



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 885 of 2005 (OS)

IN THE MATTER OF: KAINGU TONYE (DECEASED)

VERSUS

JAMES KAMBI MANGISIDEFENDANT

J U D G M E N T

Kaingu Tonye, deceased took an Originating Summons pursuant to the provisions of Order XXXVI rule 3 of the Civil Procedure Rules in which he prayed for the following orders:

- (i) *A determination as to whether he purchased from James Kambi Mangisi, the defendant herein, LR No. Kilifi/Chilulu/493 and as to whether the plaintiff has been in possession of the land since 1974.*
- (ii) *A determination as to whether or not consent was obtained to transfer the land from the defendant to the plaintiff and whether such a transfer should be ordered.*
- (iii) *Costs of the suit*

The originating summons is dated 25th October 2005 and was filed on 26th October 2005. Unfortunately, Kaingu Tonyo passed away on 27th July 2006. He was substituted by the legal representatives of his estate namely Stanley Nzai Kombe and Rebmenn Riziki Kaingu. The Originating Summons was amended twice with the last being the re-amended Originating Summons dated 20th July 2007.

When the summons came up for hearing, one witness testified in support of the plaintiffs' case and the defence closed his case without tendering any evidence. Stanley Nzai Kombe (P.W.1) produced in evidence a copy of the grant of limited letters of administration he and his brother obtained in respect of the Estate of Kaingu Tonyo, deceased. P.W.1 also produced in evidence copies of the sale agreements dated 10th August 1974 and another dated 28th August 1974 executed by the deceased and the defendant herein. The two agreements indicated that the deceased purchased plot No. Kilifi/Chilulu/493 for Kshs.2,000/-. P.W. 1 further produced in evidence a copy of the land control board consent issued by Kilifi Land Control Board on 12th March 1979. The consent authorized the transfer from James Kambi Mangisi to the late Kaingu Tonyo of the aforesaid parcel of land at a consideration of Kshs.2,000/-. It is said that the defendant went into hiding upon obtaining the land control Board consent hence making it difficult for the deceased plaintiff to obtain title to the suit property. The deceased was then prompted to lodge a caution against the title to protect his interest as a purchaser. The deceased filed a claim before the Kaloleni Land Disputes Tribunal vide Land Dispute No. 26 of 2001. P.W. 1 produced certified copies

of the proceedings in evidence. The Land Disputes Tribunal in end gave judgment in favour of the deceased. P.W. 1 said the deceased and his family resided on the suit premises since 1974 up to date. The plaintiff then prayed for judgment in terms of the Originating Summons.

At the close of the plaintiff's case Mr. Mutubia learned advocate for plaintiff gave brief oral submissions. Mr. Kenzi, learned advocate on the defendant's part opted not to make any submissions. It is the submission of Mr. Mutubia that the plaintiffs should be given judgment as prayed in view of the unchallenged evidence as a purchaser for valuable consideration.

I have considered the evidence tendered and the submissions of learned counsel. It is obvious from the documentary evidence tendered that the late Kaingu Tonyo purchased plot No. Kilifi/Chilulu/493 from James Kambi Mangisi at a price of Kshs.2,000/- in 1974. The purchase price was paid in full and the plaintiff took possession of the suit premises and has been in continuous occupation since then. I am also convinced by the evidence that the transaction of sale and transfer was consented to by the Kilifi Land Control Board on 12th March 1979. There is also evidence that the land in dispute was awarded to the plaintiff by the Kaloleni Land Disputes Tribunal in its decision of 22nd May 2001 which decision was adopted by the Resident Magistrate's court, sitting at Kaloleni on 22nd august 2001.

In the end I am satisfied that the plaintiffs have proved their case to the required standard on a balance of probabilities. Consequently the plaintiffs are declared to have acquired L.R. No. Kilifi/Chilulu/493 for valuable consideration. I hereby order and direct the defendant to execute the transfer documents to effect transfer of the aforesaid parcel of land to the plaintiffs as legal representatives of the Estate of Kaingu Tonyo, deceased within 45 days from the date of this judgment. In default the Deputy Registrar of this court to execute the aforesaid transfer in place of defendant. Costs of the suit is given to the plaintiffs.

Dated and delivered at Mombasa this 24th day of July 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Ouma h/b for Mr. Mutubia for plaintiff and Mr. Kiume Kioko h/b for Kenzi for Defendan