



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO. E312 OF 2021

KARIM MOHAMED HASSANALI.....1ST PLAINTIFF

AMIN MOHAMED HASSANALI.....2ND PLAINTIFF

VERSUS

JOHN MWAURA WAINAINA.....1ST DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI.....2ND DEFENDANT

JUDGMENT

INTRODUCTION:

1. Vide Plaintiff dated 5th December 2019, the Plaintiffs herein have sought for the following Reliefs:

- a. Declaration that the suit property lawfully belongs to the Plaintiffs.*
- b. An order do issue directing the 2nd Defendant, to cancel entries purporting to transfer the Property to the 1st Defendant;*
- c. An order do issue directing the 2nd Defendant to reinstate the entries as indicated in search dated 25th January 2016 in the names of Karim Mohammed Hassanali and Amin Mohamed Hassanali and issue the Certificate of lease accordingly.*
- d. A Permanent Injunction does issue forthwith restraining the 1st Defendant, his agents, employees, assigns and/or any other person acting on his behalf from occupying, entering upon, utilizing, damaging, interfering with, selling or dealing in any manner parcel known as Land Reference Number Nairobi/Block 99/87-Rhunda.*
- e. General Damages.*
- f. Costs.*
- g. Interests.*

2. Upon the filling of the Plaintiff and the extraction to enter appearance, the Plaintiff made efforts to serve the 1st Defendant in the usual manner but, however, same could not effect service upon the 1st Defendant. For clarity, the Plaintiff reverted to court vide an application dated 24th September 2021, in respect of which same sought for leave to serve the 1st Defendant vide substituted means, namely, by way of advertisement in one of the local Dailies.

3. Pursuant to the said application, the court proceeded to and granted liberty to the Plaintiff to serve the Plaintiff and the summons to enter appearance by way of substituted mean, via advertisement in the Daily Nation and the 1st Defendant was granted liberty to enter appearance, if any, within 15 days from the date of the advertisement.

4. Suffice it to observe that the service was duly advertised vide the Nation Newspaper of 2nd October 2021, in line with the orders of the court issued on the 29th September 2021 and despite the said advertisement, the 1st Defendant herein neither entered appearance nor filed a Statement of Defense.

5. On the hand, the 2nd Defendant herein was similarly served with Plaintiff and summons to enter appearance, but despite being served, same

similarly did not find it fit and/or appropriate to enter appearance and/or file a Statement of Defense.

6. Based on the foregoing, the subject matter therefore proceeded for Formal proof against the Defendants jointly and/or severally and the Plaintiff's testimony, pertaining to and/or concerning the impugned transaction was therefore not controverted.

EVIDENCE BY THE PLAINTIFF:

7. During the hearing in respect of the subject matter, the 1st Plaintiff testified as PW1 and same indicated that the suit property herein, namely, *Land Reference Number Nairobi/Block 99/87-Runda*, previously belonged to and was registered in the name of their Father, namely, Mohamed Hassanali Sajan, now Deceased.

8. It was the Plaintiff's further testimony that upon the death of the Deceased, the 2nd Plaintiff and himself applied for and obtain Grant of Letters of Administration over and in respect of the Estate of the Deceased and thereafter same were constituted as the lawful Administrators of the said Estate. For clarity, the witness further stated that the Grant in respect of the Estate of the deceased was confirmed on the 14th November 2005.

9. It was the witness' further testimony that after the confirmation of Grant, the 2nd Plaintiff and himself retained the services of the firm of M/s Cotoow & Associates, to facilitate the transfer and registration vide transmission of the various properties at the foot of the Confirmation of Grant, including, but not limited to the suit Property.

10. Nevertheless, the witness further testified that despite having retained the services of the said firm of advocate, there was a substantial delay by the law firm in terms of communicating the outcome of the registration and forwarding the Certificate of lease in respect of the subject property.

11. Further, the witness also testified that borne out of the delay, same therefore engaged another law firm, namely M/s Oloo & Chatur Advocates, to take over the process of registration of the lease in respect of the suit property and thereafter hand over same to the 2nd Plaintiff and the witness.

12. Besides, the Witness stated that it was during the course of exchange of correspondence between the firm of M/s Oloo & Chatur and the previous law firm, namely, M/s Cotoow & Associates that it transpired that the Certificate of lease in respect of the suit property appeared to have been lost at the Land offices before same was collected by the previous law firm.

