



REPUBLIC OF KENYA



KENYA LAW
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**Said & another v Saloo (Environment & Land Case 43 of 2009)
[2022] KEELC 15026 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15026 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 43 OF 2009
NA MATHEKA, J
NOVEMBER 22, 2022**

BETWEEN

SALIM KARAMA SAID 1ST PLAINTIFF

TUTE ALI SWALEH 2ND PLAINTIFF

AND

YAKUUB MAHMOOD BABAR SALOO DEFENDANT

JUDGMENT

1. The plaintiffs state that they are the legal administrators of the estate of Mohamed Yasin Nofali, deceased. At all material times to this suit, the plaintiffs were the registered owners of all that piece of land known as CR No 14845 situated at Takaungu in Kilifi district and demarcated and delineated on plan No 77082 deposited in the office of the Recorder of Titles at Mombasa and numbered LR No 1513/32 and measuring 0.1814 acres or thereabouts. On or about March 2008 the 1st plaintiff noticed that some developments were being undertaken on the suit property which these developments were being undertaken by the defendant and were without the plaintiffs authority or consent. The plaintiffs have discovered that the defendant has fraudulently and/or illegally obtained another title to the suit premises being title No CR No 32562 of LR No 1513/32 Takaungu with the intention of illegally dispossessing the plaintiff of the same. The defendant has carried out building works on the suit property to the detriment of the plaintiffs right. That the defendant's actions amount to trespass and/or wrongful occupation of the suit property and the plaintiffs seek an order of this honourable court to restrain the defendant in his illegal action. The defendant in total disregard to the plaintiffs claim continues to illegally occupy the suit property and has refused, neglected and/or otherwise failed to vacate the suit property thereby occasioning the plaintiffs loss and damage. The plaintiff prays for judgement against the defendant for;



1. A declaration that the plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as CR No 14845 of LR No 1513/32 Takaungu (the suit property.)
 2. A declaration that the defendant's occupation of any part of all that piece of land known as CR No 14845 of LR No 1513/32 Takaungu amounts to trespass and/or wrongful occupation of the suit property
 3. An order of injunction directing the defendant whether by himself or his servants, agents or otherwise to quit, vacate from and stop, and/or from selling, developing, alienating and/or in any other way dealing with the property known as CR No 14845 of LR No 1513/32 Takaungu and CR No 32562 of LR No 1513/32 Takaungu.
 4. An order for cancellation of and/or revocation of title No CR No 32562 of LR No 1513/32 Takaungu is a forgery.
 5. General damages for trespass and/or illegal and wrongful occupation.
 6. Costs of this suit
 7. Any other or further relief as this honourable court may deem appropriate.
2. The defendant avers that as the legal owner of the property he has inalienable right to construct which he has done and is in fact living. That the defendant has established a residential house on his plot No 1513/32 Takaungu and cannot be told to stop doing what he has already done and completed. The defendant avers that he has been charged in Mombasa criminal case No 3563 of 2008 wherein the plaintiffs are the complainants in respect to the same subject matter and the defendant thinks that such disclosure is necessary. The defendant's counterclaim is that he is the registered owner of plot No 1513/32 CR No 32562 Takaungu. The 1st and 2nd plaintiffs are alleged to be the administrators of the estate of the late Mohamed Yasin Nofali whom they purport to be the owner of plot No 1513/32 CR No 14845 Takaungu. The defendants purchased plot No 1513/32 CR No 32562 from one Zaharan Mr Zaharan on or about January 15, 2003 upon payments of the purchase price he was issued with certificate of title of the same. That upon the suit property -legally and procedurally being transferred to the defendant who followed all the conveyance procedure he began construction of a maisonette in the suit plot which maisonette contains four rooms i.e. on the ground floor and two on the first floor. That when the defendant purchased the suit plot it was vacant except for one Rashid Abdalla who was squatter on the suit plot. That the defendant paid the said squatter, Rashid Abdalla Kshs 100,000/= to give him vacant possession of the suit plot so that he could fence the same and construct the maisonette. That the defendant constructed a double storey building with two rooms on top and two rooms on the ground. That it took the defendant almost six months to construct and furnish the house without any interruptions or condemnations. That when the suit herein was filed the defendant was the registered owner and the owner of the maisonette standing on plot No 1513/32 CR No 32562 for more than five years. The defendant avers that he had occupied the said house for over 5 years when the 1st plaintiff accompanied by one IP Mwaura on or about 2008 and summoned to Urban police station and ordered to carry with him all the documents relating to the suit plot. That by the time the 1st plaintiff and IP Mwaura summoned the defendant he had constructed the house and completed the same and fenced the plot which he operated as a cottage .
3. The defendant avers that when he began construction there were many neighbors who reside in the jurisdiction of the suit plot and no one came forward to claim that he was building on someone's plot nor that the family of Mahamud Yasin Nofali owned the suit property. The defendant is that if indeed



