



**IN THE MATTER OF: SUBDIVISION PLOT NOS. 567,568 AND 569 OF SECTION III
MAINLAND NORTH**

GIDEON NASSIM KITI PLAINTIFF

V E R S U S

AISHA ALI MOHAMED DEFENDANT

FAIZ OSCAR MEULI 1ST INTERESTED PARTY

OMAR MOHAMOUD MOHAMED FARAH 2ND INTERESTED PARTY

JUDGMENT

In this Originating Summons GIDEON NASSIM KITI (whom I will herein after refer to as the plaintiff) seeks against AISHA ALI MOHAMED (the defendant) and PAULINE KWINGA a vesting order in respect of Plot Nos. MN/III/567, 568 and 569 situate at Kikambala in Kilifi District being subdivisions of the piece of land known as L.R. No. 284/III/MN. The grounds upon which he seeks this order, as stated in his replying affidavit, are that he has, to the knowledge of the defendant although he has had many cases with her, been in physical possession of those pieces of land since 1981 and even earlier and has established a permanent home on them; that he has a prohibitory order registered in the Lands Office against those pieces of land and that one of the cases he has had with the defendant being CMCC No. 1108 of 1996 was dismissed and the defendant did not appeal against that dismissal.

The matter first came up for hearing before J. Khaminwa Commissioner of Assize (as she then was) who, granted the vesting order on 8th October 1999 as there was no opposition. On learning of that order the defendant applied on 3rd May 2000 to set it aside. In the affidavit in support of that application she deposed that the plaintiff had misled the court into making that order. She stated that of the many cases she had had with the plaintiff in none was there a ruling in the plaintiff's favour. It was only CMCCC No. 1108 of 1996 which was dismissed on the ground that the matter should have been filed in the Land Disputes Tribunal in accordance with the Land Dispute Tribunal Act No. 18 of 1990. But soon thereafter she filed the matter in that Tribunal which later ruled in her favour. She further stated that the award in Land Disputes Case No. 9 of 1992 which the plaintiff used to obtain the prohibitory order referred to in his affidavit was set aside on 16th March 1993 and a fresh arbitration was ordered which ended in her favour in September 1999. She also challenged the procedure adopted by the plaintiff of applying for a vesting order as having no legal basis at all.

On 23rd June 2000 and 15th November 2000 respectively FAIZA OSCAR MEULI and OMAR MOHAMUD MOHAMED FARAH joined the fray as interested parties. In the affidavit in support of her application to be joined as an interested party Faiza Oscar Meuli (the first interested party) claimed that in 1978 she bought the undivided share of Ahmed Nassor comprising of 31.6 acres in Plot No. 248/111/MN but because she resides in Switzerland she decided to register it in the name of her mother, the defendant. In 1992 she, through her mother, subdivided that piece of land into five portions. Plot Nos. 567,568 and 569 claimed by the plaintiff are among those portions. She further stated that the plaintiff with whom they had had many cases is a trespasser who encroached onto part of her land in

1998.

On his part Omar Mohamud Mohamed Farah (the second interested Party) stated in his affidavit sworn on 15th November 2000 that he bought two pieces of land known as Plot Nos. 2060/III/MN and 2061/III/MN from the defendant in 1995. At that time the plaintiff was claiming a portion of the defendant's land but the defendant told him that the plaintiff was a mere squatter whom she was in the process of evicting. The following year in 1996 the plaintiff started harassing his workers claiming part of those pieces of land. The second interested party swore and filed another affidavit on 3rd June 2002 in support of his application for injunction to restrain the plaintiff from trespassing on and or destroying his property.

On 9th November 2006 directions were taken that the matter be heard by *viva voce* evidence and the parties decided to rely on their above summarized affidavits as their respective pleadings in this case. The second defendant, Pauline Kwanga, did not file any affidavit and did not participate in these proceedings. Faiza Oscar Meuli appeared through counsel, Mr. Kiume Kioko, but at some stage during the proceedings she dropped out. I supposed this is because her claim was basically the same as that of her mother the defendant who was ably represented by Miss Jadeed. So the contest remained between the plaintiff on the one part and the defendant and the second interested party on the other. The three testified and none called any witnesses.