13. On the other hand, the witness has further testified that when an Official search was conducted over and in respect of the suit property, it transpired that the suit property had been transferred to and registered in the name of the 1st Defendant herein, allegedly as a purchaser, even though the Plaintiffs had not sold the suit property to any one, let alone the 1st Defendant.

14. Based on the foregoing, the 1st Plaintiff proceeded to adopt the witness statement dated the 23rd August 2021, as his Evidence in Chief. Besides, also adopted the documents at the foot of the list of documents dated the 23rd August 2021, which were produced and marked as Exhibit 1 to 25, respectively.

15. Other than the foregoing, the Plaintiff also adopted the contents of the Complaint and the verifying affidavit dated the 23 August 2021 and implored the court to grant the reliefs at the foot of the said Complaint.

SUBMISSIONS:

16. At the close of the Plaintiff's case, the Plaintiff's advocate sought for leave to file written submissions and in this regard, liberty was granted for the Plaintiffs to file written submissions.

17. Pursuant to and in line with the directions of the court, the Plaintiffs proceeded to and filed written submissions on the 18th February 2022 and in respect of which the Plaintiffs' have highlighted One issue.

18. It was the Plaintiffs' submissions that the suit property hitherto belonged to and was the property of one, Mohamed Hassanali Sajan, now deceased and that upon his death, Grant of Letters of Administration were issued and/or confirmed in favor of the Plaintiffs herein. Consequently, the Plaintiffs therefore became not only the Administrators of the Estate, but also heirs and beneficiaries of the suit property.

19. On the other hand, the Plaintiffs' advocate further submitted that having procured the Letters of administration, the suit property ought to have been transferred and registered in the name of the Plaintiffs vide transmission.

20. Pursuant to the foregoing, the Advocate further Submitted that the documents towards transmission were duly lodged at the registry for registration, but upon lodgment, same were lost or misplaced by the Land Registry Staff.

21. Be that as it may, the Plaintiff's advocates submitted that the Plaintiffs' herein neither executed the Transfer instrument nor transferred the suit property to and in favor of 1st Defendant. Consequently, the Plaintiffs' advocate contended that the transfer and registration of the suit property in favor of the 1st Defendant was informed by fraud, illegality and corrupt practice.

22. Premised on the foregoing, the Plaintiffs have submitted that the transfer and registration of the suit property in favor of the 1st Defendant

ought to be canceled, revoked and/or nullified.

23. In support of the foregoing submissions, the Plaintiffs' counsel has relied in the case of **Evanson Wambugu Gachugu v Simon Wainian Gatwika & 2 Others (2014) eKLR** and **Elijah Makeri Nyangwi v Stephen Mungai Njuguna & Another (2013) eKLR**, respectively.

ISSUES FOR DETERMINATION:

24. Having reviewed the Plaintiff filed by and or on behalf of the Plaintiffs, the witness statement, the documents, which were ultimately adopted as exhibits and having evaluated the oral evidence tendered by the 1st Plaintiff and similarly, having appraised the written submissions filed on behalf of the Plaintiffs, the following issues do arise and are germane for determination:

a. Whether the Transfer and Registration of the Suit Property in favor of the 1st Defendant was irregular, illegal and/or fraudulent.

b. Whether the Plaintiffs' are entitled to the Reliefs sought.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Transfer and Registration of the Suit Property in favor of the 1st Defendant was irregular, illegal and/or fraudulent.

25. There is no doubt that the suit property herein, namely, **Land Reference Number Nairobi/Block 99/87-Runda**, belonged to and was registered in the name of Mohamed Hassanali Sajan, now deceased, having acquired same from National Housing Corporation vide transfer of Lease which was registered in his name on the 17th June 1996.

26. It is also common ground that upon the death of Mohamed Hassanali Sajan, now deceased, the Plaintiffs herein applied for and/or were issued with Grant of Letters of Administration which was thereafter confirmed in their favor. Consequently, the Plaintiffs' duly became the lawful Administrators of the Estate of the Deceased.

27. On the other hand, there is also evidence that upon Confirmation of the certificate of Grant, the Plaintiffs herein retained the firm of M/s Cotoow & Associates, to facilitate the transfer of the Suit Property vide transmissions.

28. Nevertheless, evidence has been tendered that even though the transfer vide transmission in respect of the suit property was duly lodged, to facilitate the transfer and registration, in favor of the Plaintiffs, the ultimate certificate of lease, was never released to and/or collected by the Plaintiffs advocates.

29. On the other hand, Evidence was tendered that the Certificate of Lease was misplaced by the Land registry, either deliberately or otherwise and that same was used to facilitate a transfer in favor of the 1st Defendant herein.

