



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL CASE NO. 132 OF 2011**

**1. MOSES SHADRACK KARISA**

**2. RACHEL NYEVU KARISA.....PLAINTIFFS**

**=VERSUS=**

**PETER MBUGUA KIMANI.....DEFENDANT**

**J U D G M E N T**

1. The Plaintiffs moved the court by way of a Plaint dated 15<sup>th</sup> August, 2011 and filed on 16<sup>th</sup> August, 2011.

**The Plaintiffs' case:**

2. In the Plaint, the Plaintiffs averred that they were bringing the suit as the administrators of the Estate of Shadrack Joseph Karisa pursuant to a grant of letters of administration granted to them in Malindi Succession Cause No. 27 of 2008.
3. According to the Plaintiffs' Plaint, the late Shadrack Joseph Karisa entered into an Agreement for Sale with one Johnson Samuel Kenga, also deceased, in which the said Johnson Samuel Kenga agreed to sale to Shadrack Joseph Karisa a portion of land measuring 20 acres of land known as plot no. 12 S.R. No. 2628 at the purchase price of Kshs.14,000/-.
4. The Plaintiffs have averred that upon payment of the full purchase price, Shadrack Joseph Karisa took possession of the land, developed it and built his residence on the land. However, Johnson Samuel Kenga refused to subdivide and transfer the 20 acres to Mr. Karisa who filed Malindi SRMCC No.461 of 1991 for an order of specific performance of the Agreement made on 8<sup>th</sup> November 1976.
5. The Plaintiffs have averred that the suit in the lower court was heard and the Judgment was delivered in favour of Mr. Karisa on 24<sup>th</sup> September 1992; that Mr. Kenga filed an appeal in Mombasa High Court Miscellaneous Civil Application No. 213 of 1992 seeking for leave to file the appeal out of time which was dismissed by the High Court on 10<sup>th</sup> July 1996.
6. It is the Plaintiff's averment that Mr. Johnson Samuel Kenga subsequently entered into another agreement with the Defendant herein for the sale of plot number 12 SR 2628, Mtondia/Mwazang'ombe measuring 30.381 acres which portion included the 20 acres that had been sold to the 1<sup>st</sup> Plaintiff's father; that the 30.381 acres purportedly sold to the Defendant by Mr. Kenga was surveyed and subdivided and registered in favor of the Defendant as plot number 18 (original number 12/7) and that Mr. Kenga had no saleable interest in the 20 acres in view of the judgment in Malindi SRMCC NO. 461 of 1991.

7. The Plaintiffs now claim for an order of rectification of the title in respect of plot number 18 (original number 12/7).

**The Defendant's case:**

8. The Defendant filed his defence on 9<sup>th</sup> November 2011 and denied the averments in the Plaint.
9. The Defendant averred that he entered into a Sale Agreement with the late Johnson Samuel Kenga for the sale of 12.3 Hectares for land known as plot number 18 (original number 12/7) for Kshs.600,000 on 15<sup>th</sup> October 1999.
10. According to the Defendant, he was not aware of any pending suit between the Plaintiff and Mr. Kenga and that he relied on the records at the lands office which reflected Johnson Samuel Kenga as the registered owner of the suit property; that he is the bona fide registered proprietor of the aforesaid property and that he was issued with a valid and genuine title of land from the lands office.
11. When this matter came up for hearing on 17<sup>th</sup> April 2013, neither the defendant nor his advocate were in court. This is despite the fact that the Defendant's Advocates were served with a hearing notice for 17<sup>th</sup> April 2013 on 13<sup>th</sup> March 2013. I allowed the Plaintiffs to proceed with their case notwithstanding the absence of the Defendant and his advocate.
12. The 1<sup>st</sup> Plaintiff, PW1, informed the court that the 2<sup>nd</sup> Plaintiff was his mother and the two of them were the legal representatives of Shadrack Joseph Karisa who died on 10<sup>th</sup> April 2004.
13. PW1 produced as exhibit number 1 the Grant of Letters of Administration Intestate. The Grant shows that the two are the legal representatives of Shadrack Joseph Karisa.
14. PW1 testified that he knew the late Johnson Samuel Kenga. PW1 informed the court that Johnson Samuel Kenga (Mr. Kenga) sold to his father land measuring 20 acres for Kshs.14,000 on 29<sup>th</sup> November 1976. The witness produced the agreement of sale between Johnson Samuel Kenga and Shadrack Joseph Karisa as exhibit number 2.
15. According to the witness, his father took possession of the 20 acres that were sold to him and planted cashew nut trees, mango trees amongst other crops and developed five permanent houses. They have been living in those houses since 1976.
16. PW1 produced in evidence copies of the Plaint and Defence in SRMCC No.461 of 1991 as exhibit number 3 and the Judgment that was delivered as exhibit number 4. The witness also produced a copy of the Application in Mombasa High Court Civil Miscellaneous Application Number 213 of 1992 which was filed by Mr. Kenga and the order dismissing the Miscellaneous Application as exhibit 5 a and b respectively.
17. It was PW1 evidence that after both his father and Mr. Kenga died, the Defendant moved on the suit property in 2011 claiming that he had bought the suit property from Mr. Kenga and when he conducted an official search at the Mombasa Land Registry, he discovered that the land had indeed been registered in the name of the Defendant.
18. The land which had been registered in the name of the Defendant was 30 acres, which was inclusive of the 20 acres that was occupied by the Plaintiffs' family. The witness produced the official search and the indenture as exhibit 7 and 8 respectively. The witness also produced the demand letter that was sent to the Defendant as exhibit number 9.
19. PW1 finalised his testimony by stating that when the defendant bought the land from Mr. Kenga in 1996, he knew that the plaintiff owned the 20 acres because they were staying on the suit property. The Defendant should have known of their interest in the land because they had more than one thousand mango trees on the land and houses. The witness produced photographs showing their houses as exhibit number 10. PW1 also produced as exhibit number 11 a survey report showing the extent of the land that their father purchased.
20. The 2<sup>nd</sup> Plaintiff, PW2 informed the court that the late Johnson Shadrack Karisa was her late husband and that she has been staying on the suit property since 1976.
21. According to PW2, the family has built houses on the suit property and planted mango trees, oranges, guavas amongst other crops.
22. PW2 finalised her testimony by stating that Mr. Kenga refused to transfer the property to her late husband and that they had never seen the defendant before the year 2011.
23. The Plaintiffs' advocate filed written submissions on 15<sup>th</sup> May 2013 which I have considered.