In his testimony the plaintiff stated that he was born in 1963 on Plot No. 284/III/MN comprising 1590 acres and belonging to his late father. At that time the land was not registered and so his father had no title to it. In 1989 Pauline Kwanga, the second defendant, came onto the land and built a bar. As she did not interfere with the portion he occupied he was not interested with her occupation. But the defendant was. She filed HCCC. NO. 931 of 1981 against Kwanga and the court awarded her 11.6 acres in 1986, which were to be excised from the said Plot No. 284/III/MN and ordered a survey that resulted in Plot No. 566 comprising 11.6 acres, Plot No. 567 comprising 10 acres and Plot No. 568 comprising 16 acres and Plot No. 569 comprising 4 acres. The defendant was given Plot No. 566 and he (the plaintiff) took the other three subdivisions, which fell on the portion he was occupying.

Not satisfied with the 11.6 acres she was awarded in 1989 the defendant filed RMCC. No. 508 of 1989 against him claiming the whole of Plot No. 284/III/MN. When the case went before the Senior Resident Magistrate for hearing on 11th June 1991 it was by consent referred to elders for arbitration. On the following day that is on 12th June 1991 a further consent was recorded restraining the plaintiff (who was the defendant in that case) from constructing any structures on the land but allowing him to remain on it until further orders of the court. The elders in Land Award No. 9 of 1992 awarded the land to the defendant. But as that award was made outside the 60 days ordered by the court the plaintiff got it set aside with costs to him. In his ruling of 16th March 1993 the Senior Resident Magistrate ordered that the consent order of 11th June 1991 was to remain in force.

Armed with that ruling setting aside the elders' award the plaintiff went to the Lands Office to lodge a caveat. As the matter was pending in court he was advised to obtain a prohibitory order. He went back to court and obtained one, which he registered against the three subdivisions he claimed. As the matter remained in limbo, he brought this Originating Summons and obtained a vesting order, which was later set aside.

In cross-examination the plaintiff conceded that Plot No. 284/III/MN was registered land and that it was on 4th June 1957 transferred to one Swaleh Bin Malim Hero who transferred it to Ahmed Nasoro on 19th June 1957. He further conceded that the survey giving rise to subdivision Nos. 566, 567, 568 and 569 was according to defendant's Ex. 3 cancelled and another one carried out which resulted in subdivision Nos. 2057/III/MN to 2062/III/MN and that the transfers of subdivisions Nos. 2060 and 2061 to the second interested party were registered on 17th May 1995 while his prohibitory order was registered eight days later on 25th May 1995. Although he stopped the second interested party from sinking a borehole or carrying out any other developments on those pieces of land he denied harassing or threatening his workers.

As I have said the plaintiff did not call witnesses. After closing his case the defendant took the witness stand. She said that in 1974 while she was working for Casurina Hotel in Kikambala one John Alfa, a Tanzania introduced her to Chief Ahmed Nator. The latter sold to her 11.65 acres of his share in L.R. No. 284/III/MN. At that time Nator had allowed John Alfa to build a bar on the land. When she bought the land she allowed him to complete it. After sometime John Alfa told her that as the Kenya Government wanted foreigners out of the country he had sold his structure without land to John Kwinga. Kwinga agreed to pay to the defendant ground rent of shs. 30/- per month but he did not. Instead after Nator had died he brought in a surveyor who despite her protestations excised Nator's whole share of 42 acres from L.R. No. 284/III/MN and subdivided into three portions. To protect her interest she filed HCCC. No. 931 of 1981 against Pauline Kwinga the widow of John Kwinga who had by then died, the Public Trustee and Kulthum Ahmed Natoro the son of the late Chief Ahmed Natoro. The court in that case ordered Pauline Kwinga to vacate the defendant's 11.65 acres. After that she bought the remaining pieces from Kulthum Ahmed Natoro and ended up with 42 acres. She caused them to be consolidated and sub-divided afresh into six pieces. The resulting subdivisions were L.R. No. 2057/III/MN to 2062/III/MN. She sold subdivision Nos. 2060/III/MN & 2061/III/MN to the second interested party and has no problem with him.

The defendant further testified that when she bought the land the plaintiff was nowhere on it. The plaintiff was brought to the land in 1988 by a lady known as Mama Mushi a wife to the Tanzanian John Alfa who had left. That Mama Mushi leased a structure on the defendant's land to run a bar. She was however unable to pay rent and she left with the plaintiff after two months.

Soon after that the defendant was hospitalized for a month and after discharge she stayed with her son in town for over two months. On going back to the land she found the plaintiff had returned and put up a structure on it. That led to several cases with the plaintiff all of which were decided in her favour.

