



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 64 OF 2008

JONATHAN MSUKO SHOKAPLAINTIFF

VERSUS

**SAMUEL GONA NDORO
JOSEPH KADENGE NDORO**

DAVID NYIRO NDORODEFENDANTS

JUDGMENT

Jonathan Msuko Shoka(the Plaintiff) has filed this suit against Samuel Gona Ndoro(1st Defendant), Joseph Kadenge Ndoro(2nd Defendant) and David Nyiro Ndoro(3rd Defendant).

The Plaintiff claims to be the registered proprietor of parcel of land situated at Ngerenyi village in Kilifi District known as Title Number Kilifi/Ngerenyi/621 measuring 4.8 hectares(referred to as the suit premises). He bought the parcel from Elijah Chengo on 7th December 1977 and was issued with Title on 24th October 2002. He took possession of the land in 1977, developed it by planting cashew nut, mango and coconut trees. He also constructed some permanent buildings.

On 19th February 2002, the Defendants attempted to subdivide the suit premises was 4 equal portions allegedly in pursuit of a decision by the Bahari Division Land Dispute Tribunal in **Kilifi SRM Land Dispute No.4 of 2002(Samuel G. Ndoro, David N. Ndoro and Joseph K. Ndoro V Elijah Ndoro.** The said Jonathan Msuko was not a party to the case and the defendants have no right over the property. Further that the decision of the Land Disputes Tribunal is null and void and cannot be executed against the Plaintiff. It is Plaintiff's contention that the Land Disputes Tribunal had no jurisdiction to order the land to be sub-divided and given to the Defendants or declare that Plaintiff's interest was extinguished especially because this was a first registration. He therefore prays for orders of a permanent injunction to issue restraining the Defendants, their servants and/or agents from sub-dividing, trespassing or in any other manner dealing with the said parcel.

The defendants admit that plaintiff is the registered proprietor of the property but say the registration is illegal and therefore null and void as it was done in total disregard of the mandatory and statutory provisions of the law in that the parties to the sale agreement did not take the necessary legal steps to obtain the title documents.

The defendants deny that plaintiff has been in occupation of the land since 1977 and put him to strict proof. On a without prejudice basis, it is further pleaded that there is no sale agreement which was signed by plaintiff and the seller so the suit is bad in law. They also deny that plaintiff has carried out any

developments on the land and that if he did, then it was without legal rights because the defendants have always challenged the plaintiff's acquisition, ownership and possession of the property and they took the necessary steps by filing a suit before the Bahari Land Disputes Tribunal. They also found out that the plaintiff was aware of the existence of the suit before the tribunal and he even participated and gave evidence and he never challenged the decision of the tribunal.

They maintain that by the time plaintiff was getting the land to be registered in his name, the tribunal had already made its award which was adopted as judgment of the court by the Senior Resident Magistrate's Court at Kilifi. It is their contention that the decision by the Land Disputes Tribunal, requiring that the parcel be sub-divided should be implemented as it actually had jurisdiction to deal with the matter. They see no injustice in extinguishing the Plaintiff's proprietary rights by effecting the sub-division, saying that action will correct the mistake and illegal acquisition of the parcel by Plaintiff.

The Defendants plead that the Plaintiff acquired the property fraudulently and the particulars of fraud are cited as:-

1. Registration was carried out yet the seller did not apply for and obtain consent to sell and transfer the property within the statutory period as is required under the Land Control Act.
2. The consent states that the consideration for the purchase of the suit property was Kshs.12,500/- whereas Plaintiff stated before the Land Disputes Tribunal that he bought the first 6 acres at 2000/- and the other 6 acres at Kshs.5500/- making a total of Kshs.7500/- for 12 acres.
3. The settlement officer did not give amount for sale and transfer of the same property.
4. The plaintiff caused the registration in his name AFTER the award by the Land Disputes Tribunal and judgment by SRM's court, Kilifi.
5. The plaintiff and Elijah Chengo did not challenge the award of the Land Dispute Tribunal by way of Judicial Review on appeal in the Provincial Appeal Board.