24. The uncontroverted facts of this case are that the late Johnson Samuel Kenga entered into a written agreement with the late Shadrack Joseph Karisa on 14th September 1976 for the sale of 20 acres of plot number 12 SR No.2628 situated at Mtondia/Mwazang'ombe.
25. According to Plaintiffs' exhibit number 2, the whole parcel of land measured 82.80 acres and the late Shadrack Joseph Karisa paid Kshs.14,000 for 20 acres.
26. It is not in dispute that Shadrack Joseph Karisa took possession of the 20 acres and settled on the land with his family in 1976. He constructed houses and planted mango trees, amongst other crops.
27. It is also not in dispute that the 1<sup>st</sup> Plaintiff's father filed in the Senior Resident Magistrate's court at Malindi Civil Suit No. 461 of 1991 seeking for an order of specific performance in respect to the 1976 sale agreement. Johnson Samuel Kenga filed a defence and on 24<sup>th</sup> September 1992, Honourable J. R. Karanja delivered a Judgment in which he held as follows;

***“ In this case, the wrong doer is absolutely the defendant. The Plaintiff has convinced this court that he is entitled to the grant of specific performance rather than damages.”***

28. The Defendant's attempts to set aside the Judgment in SRMCC No. 461 of 1991 by filing an Application for leave to appeal out of time in the High Court was dismissed on 10<sup>th</sup> July 1995.
29. The Plaintiff produced exhibit number 8, an indenture between Johnson Samuel Kenga and the Defendant herein showing that the late Mr. Kenga transferred 10 acres being part of plot no. 12 S. R. No.2628 on 15th October 1996 to the Defendant.
30. From the indenture, it is not clear how the Defendant acquired 12.30 Ha which is approximately 30 acres shown in the certificate of Postal search as at 22<sup>nd</sup> February 2011.
31. What is important, for the purposes of the material placed before me, is that as at the time the said indenture was signed, the Plaintiffs were in possession of 20 acres of the same land having purchased it in 1976.
32. The Plaintiffs' father was also in possession of the Judgment of the lower court which clearly held that he was entitled to the 20 acres that he had purchased from Mr. Kenga.
33. Mr. Johnson Samuel Kenga who sold the suit property to the Defendant was aware of the lower court's Judgment having participated in the trial. In fact, his attempts to prefer an appeal against the Judgment flopped when the High Court sitting in Mombasa dismissed his application seeking for leave to file the Appeal out of time.
34. Having been aware of the lower court Judgment in respect to the 20 acres that he had sold to the 1<sup>st</sup> Plaintiff's father, the late Johnson Samuel Kenga had no proprietary interests in the 20 acres to pass to the Defendant or at all.
35. Section 44(1) of the Evidence Act provides as follows:

***“A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specific person but absolutely, is admissible when the existence of any such legal character, or the title or any such thing, is admissible.”***

36. Section 44 (2) states as follows.

***“Such judgment, order or decree is conclusive proof that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.”***

37. The Judgment in SRMCC No. 461 of 1991 declared the 20 acres of portion 18 (original no. 12/7) Group X currently registered in the name of the Defendant to belong to Shadrack Joseph Karisa. That position has never changed. Indeed, that position was apparent because the Plaintiffs' family have been in possession of the 20 acres since 1976 and they have built houses and planted mango trees on the land.
38. In the circumstances, I find and hold that the Plaintiffs have proved their case on a balance of

probability and I allow the Plaintiff dated 15<sup>th</sup> August, 2011 in the following terms:

**(a) That the Plaintiffs be and are hereby allowed to survey the land measuring 20 acres which is part of portion 18 (original number 12/7) Group X in accordance with the survey report of B.C. Mwanyungu dated 23<sup>rd</sup> January 2013 and produced as exhibit number 11 and the said 20 acres be registered in the names of Moses Shadrack Karisa and Rachel Nyevu Karisa as the Administrators of the Estate of Shadrack Joseph Karisa.**

**(b) That the remaining portion of 10.381 acres of Portion 18 (original number 12/7) Group X as indicated in the survey report of B.C Mwanyungu dated 23<sup>rd</sup> January 2013 and produced as exhibit number 11 be registered in the name of Peter Mbugua Kimani, the defendant.**

**(d) The Deputy Registrar of this court to execute the Transfer form and any other relevant document for the registration of the 20 acres in favour of the Plaintiffs as the Administrators of the Estate of Shadrack Joseph Karisa.**

**(e) The Defendant to pay the costs of the suit.**

Dated and Delivered in Malindi this 11<sup>th</sup> day of July, 2013.

**O. A. Angote**

**Judge**