The evidence of Omar Mohamud Mohamed Farah was in a nutshell that he bought L.R. Nos. 2060/III/MN and 2061/III/MN from the defendant in 1995 and got them transferred to his name. At the time of purchase the two pieces of land were vacant and their titles were clear of any encumbrances. It is when he started developing them that the plaintiff started claiming that Plot No. 2060 as being his Plot No. 567 and that part of Plot No. 2061 was on his Plot No. 568 and has since not given him any peace.

After the parties had closed their respective cases counsel for the defendant and second interested party filed written submissions. I have considered them.

This case is a clear manifestation of the untold suffering that the court staff in collusion with parties sometimes cause to innocent parties. From the evidence as summarized hereinabove it is clear as daylight that there was no basis for the issue of the prohibitory order which is the basis of this case. The prohibitory order talks of a decree having been passed in favour of the plaintiff in Land Case No. 9 of 1992. No decree had been issued in that case. If the Chief Magistrate had bothered to peruse that file before signing the prohibitory order he could have realized that the case was still pending and that there was no decree in favour of either party. If anything the plaintiff in this case who was the defendant in that case had actually lost before the elders. All he had succeeded in was in setting aside of the elders' award on a technicality.

Reverting to the application before me, as I have said it seeks a vesting order under section 48 of the Trustees Act and Order 36 Rules 1 and 5A of the Civil Procedure Rules. How the plaintiff came to think of a vesting order can only be implied from the circumstances of this case.

Realising that the matter was going to remain in limbo for quite some time and he had an order authorizing him to continue staying on the land until the matter was determined, the plaintiff obviously started having ideas of how he could make his stay on the land more secure. As he said he went to the Lands Office to lodge a caveat. We do not know if he gave the Lands Office officials the correct position in the court case. Whatever he might have told them, as the matter was the subject of a court case he was advised that the right document to lodge was a prohibitory order. He went back to court and got one which he caused to be registered against the title. Having succeeded that far he obviously started

scheming to get titles to the suit pieces of land. I say scheming because he had not succeeded in any of the cases to get any order awarding the pieces of land to him. That is apparently when he was advised of a vesting order hence this Originating Summons.

What is a vesting order? Blacks Law Dictionary, 7th edition defines a vesting order as “a court order passing legal title in lieu of a legal conveyance”. In other words it is an order of a court, which issues to confer ownership of property upon a person or to invest a person with the full title to the property of another person who the court has found to be under obligation to invest that other person with the title to the property but has refused or is unable to do so. That in essence is what section 48 of the Trustees Act provides for. Though long, for ease of reference, let me set it out. It reads: -

“Where any court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of any interest in the land, or entitled to a contingent right therein, and is a party to the action or proceedings in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee for purposes of this Act, and the court may make an order vesting the land or any part thereof for such an estate or interest as the court thinks fit in the purchaser or mortgagee or any other person.”

Order 36 Rule 1 of the Civil Procedure Rules under which this Originating Summons is also brought provides for the people who may take out originating summons and in respect of what matters. They are executors or administrators of deceased persons, trustees under any trust and any person claiming an interest or relief as a creditor or heir or in whatever capacity from the estate of a deceased person or from any trust. The Rule goes on to provide for the situations in respect of which originating summons can be made.

No judgment has been given or order made in this case in favour of the plaintiff requiring the title to the suit pieces of land to be conferred upon or invested in him. The Plaintiff is also not claiming any relief from the estate of any deceased person or under any trust. So section 48 of the Trustees Act and Order 36 Rules 1 and 5A under which this matter is brought are totally inapplicable. I did point out this to Counsel for the plaintiff at the start of the hearing but he said he was under instructions to proceed with the matter as it stood and actually prosecuted it as though it was a claim for title under adverse possession. From the evidence on record it is clear to me that even if this was any such claim the same would not have succeeded. The plaintiff did not prove that he has been in adverse possession for 12 years and over. Before 1995 all the suit pieces of land belonged to the defendant and she had title deeds to them. In 1995 she legally transferred Plot nos. 2060 and 2061 to the second interested party and retained the others. The plaintiff has no legal interest in any of them and he should stop interfering with the defendant's and second interested party's quiet possession of them.

For these reasons I find no merit in this Originating Summons and I therefore dismiss it with costs to the defendant and the second interested party.

DATED and delivered this 25th day of May 2007.

D.K. MARAGA

JUDGE

25.5.2005

Before Maraga – Judge

Kinyanjui for plaintiff

Wameyo for the defendant

Swaleh for 2nd Interested Party

Court clerk - Mitoto

Court – Judgment delivered in court.

D.K. MARAGA

JUDGE