The defendants have filed a counter claim against plaintiff saying he wrongfully entered the suit land and forcibly retained the same, and his acts amounted to trespass. They claim to have suffered loss and damages as they have been deprived the use and enjoyment of the suit property. They urge the court to declare that plaintiff unlawfully entered and occupied the property.

(2) That an order do issue to the effect that plaintiff's registration as the proprietor of the property was irregular and in breach of the law and should be reversed and the register rectified.

They also pray for permanent injunction to restrain plaintiff by himself, his servants or agents from entering or otherwise dealing with the suit premises.

In response, plaintiff denies that he acquired registration of the property by fraud or that he has disobeyed orders of the SRM's Kilifi court.

The counterclaim is denied, his contention being that he is entitled to possess, occupy and work on the suit property as it has never belonged to the defendants. He insists that he is in legal possession of the land and urges this court not to grant the prayers sought in the counterclaim.

At the hearing, the plaintiff testified that he entered into an agreement with Elijah Chengo in 1977- each party wrote his part of the agreements but they did not sign. The agreement is produced as exhibit 1. Elijah had been allocated the land by the Government of Kenya under the Ngerenye Settlement Scheme and Elijah showed him a copy of agreement (exhibit 2) which was to the effect that Elijah was a licensee and was required to pay certain fees to the settlement Fund Trustee. However it is the Plaintiff who made those payments and he produced the receipts in support as exhibit 3A-E.

Plaintiff then wrote to the DC who directed him to go to the Lands Office. So Plaintiff and Elijah Chengo went to the Lands Office and filled the transfer forms and were given a date to appear before the Land Control Board (LCB) so as to obtain consent. The application made before the LCB was produced as exhibit 4 and the LCB gave its consent and issued the same as exhibit 5. Plaintiff and Elijah Chengo then filed the transfer forms (Exhibit 6). Later Plaintiffs received a demand letter for accrued annual rent being Kshs.18,000/- he paid and produced the receipts as exhibit 7. He was then issued with Title (exhibit 8).

Plaintiff confirms that Defendants indeed sued the Elijah Chengo (who was their elder brother) at the Land Disputes Tribunal saying the land belonged to their father, Kalama Ngoro and not Elijah, and Plaintiff testified before that tribunal. He showed the minutes of the tribunal all the documents he had, and the Defendants were advised to sue Elijah but he (Plaintiff) was not allowed to participate.

Later he received a letter informing him that the land was to be surveyed and a further letter directing them to surrender his Title Deed to the Lands Office. He prays to be left in peace, saying he has occupied the land since 1977 and Elijah never told him, the same was his father's land.

David Ngoro alias Nyiro (Dw1) told this court that the Defendants' are his brothers and he reiterates that the land which plaintiff occupies belonged to their late father – they moved into that property in 1965/66- cleared the forests, built houses and planted cashewnut, mango and coconut trees. They later got to learn that their brother Elijah Chengo had sold the land – Elijah is now deceased. It is his testimony that they were never summoned to appear before the Land Control Board before consent was given and he also wonders why there is a difference in what the actual purchase price was – the sale agreement and the document presented to Land Control Board reflect different prices. He never saw the letter of consent and observes that several years passed between the date the Land Control Board sat and the date consent was given pointing out that the transfer document (D.exhibit 3) shows that Elijah transferred the land to Jonathan on 12/11/80, yet consent was obtained on 26/11/80 – meaning by the time consent was obtained, transfer had already been effected when they went before the Land Disputes Tribunal, a decision was made in their favour directly for sub-division of the land between the brothers. The Plaintiff obtained Title while Defendants were pursuing the Tribunal case and they are aggrieved by his actions.

Mr Shujaa who appeared for the Plaintiff submitted that there was evidence of a valid contract entered into between the Plaintiff and Elijah Chengo for the parcel measuring 12 acres at a consideration of Kshs.7500/- paid by Plaintiff. He urged court to accept the sale agreement (Exhibit 1) as valid and that the Plaintiff complied with provisions of section 3 of the Law of contract. He submits that the Title passed from Elijah Chengo Ngoro to the Plaintiff and he took legal possession. However Mr Odhiambo for the Defendants argues that the contract was not valid because this was immovable property and the sale agreement had to be signed by the parties to the agreement and the signatures attested by a witness. In the present case the Plaintiff and Elijah Chengo did not sign the sale agreement and no one attested to their signatures.

Section 3 (3) of the Law of Contract (Cap 23) provides that;-

“No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded-

- (i) Is in writing
 - (ii) Is signed by all the parties thereo
- (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Under the Law of Contract, disposition includes a transfer and includes a mortgage, charge, lease, conveyance, assignment, consent. No explanation has been given as to why the parties did not sign the sale agreement although on re-examination, the Plaintiff states they signed the agreement by writing their

names in full. I recognize that there is no prescribed form as to what constitutes a signature and I do not think it necessarily has to be a squiggle or illegible scribbling. A signature in the Concise Oxford English Dictionary(10th Edition) at page 1334 is defined as a person`s name written in a distinct way as a form of identification or authorization.

I also recognize that there are individuals whose signatures are actually their full names – however in this instance Plaintiff did not confirm that they did not sign their agreement but just wrote their full names. Even if I was to accept that those full names constituted a signature, there still remains the issue of no one having attested the signatures so as to make the agreement valid. Due to that non compliance, I make a finding that the contract was void. Mr Shujaa also submits that there is evidence to demonstrate that prior to the establishment of Ngerenyi Settlement Scheme in 1964, the suit property was on a portion of land comprised in a parcel of land owned by a foreigner named Mr Ngerenyi. He points out that 3rd Defendant`s testimony was that their late father Ndoro Gona would occasionally cultivate a portion of that as a squatter but he never resided on that portion and he died before the establishment of the scheme and was even buried elsewhere.

On this account then, he submits that Ndoro Gona did not have any beneficial interest in the land capable of being held in trust for Elijah Chengo Ndoro. His contention is that Elijah Chengo Ndoro was in the Poll Tax Records which qualified him to be allocated land and that is how he was allocated the suit property. He further submits that the other Defendants did not qualify for allocation as they were not in the Poll records, (which was then a condition set for registration) and their late father Ndoro Gona did not exist by the time the Poll Tax records were being set up, and so Elijah Ndoro was registered as the owner of the suit property and not as holding the suit property in trust for the family. So Elijah was registered as a licensee of the Commissioner of Lands on 25th November 1966. A copy of the agreement produced as exhibit 2 shows that indeed the agreement for Elijah Chengo to rent the 12 acre parcel was between himself and the Commissioner of Lands and it does not indicate that he was registered as a Trustee. However Mr Odhiambo argues that the agreement (exhibit 2) had special conditions which required the licensee (that is Elijah) not to transfer, sublease or charge the holding or part thereof without the consent of the Commissioner of Lands and that Elijah did not comply with those conditions and because of that the sale was illegal ab initio. It is correct that there is no evidence to demonstrate that the seller Elijah Chengo did comply with some of the special conditions set regarding transfer or subleasing.

But the issue remains this – even if the conditions were not complied with, was Elijah registered as a Trustee? – There is no evidence to prove that contained in the instrument between the Elijah and Commissioner of Lands? The Plaintiff does not state that upon purchasing the land he got vacant possession, infact it is not clear at what point the Defendants moved onto the land. However it seems they were in occupation for some time until recently when the Plaintiff evicted them. Could it then be that they occupied the land and made use of it by virtue of the fact that Elijah was holding it in trust for them?

