



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 34 OF 2012

KATAMA MAGUYA KATAMA

alias KATAMA MANGUYA KATAMA PLAINTIFF

- V E R S U S -

JOSPHAT HANJARI MWAMUTSI & ANOTHER.....DEFENDANT

JUDGEMENT

[1] The plaintiff avers that he was at all material times relevant to this suit, alongside with Gona Fondo, Kazungu Mwana and Hussein Mohamed (all deceased) were the registered beneficial and absolute proprietors of parcel of land known as Plot No. 3632 Section II Mainland North. The plaintiff states that upon the demise of the other 3 joint owners the plaintiff and personal representatives of the deceased joint owners agreed to subdivide the suit land so that each person could have an individual Title Deed.

The Plaintiff states that the 1st defendant was aware of the intended subdivision and offered to assist in the land office. The plaintiff further states that he did not give the mother title to the 1st defendant. He discovered that the same was missing after sometime and reported to Bamburi Police Station.

[2] That the plaintiffs and the personal representatives of the three deceased persons had agreed to sell two (2) acres out of the said land to enable them to get finance to pursue the lost title. That they entered into an agreement for sale for the said two acres. Upon a search in the land office they found that a fraud had been committed and that their land had been subdivided into five (5) instead of four (4) plots. The plaintiff states that the defendants illegally and fraudulently and without the consent and knowledge of the plaintiff did the subdivision. The plaintiffs set out the particulars of fraud on the part of 1st and the 2nd defendant. The plaintiff states that under the prevailing circumstances he has been forced to apply for the issuance of a provincial certificate for his subdivision No. 6929 (original Number 3632) Section II Mainland North measuring 1.647 hectares to enable him to transfer two (2) acres to compensate the buyers who have already paid a deposit.

[3] The plaintiff prayed for an order of permanent injunction restraining the defendants by themselves their servants, employees, agents and any other person whatsoever and howsoever claiming through them from selling, leasing, transferring, trespassing, entering, claiming, threatening or occupying land known as subdivision Number 6931 (original number 3632) Section II Mainland North.

The plaintiff claim for a declaratory order that the subdivision of Plot No. 3662 Section II Mainland

North by 1st defendant aided by the 2nd defendant was null and void. Further that the Certificate of Title issued to the 1st defendant by the 2nd defendant is null and void. And finally an order directed at the 2nd defendant to cancel the certificate of Title issued fraudulently to the 1st defendant and issue a single certificate for the whole suit plot. Costs and interest.

[4] The defendant herein was served by way of substituted service through the Standard Newspapers on Thursday May 17th 2012. Such service having been authorised by the Court on 8th May 2012.

The defendant did not enter appearance and judgment was entered by the Court on 29th January 2013.

The matter came up for formal proof on 6/6/2013. He called one Mohammed Hussein as PW1. he said that he lives at Otange. That he knows the plaintiff who is his neighbour. That his father one Hussein Mohamed Ali (now deceased) and the plaintiff had owned land jointly and had one title. He said that there were four owners. That all the owners were dead except the plaintiff. He produced a map showing how people lived on the land. He also produced a death certificate for his father and Letters of administration for administration of his estate. He also produced death certificates for Kazungu Mwene Salim, Gona Fondo Kuchu. Also produced by him was the search certificate of the land produced as Exh. 6. He said that the original title got lost on 23/6/2001. That the matter was reported to the police and he produced a police abstract for such report as Exh. 7. He said in his testimony that they had a family agreement on how the land should be shared among the four families. The map showing how the land would be shared was produced in Court as Plaintiff Exh. 8. He said that when they did a search in the land office they found out that the land had been subdivided into five (5) pieces. He produced the subdivisions as plaintiff Exh. 9(a) (b) (c) (d) and (e). He said that they had not allowed the plot to be subdivided. He said that they discovered that it was the first defendant who had done the subdivision and that they had not authorised the 1st defendant to do so. He said that they want the certificates to be cancelled. That they wanted all the five certificates cancelled and the original title be reinstated.

[5] I have looked at all the documents produced by the plaintiffs. I am convinced without a doubt that the land parcel number Plot No. 3632 Section II Mainland North was subdivided by the first defendant without the consent of the plaintiff and the personal representatives of the other three deceased co-owners. I am also convinced that the 2nd defendant was also involved in illegally and fraudulently issuing certificates of leases contrary to the wishes of the legally registered owners and/or their legal representatives. Further that the registration was illegal and invalid for lack of the relevant land control consent and finally that the registering the 1st defendant as an owner thereof was wrongful since the 1st defendant was not at all entitled.

I therefore allow the prayers sought in the plaint in prayer (a) (b) (c) (d) and (e) hereof as prayed.

These are the orders of the Court.

Dated and delivered in open Court at Mombasa this 26th day of July, 2013.

S.N. MUKUNYA

JUDGE

26.7.2013

In the presence of:

Mr. Asige Advocae for Omwenga Advocate for the plaintiff

Mr. Eredi State Counsel for the defendants