the suit plot belonged to the 1st plaintiff great grandfather by the time he constructed and completed the house they would have moved the court for injunction orders if the plot belongs to them and not Zaharan M Zaharan to whom the defendant had purchased the plot from. The defendant avers that if the plaintiff's and or administrators of the estate of the late Mohamed Yasin Nofali indeed own any plot it is far away from the defendant's plot and they acquired title No CIR 1485 LR No 1513/32 illegally and by false misrepresentation. The defendant prays for judgment against the plaintiff for;

1. An order for cancellation of and/or revocation of title No CR No 1485 of LR 1513/32 Takaungu in the names of the administrators of the estate of Mohamed Yasin Nofali
4. This court has considered the evidence and the submissions therein. It is the plaintiffs' case that they are the legal administrators of the estate of Mohamed Yasin Nofali, pursuant to High Court Succ cause No 84 of 2003 letters of administration intestate issued on May 25, 2004 in the estate of Mohamed Bin Yassin Nofali (PEX-f). The said letters of administration were confirmed and Tute Ali Swaleh and Salim Karima Said were issued with certificate of confirmation of a grant on September 8, 2004 (PEX-g) in their capacity as granddaughter and great grandson respectively. I do note that the certificate of confirmation is incomplete as it does not include the schedule of the deceased property being distributed to the dependents of the estate. The court cannot confirm that indeed the grant was issued to distribute the suit property.
6. The plaintiffs claim to the suit property is premised on a certificate of ownership dated February 13, 1976 which indicate that LR 1513/32 is registered in the name of the administrator of the estate of Mohamed Yasin Nofali. The plaintiffs claim that when Mohamed Yasin Nofali died in 1950, and the suit property was inherited by father to the 2nd plaintiff and a cousin to Mohamed Yasin Nofali. Then the 2nd plaintiff, deceased and mother to the 1st plaintiff bought the suit property from her father as seen from the translated sale agreement PEX-b. However, the said agreement of sale does not indicate the nature of the relationship between the vendor (Ali Bin Saleh) and the purchaser (Tute Bint Ali Bin Saleh), further the agreement fails to indicate specific suit property being purchased. Therefore, the court cannot state with certainty that it was the suit property which was the subject of the said transaction.
7. Further the 1st plaintiff in his witness statement PEX-a he makes contradicting statements on one hand he claims that he draws ownership to the suit property as an administrator of the estate of Mohamed Yasin Nofali pursuant to the confirmed grant dated September 8, 2004 and on the other hand he claims that the suit property belongs to the 2nd plaintiff his deceased mother and should pass to him and other beneficiaries. I find that the certificate of title to the suit property indicate that the registered owners as at February 13, 1976 were the administrator of the estate of Mohamed Yasin Nofali, a position which the plaintiffs claim remains to date as seen from the certificate of postal search dated April 30, 2003 (PEX-h). Upon a keen perusal of this certificate of postal search I do find that they were issued on April 30, 2003 at least a year before the confirmation of the grant issued to the plaintiffs by court on September 8, 2004. The plaintiffs have neither disclosed to court the identity of the initial administrator nor have they informed court whether they are alive or dead. The plaintiffs have also not produced the letters of administration that were granted to the initial administrator which led them to be registered as the administrator of the estate of Mohamed Yasin Nofali. The plaintiffs have therefore failed to prove to court that they are the registered owners of the suit property by reason of being administrators to the estate of Mohamed Yasin Nofali.
8. The second assertion made by the plaintiff is that the 2nd plaintiff, his mother bought the suit property from her father who inherited it from one Mohamed Yasin Nofali. The agreement of sale that the 1st Plaintiff seeks to rely on is the translated sale agreement PEX-b, which unfortunately does not indicate