Section 126(1) of the Registered Land Act provides that:-

(1) “A person acquiring land, a lease or a charge in fiduciary capacity may be described by that capacity in the instrument of acquisition and if so described, shall be registered with the addition of the words “as trustee” but the Registrar shall not enter particulars of any Trust in the register”

Does that mean that Elijah Chengo ought to have been described as a Trustee in the instrument he obtained which enabled him to be registered as a licensee in respect of the land in issue?

Madan J, in the case of Gatimu seemed to think otherwise, that there was no need to register the said Elijah as trustee because he was registered as the eldest son in the family or the one who was in the Poll Records which was a precondition at the time for one to be registered with the Settlement Fund Trustee. That pointer would then explain how and why the three Defendants who are Elijah`s brothers ended up together on the land in question. The defence witness gave ample evidence of how Elijah ended up being the one registered in respect of the said parcel and I make a finding that he held the land in trust

for his siblings. The Defendants apparently had been in joint possession, occupation and use before Plaintiff threw out of them out of the land.

It is further submitted that at the time of purchase, the suit premised on 7th December 1977, Ngerenyi Settlement Scheme had not been gazetted as a land control area so the Land Control Act did not apply to the area until 1980, and there is no evidence to rebut that. So the parties applied for consent to the Land Control Board on 12th November 1980 as per exhibit 5 that is 3 years later. The variance in the purchase price is because page 2 shows the price paid for the land and a figure of Kshs.5000/- in respect of land charge paid to the settlement Fund Trustee to make a total consideration of Kshs.12500/- hence what appears to be a variance in figures.

Mr Odhiambo however responds that section 6 and 8 of the Land Control Act was applicable to the transaction between the Plaintiff and Elijah Chengo because the suit plot is agricultural land and section 8 provides that consent must be applied for within six(6) months of making the agreement. In this instance the consent was obtained three years after the transaction and Mr Odhiambo submits this makes the transaction void. It is Mr Odhiambo contention that the land was and still remains agricultural land, which is why Chengo did apply for consent to sell and transfer the same to the Plaintiff.

According to section 6 of the Land Control Act, any dealing in agricultural land, whether sale, transfer, lease, mortgage or earn exchange or partition, of other disposal if or clearing of land situated within a Land Control area, is void unless consent of the Land Control Board has been given. It is not disputed that the land is agricultural land, and required consent. However Mr. Shujaa argues that as at the time of the transaction it was not yet gazetted to be land under the Land Control Act which lands fall under the Act. So when was it gazette and which lands fall under the Act? This would include agricultural land as contemplate under section 6 (1) of the Land Control Act (Cap 302). This in effect means that an agreement of sale of agricultural land is void unless the Land Control Board has given consent. Secondly the consent was obtained 3 years after the transaction. Was this consent valid?

Section 8 of the Land Control Act provides as follows;-

“An application for consent in respect of a controlled transaction shall be made....to the appropriate Land Control Board within six months of the making of the agreement for the controlled transaction by any party. Provided that the High court may, notwithstanding the period of six months extend that period”

The failure to comply with form of the Land Control Act within the recognized period. It has not been demonstrated by the Plaintiff, that he obtained an extension of the period. I do not think the provision of section 8 (2) which provides that the consent of the Board once given is final and shall not be challenged in any court can be a source of refuge to Plaintiff because section 8 (1) is couched in mandatory terms and I think section 8(2) applies where the correct provisions have been met. In this I am guided by the decision on **Rioki Estate Co(1970) Limited V Kimuha Njoroge (KLR) 1976-f e Vol 1 page 589 at 595** which recognized that failure to take steps within the three months statutory period to apply for consent rendered the transaction void.

