownership of the suit property together with all rights and privileges associated therewith. See section 24 of the Land Registration Act, 2012. The rights conferred upon the plaintiff upon registration as aforesaid includes the right to exclusive possession of the suit property. It is not in dispute that the defendant is in occupation of the suit property. The defendant has not provided any lawful justification for his continued occupation of the suit property. In the absence of such justification I am in agreement with the plaintiff's submission that the defendant is a trespasser in the suit property. The plaintiff having proved that the defendant is a trespasser in the suit property, the plaintiff is entitled to the reliefs sought herein.

26. Issue No. V;

I have already held hereinabove that the defendant has failed to prove that the plaintiff was unlawfully and fraudulently registered as the proprietor of the suit property. Since the defendant's counterclaim was grounded solely on this issue, the same must fail. It is therefore my finding that the defendant is not entitled to the reliefs sought in the counterclaim.

27. Conclusion;

I am satisfied that the plaintiff has proved his claim against the defendant on a balance of probability. On

the other hand, the defendant's counter-claim is not proved. I therefore enter judgment for the plaintiff against the defendant as prayed in paragraph (i) and (ii) of the plaint dated 13th February 2010. The plaintiff did not prove his general damages claim against the defendant and as such the claim is rejected. The defendant shall vacate and hand over possession of the suit property to the plaintiff within one hundred and eighty (180) days from the date of this judgment in default of which the plaintiff shall be at liberty to apply for his eviction. The defendant's counter-claim is dismissed. The plaintiff shall have the costs of the suit and the counter-claim.

Delivered, signed and dated at KISII this 31st of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Oguttu-Mboya for the plaintiff

Mr. Bosire for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE