



REPUBLIC OF KENYA



**Hayer v Simba & 3 others (Land Case 142 of 2021)
[2022] KEELC 14615 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
LAND CASE 142 OF 2021
AE DENA, J
OCTOBER 14, 2022**

BETWEEN

CHARANJIT SINGH HAYER PLAINTIFF

AND

ALI VUYAA SIMBA 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

KWALE DISTRICT LAND REGISTRY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. By a plaint dated 5th August 2020, the plaintiff filed suit against the Defendants seeking inter alia the following orders;
 - a. A declaration that the plaintiff is the absolute proprietor of the land comprised in title number Kwale/Funzi/Island/60
 - b. An order compelling the 3rd defendant to cancel and revoke the title deed to Kwale/Funzi/Island/60 in the name of the 1st defendant and to restore the title deed to Kwale/Funzi/Island/60 in the name of the plaintiff.
 - c. An order compelling the 3rd defendant to cancel all entries in the land register for Kwale/Funzi/Island/60 made subsequent to the illegal issuance of the title deed to the 1st defendant.
 - d. A permanent injunction restraining the defendants whether by themselves, their servant, agents, employees and or anyone acting on their authority from subdividing, leasing, selling, transferring, charging, further developing or dealing with the parcel of land known as Kwale/Funzi/Island/60 in any manner whatsoever that is advance (sic) to the plaintiff's title to the land.



- e. Cost of the suit and interest.
2. On 13th March, 2021 the suit against the 1st defendant was withdrawn upon evidence that the said defendant died on 20th June 2020, this suit having been filed in August 2020. Mr Birir had earlier informed the court that he had been instructed to act for the 1st Defendant and was desirous of applying for substitution.
3. The 2nd defendant National Land Commission never entered appearance in these proceedings. Though Mr Mbuthia counsel for the Commission attended court on 14/10/2020 and undertook to file the 2nd defendants' pleadings he never appeared thereafter nor did he file the same.
4. The 3rd and 4th defendant with leave of the court filed their defence dated March 17, 2022 on March 21, 2022 through the State Counsel from the office of the Attorney General. They stated that if at all title was issued to the 2nd defendant, it was duly issued pursuant to the 3rd defendants powers and duties as set out in the Land Registration Act. That the reliefs sought by the Plaintiff were not merited.
5. The matter was heard virtually through the Microsoft teams' platform on 23rd March 2022 where each of the participating parties party called one witness. The plaintiff was represented by Mr Mugambi and the 3rd and 4th defendants by Mr Mwandeje Senior litigation counsel.

The Plaintiffs Case

6. In his plaint the plaintiff averred that he was the registered proprietor of the suit property. The Plaintiff gave evidence in support of his case and adopted his witness statement dated August 5, 2020. It was his evidence that the suit property was registered in the name of Peter Nganga Kamande who had charged it to Industrial Development Bank (the Bank) to secure a loan facility advanced to Premium Sea Foods Limited who were the charger and borrower respectively. They both defaulted on servicing the facility and the bank exercised its statutory power of sale and sold the suit property by way of private treaty and which sale was sanctioned by the court. That after following due procedure he was registered the proprietor and issued with a title on June 8, 2006 by the 3rd defendant.
7. It is the plaintiff's evidence that following a search in 2019 he discovered that the 3rd defendant had issued another title deed to the 1st defendant dated January 24, 2016 on the instructions of the 2nd defendant without justification and notice to him. It is the plaintiffs case that the actions by the 2nd and 3rd defendants were illegal, amounted to unfair administrative action, fraudulent and thus void ab initio. As part of his evidence the plaintiff produced 10 copies of documents as listed in the plaintiff's bundle dated and filed on 5th August 2020 which were marked as exhibits.
8. On cross examination the plaintiff confirmed that he undertook due diligence of the suit property before he purchased the same. He told the court he never got involved with the 2nd defendant because at the time, there was no emerging problem and that he has never sold the suit property.

The Defendants Case

9. Mr Beneah Nandi Land Registrar 2 stationed at Kwale land registry at the time gave evidence on behalf of the 3rd and 4th defendant as DW1. He gave the history of the suit property from the parcel file and produced as evidence copies of documents as listed in the list of documents dated March 17, 2022 which were marked as defence exhibits 1- 9'. He told the court that the register showed that the plaintiff was the registered owner of the suit property and his title was issued on June 8, 2006 and that there were no entries in the green card relating to the 1st defendant.



10. Upon cross examination he confirmed the plaintiff was the bonafide registered owner of the suit property. That the record only had a copy of the title to the 1st defendant. That the said copy showed the land size as 6.48 acres while the green card showed 5.3 acres the latter tallying with the Plaintiffs title. He told the court he could not confirm any records by the 1st defendant and that he was aware the 2nd defendant lacked jurisdiction over private land. On reexamination he clarified that changes of ownership are always reflected in the green card but the same were not reflected in respect of the 1st defendant and as such the said title cannot be genuine since the green card is the official record.
11. I directed counsels to file and exchange written submissions and they complied.

Analysis and Determination

12. From my analysis of the pleadings, documentary and oral evidence, and the submissions filed by both parties the main issue for determination is, Whether the plaintiff has a valid title to the suit property and whether he is entitled to the orders sought.

Whether the Plaintiff has a valid title to the suit property

13. The Plaintiff testified that he was the sole registered owner of the suit property which initially belonged to Peter Ng'ang'a Kamande who charged it as security for a loan to Industrial Development Limited for Premium Sea Foods (Kenya). That the suit property was sold and transferred to him by the bank following their exercise of statutory power of sale. The law requires under section 107 (1) of the *Evidence Act* that; -

‘Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.’

14. In other words, the burden of proof was upon the plaintiff to adduce and produce documentary evidence that will prove its case. He produced a copy of title deed for Kwale/Funzi Island/60 issued on December 16, 1988 together with a copy of the green card both showing Peter Ng'ang'a Kamande was registered proprietor on 9/12/88 and title deed issued on 16/12/88. The plaintiff also produced as his evidence a bundle of correspondence exchanged between the Bank, its lawyers and the plaintiff's lawyers that led to an agreement on the terms of sale of the suit property to the plaintiff. These revealed there was an offer by the plaintiff to the Bank to purchase two properties including the suit property for Kshs 800,000 which had been accepted by the Receivers of the guarantors of the loan who had offered the suit premises for sale, There was a court order issued on April 15, 2005 by Justice Azangalala granting leave to the Bank to sell the suit property by way of private treaty whereupon an 'Agreement for Sale' dated August 16, 2005 was entered into between the Bank and the Plaintiff in respect of Kwale/Funzi Island/60 the suit property and Kwale/Funzi Island/276 at a purchase price of Kshs.800,000, Cheque for Kshs 80,000 to the Bank being 10% deposit thereof and letter from the Banks Legal affairs Manager transmitting a receipt in respect of the balance to Adera & Co Advocates the banks lawyers. There was also produced Land Control Board consent to Peter Nganga Kamande on September 14, 2005 to transfer to the plaintiff, Transfer dated September 27, 2005 lodged on 8/6/2006 and duly registered on June 8, 2006. This court noted a payment for stamp duty in respect of the transfer. DW1 who was the Land Registrar stationed at Kwale at the time of the hearing also produced from the records held at the Kwale land registry the title deed dated 8th June 2006 to Kwale/Funzi Island/60 in the name of Charanjit Singh Hayer and the green card. The same was a replica of the title submitted by the plaintiff in terms of the date of issue (June 8, 2006), the registered proprietor who is the plaintiff and approximate area. These were also confirmed by the green card which was presented both by the plaintiff and DW1 and bore the same content. DW1 produced the transfer dated September 27, 2005



and registered on June 8, 2005 which was a replica of what was produced by the Plaintiff including the court order herein.

15. From the documentary evidence provided I observed among others that the entire transaction that led to the registration of the plaintiff as the proprietor was carried in accordance with the law having complied abinitio with the requirements under sections 77 and 79 of the Registered Land Act (now repealed) as it relates to requirement for leave in a sale by private treaty, requirements of a valid contract for the sale of land which was evidence by the agreement for sale, payment of the full consideration, consent of the land control board as well as stamp duty requirements and rates clearance certificate. I did not find any gap that would raise a doubt on the authenticity of the same. To me the plaintiff held a valid title.
16. DW1 further presented a copy of title deed for Kwale/Funzi Island/60 in the name of the 1st defendant which he could not confirm during cross examination as the registry's official document. He stated it was only a copy and there was no corresponding register or entry for it. He also pointed disparities in the parcel sizes which this court was also able to observe. A further look at this title and its purported green card also presented by PW1 revealed that it was issued on January 24, 2016 and the parcel file following the opening of the register on April 30, 2002 and there are no entries to show what transpired between the said date and January 2016 when the 1st defendant's title was issued. This was confirmed by the plaintiff who during cross examination stated he undertook due diligence and there was no such entry. It was PW1 testimony that the 2nd defendant caused this title to be registered through a letter dated February 18, 2015 which was produced as evidence by both parties. The letter is addressed to the District Land Registrar Kwale County and states as follows; -

The National Land Commission received complaints from one Ag Vuya Mwanasimba alleging fraudulent transfer of his land.

Details of what transpires (sic) are enclosed. Unless there is evidence to the contrary:

- a) Please do away with the fraudulent transfer
- b) Reinstate ownership for the claimant as per law and procedures.

The letter is signed by the then Chairman of the Commission Huhammad A. Swazuri and is copied to various government offices.

17. It was submitted by both Counsels that since the suit was registered as private land the 2nd defendant had no jurisdiction and that their purported action over the suit property was illegal and void abinitio. I respectfully agree with this submission. The functions and powers of the Commission are set out in section 5 and 6 of the National Land Commission Act No. 5 of 2012 read together with section 14 thereof and inter alia articles 64, 67, 68 & 62 of the Constitution on the functions of the Commission and the various definitions of land as given therein limit the jurisdiction of the Commission to public land. See Mwangi Stephen Murithi v National Land Commission & 3 Others [2018] eKLR and Robert Mutiso Leli and Cabin Crew Investments Ltd v National Land Commission & 3 Others [2017] eKLR. It is therefore the finding of this court that the said title was void and did not confer a valid interest.
18. My findings are further emboldened by the provisions of section 32 (1) of the Registered Land Act (repealed) and which applies by dint of section 107 of the Land Registration Act which stipulates; -

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- (1) The Registrar shall, if requested by a proprietor of land or a lease where no title deed or certificate of lease has been issued, issue



to him a title deed or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease:

Provided that - (i) only one title deed or certificate shall be issued in respect of each parcel of land or lease.

- 19 Mr Mwandeje submitted that by the time the 1st defendant acquired his title in January 2016, the Plaintiff was already in possession of the title and being first in time should be upheld. This court was referred to the case of *Wreck Motors Enterprises v The Commissioner of Lands and Others* Civil Appeal No.71 of 1997 and *Gitwany Investment Ltd v Tajmal Ltd & 3 Others* [2006] eKLR which I agree with. Also see *Lawrence Mukiri v The Attorney General & 4 others* [2013] eKLR. DW1 also confirmed in cross examination that the plaintiff was the bonafide registered owner of the suit property.
20. Based on the evidence and facts placed before this court, I find that the Plaintiff has established on a balance of probabilities that he holds a valid title to the suit property and is entitled to the orders sought. I enter judgement in favor of the plaintiff in the following terms; -
- a. A declaration be and hereby issues that the plaintiff is the absolute proprietor of the land comprised in title number Kwale/Funzi/Island/60.
 - b. The 3rd defendant to cancel and revoke the title deed to Kwale/Funzi/Island/60 in the name of the 1st defendant and to restore the title deed to Kwale/Funzi/Island/60 in the name of the Plaintiff.
 - c. An order compelling the 3rd defendant to cancel all entries in the land register for Kwale/Funzi/Island/60 made subsequent to the illegal issuance of the title deed to the 1st defendant.
 - d. The plaintiff shall have the costs of this suit.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 14TH DAY OF OCTOBER, 2022

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mugambi H/B for Ms. Kitoo for the Plaintiff

Mr. Mwandeje for the 3rd and 4th Defendant.

Mr. Denis Mwakina- Court Assistant.