Then there is the fact that Plaintiff was actually aware of the existence of the dispute over the suit property and he even testified in those proceedings before the Land Disputes Tribunal. Would this affect the Plaintiff`s registration as proprietor of the suit property. Mr Shujaa`s argument is that the evidence shows Plaintiff`s registration was a first registration within the meaning of section 27 and 28 of the Registered Land Act (Cap 300) and the Title cannot be deferred as contemplated under section 143 (1) and 143(2) of the Registered Lands Act(Cap 300). Further that the Plaintiff purchased the land for valuable consideration on 7th December paid the requisite fees to the Settlement Fund Trustee and was registered on 24/10/02, so the case and decision which was before the Bahari Land Disputes Tribunal and the Senior Resident Magistrate Kilifi were inconsequential. It is his contention that the process to register the Plaintiff as proprietor was not hurriedly done to defeat the decision of the Land Disputes Tribunal – it is significant that the Tribunal`s decision was on 18th April 2002. He submits that there was no fraud

involved and even if there was, then the Tribunal has no jurisdiction to cancel the title. And there was the contention, that Plaintiff hurriedly did the registration process so as to defeat the decision by the Tribunal.

Mr Odhiambo`s argument is that the Title was obtained by Plaintiff in total disregard and contradiction of the modality provision of the Law of Contract, the Land Control Act, and the special conditions set out in exhibit 2. He points out that the Plaintiff attended the proceedings before the Land Disputes Tribunal, yet took no steps and/or action to stop the proceedings and if the was approved he ought to have filed for Judicial Review rather than file this suit. I cannot fault that line of reasoning – I agree.

He further submits that fraud by Plaintiff has been demonstrated and section 143 Registered Land Act recognizes that Title can be challenged on grounds of fraud, mistake or misrepresentative. He argues that Plaintiff had knowledge of the omission or fraud or mistake and he contributed to it by default. Therefore the Plaintiff cannot claim a clear Title. The Plaintiff has not demonstrated that at the time of obtaining Title he disclosed - the existence of the case which was before the tribunal. Does the fact that Plaintiff obtained first registration then make his Title sacrosanct and not liable to any challenge? Mr Shujaa says yes and finds grounds on the decision of **Mugogo V Sihowa (1988) KLR page 256** which holding that by **Nyarangi, Gachuhi and Apalso JJA** was that:-

- (1) **“Under the Registered (Cap 300) section 143, the court may order rectification of the register by directing that registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake**
- (2) **There was no evidence of fraud or mistake in this case and even if fraud were established, the Respondent`s title could not be defeated in as much as it was acquire by a first registration”**

This position was also state by **Todd J in Ambale V Masohi HCCC NO. 759 of 1971, reported in 1986 KLR page 241** that:-

“On a proper construction of section 143 of the Registered Land Act, even if the alleged fraud or mistake was shown, the title was indefeasible”

Would the Plaintiff find protection under this provision despite the court`s finding that the transaction on which this registration was pegged was void, for failing to meet section 3 of the Law of Contract Act and section 8 of the Land Control Act? And what about the finding that Elijah held the land in Trust? Would not the effect of applying such a rationale as stated in the two decisions result in a complete contradiction to all what this court has observed which render the transaction void. My view is that the registration was tainted with misrepresentation made by the Plaintiff to the effect that the land was not encumbered yet he was fully in the picture regarding the dispute at the Land Disputes Tribunal and a clearer consideration of section 143 (2) is this:-

“The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land...for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake, in consequence of which the rectification is sought...”

In any event section 143(1) is a provision made subject to subsection (2) and I make a finding that the Plaintiff`s title is subject to challenge. His claim therefore fails and is dismissed with costs. I do not think I can award the prayers sought in the counter claim yet the judgement adopted by the Senior Resident Magistrate`s Court Kilifi, in favour of the Defendants still remains in force – it would make a circus of the judicial system. I decline to make any orders for the counter claim. The upshot is that the Plaintiff`s claim is dismissed. The counter claim is also dismissed. Each party bears its own costs.

Delivered and dated this 10th day of December 2010 at Malindi

H A OMONDI

JUDGE

Mr Shujaa for Plaintiff

Defendants present

Mr Odhiambo for Defendants absent