the nature of the relationship between the vendor (Ali Bin Saleh) and the purchaser (Tute Bint Ali Bin Saleh), further the agreement fails to indicate specific suit property being purchased. Therefore, the court cannot state with certainty that it was the suit property which was the subject of the said transaction. In addition, the 2nd plaintiff died and a certificate of death issued on March 21, 2014 PEX-1, however from a copy of an order in Kadhi succession case No 60 of 2018 In the matter of the estate of Tute Ali Swaleh dated April 25, 2018 PEX-q, the deceased had several beneficiaries and the 1st plaintiff is named as the trustee of the estate which costed of the suit property. The Kadhi's court cannot enter judgement and distribute a parcel of land which is subject to litigation in this suit. For the above reasons I find that the plaintiff has failed to, on the balance of probability proved to court that they are the registered owners of the suit property and their claim is dismissed.

9. It is the defendant's case that he is registered owner of plot No 1513/32 having purchased the same from Zaharan M Zaharan *vide* an agreement of sale dated January 10, 2003 between the Zahran Mohamed Zahran (vendor) and Yakooob Mahmood Baber Saloo (purchaser) for Kshs 130,000/= (DEX-2). He averred that the suit property was legally and procedurally transferred and he was issued with a certificate of title on January 21, 2003 (DEX-1). He stated that after the purchase he constructed a maisonette and lived there peacefully until 2008 when the 1st plaintiff claimed ownership to the suit property. The defendant states that the plaintiffs were fraudulent and misrepresented themselves as heirs of Mohamed Yasin Nofali, that they misled the plot number of the suit property and gave contradictory documents to support their case. The defendant prayed for the cancellation or revocation of the title to LR 1513/32 Takaungu in the names of the administrators of the estate of Mohamed Yasin Nofali.
10. On cross examination, the defendant (DW1) stated that he bought the suit property from Zahran Mohamed Zahran. On cross examination, Zahran Mohamed Zahran (DW2) stated that the suit land belonged to his grandmother Hadyah Ali Suleiman who lived in suit property until her demise. He testified that he got the certificate of title from lands office in Mombasa after writing to them stating the land belonged to his grandmother and presenting all the relevant documents.
11. I have looked at the agreement of sale and I note that the same is dated January 10, 2003. The defendant has produced a letter of consent DEX-5 addressed to Zahran from the Bahari land control board, making reference to Zahran's application dated December 13, 2002 and the consent is dated December 24, 2002. The defendant has also produced 2 copies of certificate of postal search; one is dated December 13, 2002 with Zahran as the registered owner DEX-4 and the other one dated October 21, 2004 with the defendant as the registered owner DEX-3. The defendant has also produced a certificate of title to the suit property indicting that the same was transferred to him on January 21, 2003. I find that the defendant is an innocent purchaser for value. I find that this is a case of two titles over the same land. The title to be upheld is the one that conformed to the procedure and can be properly traced. I find that the defendant's title has a good foundation and that title passed properly to him. I find that the defendant has proved his counterclaim dated January 30, 2018 on a balance of probabilities and I grant it as prayed with costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22TH DAY OF NOVEMBER, 2022.

N.A. MATHEKA

JUDGE

