



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI
Civil Suit 26 of 2009

KATANA KITSAO TUVAPLAINTIFF

VERSUS

PETER MUTHAIGA MURIITHI.....DEFENDANT

J U D G E M E N T

Katana Kitsao Tuva (the plaintiff) filed his suit against Peter Muthaiga Muriithi (Defendant) seeking for an order of rectification of the Register in respect of Title Kilifi/Madeteni/438 by causing a cancellation of the defendant as holder of Title Kilifi/Madeteni/438. He also seeks costs of this suit and interest therein at court rates.

It is the plaintiff's case that he is a lawful allottee from the Government of Kenya through the Settlement Fund Trustee of all that Plot/Property comprised in Title No. Kilifi/Madeteni/438.

In the year 1981, following an adjudication exercise carried out in the Madeteni and adjoining area, on instructions of the Government of Kenya, the plaintiff became registered as first owner of the suit property and was issued with a Title deed on 16th November 1981.

On 28th May 1985, the Government of Kenya, through the then Commissioner of Lands, recalled all Titles including the previous title issued to the plaintiff in respect of the suit properly citing fundamental error in the manner the adjudication exercise was carried out in the Madeteni and adjoining areas.

Plaintiff duly surrendered his title documents in respect of the suit property to the Land Registrar, Kilifi, in compliance with Gazette Notice No. 25005 of 30th May 1986, for further action by the Commissioner of Lands. Madeteni area was subsequently declared and zoned out by the Government of Kenya, as a settlement Scheme to be administered by the Settlement Fund Trustee – in effect causing the Title Kilifi/Madeteni/43B, to be owned by the Settlement Fund Trustee. Plaintiff then made an application to the Director of Land Adjudication and Settlement, for allocation of the suit property and the same was offered to him by a letter dated 9th December 2002.

He met all the requirements of the said offer and on 5th May 2008, the Settlement Fund Trustees caused a discharge of their charge on the suit property and duly executed a transfer of the suit property to the plaintiff as the owner.

On 24-9-08 while the plaintiff was lodging an application for registration of the transfer of the suit property in his favour at the Kilifi Land Registry, he realized that there existed a "Green Card" over the suit property in the custody of the Land registrar, Kilifi, where the defendant is recorded as holder of the Title to the suit property following an alleged sale and transfer to him by the plaintiff in 1985.

However the records held by the Land Registrar did not have any sale agreement in respect of the suit or any evidence of payments of stamp duty nor could registration fees for such a transaction be found, thereby making the plaintiff to conclude that the same as an act of fraud.

The particulars of fraud are pleaded as:-

- (i) The defendant fraudulently prepared, executed, uttered and presented transfer of the suit property into his name.
- (ii) The defendant fraudulently obtained registration of the suit property on an illegal fraudulent and/or purported sale and transfer from the plaintiff.

Plaintiff states that he has been in occupation and in use of the suit property until its transfer to him by the Settlement Fund Trustee and he now seeks an order for rectification of the Register by cancellation of the defendant's name in the same.

The defendant failed to enter appearance and file defence – having been served by way of substituted service through a newspaper advert in a copy of the Standard Newspaper of 29th July 2009.

The matter thus proceeded to hearing exparte.

The plaintiff (PW2) testimony, is simply a reiteration of what is contained in the pleadings and confirmed that he was allocated land in Madeteni being plot No. 438 – and he lives there to date. Incidentally plaintiff had worked at the Ministry of Lands under the respondent who was in charge of demarcations. After adjudication, they were told to surrender the titles as they had some defects and he obliged. Later on when he went to register so as to get a fresh title he was told that defendant had taken his title away.

Harrison Stephen Wasiwasi Musumia (PW) the District Lands Registrar for Kilifi, Malindi and Kaloleni District testified that some time in May 2008, he received documents requesting for transfer and discharge of change in respect of land in Kilifi – Madeteni 438 – he has produced the same as Ex1.

He received a copy of discharge in respect of the land – the owner was Settlement Fund Trustee and is produced as Ex.2. There was also a copy of the transfer (Ex.3) The transfer was to be in favour of Katana Kitsao Tuva. There was also a letter of authority dated 19th September 2009 from the Chief Lands Registrar (Ex.4) to register the transaction using the plaintiff's identification card, (Ex. 5) Pw1 verified and confirmed the record to be proper. He also received the plaintiff's PIN certificate no. 004504111A (Ex.6). Plaintiff paid Kshs. 500/- so as to have his application processed as per Ex.6. However PW1 did not register the documents because despite the fact that plaintiff had accepted and made payment vide Ex.8 because the adjudication records showed other unfavourable details. There was a card (Ex 10) which showed that the land was registered in plaintiff's name on 31st July 1981, then this was cancelled because of irregularities in allocation in Chembe- Kilifi- Jimba and Madeteni area and all allottees returned their cards for cancellation. The land reverted to the government of Kenya, then a fresh allocation was made by the letter of offer – the land owners were to apply and plaintiff then got the letter of offer.

However in the new card, the entry showed that on 24-2-87, the land had been allocated to Katana Kitsao Tuva and a title deed issued to him and on 26th July 1991, he transferred the land to Peter Muthigani at a consideration of Kshs. 53,500/-, and on 26th July 1991, a fresh title deed was issued to Peter Muthigani. However PW1 was unable to trace any transfer documents, valuation or stamp duty to justify the transfer – so PW1 could not register plaintiff as owner because the card was produced as Ex 11.

On making queries, plaintiff denied transferring the land to anyone else.

From the documents presented to this court it is clear that both in the first allocation and subsequent allocation the land was registered in the name of the plaintiff. Later after the re-issue of titles, the defendant got himself registered on pretext that plaintiff had transferred the plot to him following a sale agreement. The purported sale is not supported by any documents and certainly there is a query as to how defendant became registered after obtaining cancellation of the plaintiff's title. In the absence of tangible explanation as to how this state came to be, then it is reasonable to infer that defendant having worked in the Ministry of Lands and Settlement in a senior position, took advantage of that to interfere with the records in a fraudulent manner to his advantage. The plaintiff has thus established his claim on a balance of probabilities and judgment is entered in his favour as follows:-

That the Register be rectified in respect of Title Kilifi/Madeteni/438 by canceling the name of the defendant s the holder of the same.

- (b) Costs of this suit be borne by defendant.

Delivered and dated this 25th day of **November 2009** at Malindi.

H. A. Omondi

JUDGE