30. Be that as it may, the Plaintiffs herein have contended that at no point in time did same sell and/or transfer the suit property to and in favor of the 1st Defendant.

31. In this regard, the Plaintiffs have contended that their signatures contained at the foot of the transfer instrument were forged and that at no point in time, did same appear before any of the said Advocates, who purported to have attested their Signatures.

32. The evidence that was placed before the court by and or at the instance of the Plaintiffs herein, coupled with the documentary evidence tendered, were not challenged and/or controverted.

33. In the premises, I have no alternative but to believe the evidence that has been placed before the court and to find and hold that the transfer of the suit property to and in favor of the 1st Defendant, was not only irregular, but same was similarly illegal and/or fraudulent.

34. Suffice it to say, that a Title procured and/or obtained contrary to and in contravention of the law and without compliance with the Due process, is amenable to cancellation and revocation.

35. In support of the foregoing position, it is sufficient to refer to and take cognizance of the decision in the case of **Munyua Maina versus Hiram Gathiha Maina [2013] eKLR**, where the Honourable Court Of Appeal stated as hereunder;

” We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.

36. In respect of the subject matter, it behooved the 1st Defendant to attend court and show how he acquired the title in respect of the suit property. For clarity, it is not enough that same holds a certificate of lease in respect of the suit property, irrespective of how same was

acquired.

ISSUE NUMBER 2

Whether the Plaintiffs' are entitled to the Reliefs sought.

37. The Plaintiffs herein were entitled to be registered as the proprietors of the suit property, following the completion of the succession proceedings over the Estate of their deceased Father. For clarity, the Certificate of confirmation of Grant, distributed the suit property unto to them.

38. Nevertheless, it is also evident that upon the lodgment of the Transfer by transmission, the suit property was indeed transferred to and registered in the Joint names of the Plaintiffs and certificate of Lease is shown to have been Issued on the 25th January 2016. However, it is the said certificate of lease that appears to have been hijacked and used to transfer the suit property to and in favor of the 1st Defendant, which transfer, I have found and held to have been illegal, unlawful and fraudulent.

39. Based on the foregoing, the question then is; are the Plaintiffs entitled to the Reliefs sought. Clearly, I am of the humble opinion that the Plaintiffs' herein are entitled to the Reliefs at the foot of the Complaint dated the 23rd August 2021.

40. As concerns the issue of General damages, it is imperative to note that by virtue of being the lawful and legitimate Proprietors of the suit property, the actions by and/or on behalf of the 1ST Defendant constituted conversion and therefore amounted to trespass. In this regard, the Plaintiffs are therefore entitled to compensation on account of trespass.

41. Consequently and in the premises, it is my finding and holding that an award in the sum of Kshs.2, 000, 000/= Only, will suffice, given the location of the suit property and more particularly, the fact that same is situate within the exclusive Upper Market area, within the City of Nairobi.

42. In support of the foregoing decision, I adopt and rely in the decision in the case **Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR** where the Court faced with a similar situation held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff's land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

FINAL DISPOSITION:

43. Having reviewed and addressed the issues for determination that were outlined in the body of the Judgment herein, it is now appropriate to terminate the Judgment herein and render the dispositive orders.

44. Consequently and in the premises, I make the following orders;

a. Declaration be and is hereby issued that the suit Property, namely, LR NO. NAIROBI/ BLOCK 99/87- RUNDA, lawfully belongs to the Plaintiffs.

b. An order be and is hereby issued directing the 2nd Defendant, to cancel, revoke and nullify all the entries purporting to transfer the Property to the 1st Defendant;

c. An order be and is hereby granted directing the 2nd Defendant to restore and/or reinstate the entries as indicated in the Official search dated 25th January 2016 in the names of Karim Mohammed Hassanali and Amin Mohamed Hassanali and issue the Certificate of lease accordingly.

d. A Permanent Injunction be and hereby issued forthwith restraining the 1st Defendant, his agents, employees, assigns and/or any other person acting on his behalf from occupying, entering upon, utilizing, damaging, interfering with, selling or dealing in any manner parcel known as Land Reference Number Nairobi/Block 99/87-Runda.

e. General Damages be and is hereby awarded to Kshs.2, 000, 000/= only as against the 1ST Defendant.

f. Costs and interest to be borne by the 1st Defendant.

45. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF APRIL 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Ms Okello H/B for Mr. Kihiko for the Plaintiff

No appearance for the Defendants