



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 506 OF 2011

PETER KIRIGHA1ST PLAINTIFF

WILLIAM MATONYA AOSA.....2ND PLAINTIFF

EDWARD MUTUA.....3RD PLAINTIFF

CHRISTOPHER K. MWERO.....4TH PLAINTIFF

VERSUS

1. ADA TRANSPORTERS LIMITED

2. DIM PROPERTIES LIMITED.....DEFENDANTS

JUDGMENT

PLAINTIFFS' CASE

1. The plaintiff's instituted this suit by a plaint dated 12th September, 2011 which was amended on 10th February, 2012 and further amended on 28th February, 2017. The plaintiffs are seeking the following orders against the 1st and 2nd defendants jointly and severally:

a. A mandatory injunction prohibiting the 1st and 2nd Defendants from constructing a perimeter fence that would block hinder deny access by the plaintiffs to their respective properties known as PLOT NO. 23921, MARIAKANI.

b. A declaration that the plaintiffs have the right of access to their respective properties known as PLOT NO.23921, MARIAKANI.

c. Damages.

d. A declaration that the title held by the 2nd defendant be and is hereby revoked.

e. A declaration that the plaintiffs herein jointly and severally have acquired proprietary interest in the property known as PLOT. NO.23921, MARIAKANI has been extinguished.

f. A declaration that the Land Registrar be and is hereby ordered to cancel the register indicating the defendants as the registered owners and in the alternative to rightful the plaintiff herein as the beneficial and/or registered owner of the property known as PLOT NO.23921, MARIAKANI.

g. A declaration that the Land Registrar be and is hereby ordered to cause registration of the plaintiffs as the owners of PLOT NO.23921, MARIAKANI and proceed to issue a title document to their favour without gazettelement.

h. Costs and interests.

2. The plaintiffs' case as pleaded is that vide a sale agreement dated 7th April, 2009 executed between 2nd Plaintiff and a Mr. Kalu Kiti and Kenga Kahi Kiti, the 2nd Plaintiff purchased for valuable consideration and in good faith a distinct portion of land measuring 1³/₄ acres

situated in the Mitangoni area along Mombasa- Nairobi Highway near the Mariakani Weighbridge in Mariakani Location of Kaloleni Distinct from the said Kitl Kalu Kiti and Kenga Kalu Kiti. That vide a Sale Agreement dated 24th July, 2002 the 3rd plaintiff purchased for valuable consideration and in good faith a distinct portion of land measuring 1.6 acres situated along the Mombasa-Nairobi Highway by the junction leading to the Kenya Army Barracks in the same area from a Mr. Kiti Kahi and a Mr. Tsuma Mombo. That vide another Sale Agreement dated 19th April 2008, the 1st Plaintiff purchased a distinct portion of land measuring 0.5 acres from Kiti Kahi Kiti and that vide a sale agreement dated 21st December, 2003, the 4th plaintiff purchased a distinct portion of land measuring approximately one (1) acre from the said Kenga Kalu Kiti.

3. The plaintiffs aver that their respective agreements were witnessed and approved by the area chief who is said to be well versed with the issue of land ownership in the area. The plaintiffs aver that since the execution of the respective sale agreements, they have been in quiet possession of their respective properties without any disturbance and that they have proceeded to develop their respective portions of land at great costs by constructing structures, farming and conducting animal husbandry.

4. The plaintiffs state that on 6th September, 2011, the 1st defendant without notice and legal right purported to lay claim to a portion of the land and asserted its claims on the land by instructing its agents and/or servants to commence the digging of trenches with a view of constructing a perimeter fence around the said property which action would lead to the plaintiffs having no access to all their properties. The plaintiffs allege that the 1st defendant's action is in breach of the plaintiffs' rights in alieno solo as the construction of the perimeter fence would totally shut out the plaintiffs from accessing their properties.

5. The plaintiffs further state that the allotment of the suit property to the 1st defendant in the year 1996 by the Municipal Council of Mariakani and the subsequent sale and transfer of the property to the 2nd defendant was unprocedural and tainted with fraud. The plaintiffs have given the particulars of fraud and unprocedural allotment to the 1st and 2nd defendants companies as follows:

a) There was no entity by the name ADA TRANSPORT LIMITED as at the year 1996 when it is alleged that the 1st defendant was allotted the property in question by the Town Council of Mariakani.

b) The defendants Company was actually incorporated in the year 2010 as per records obtained from the companies registry Nairobi.

c) The property is situate northwest of Mariakani and not South East as stated on the 1st defendant's title.

d) The alleged minutes of District Plots Allotment Committee meeting held at the District Commissioner's office on Friday 25th October, 1996 were doctored to reflect an entry purporting the allocation of the suit property to non-existent entity i.e. the 1st defendant company.

e) The plaintiffs have further established that the 1st defendant company has recently transferred the property to a 3rd party company i.e. DIM PROPERTIED LIMITED the 2nd defendant herein to defeat the plaintiffs claim in the present suit.

f) The 1st and 2nd defendants company in possible cahoots with the Town Council of Mariakani acted to deprive the plaintiff of the vested proprietary rights preferential and entitlement under the Trust Land Act.

6. Christopher Kalimbo Mwero, the 4th plaintiff testified as PW1. He stated that he had the authority of the 1st, 2nd and 3rd plaintiffs to testify on their behalf. PW1 adopted his witness statement dated 24th October, 2018 as his evidence –in-chief. He testified that on 21st December, 2003, bought a piece of land measuring one (1) acre from a married couple, Mr. Kenga Kalu Chiti and his wife Mrs. Kuha Kenga Kalu for Kshs.30,000. That the transaction was witnessed by the area Assistance Chief, one Mr. Sammy Charo Kombo. PW1 stated that after buying the piece of land, he used it for farming and planted crops such maize for domestic use and selling. That he utilized the land and carried out his farming activities peacefully without any interference from anyone until 6th September, 2011 when the 1st defendant without notice or legal right purported to lay claim on the said piece of land and through its agents and/or servants commenced digging trenches and building a perimeter wall, hence the filing of this suit. He testified that the other plaintiffs purchased their land at different times.

7. PW1 testified that a few days before the 6th September, 2011, the District Officer of Mariakani came to the suit land for a public Baraza and explained that the portions the plaintiffs had purchased had earlier been bought by someone else and who was to come anytime. That indeed some people came on 6th September, 2011 which they later learnt represented the 1st defendant and proceeded to dig trenches to put up a perimeter fence under the guard of police officers. That the fence surrounded the plaintiffs portions of land. The witness argued that the 1st defendant's title indicates that the plot is located in south east of Mariakani Trading Centre while the actual location of the suit land is North West. He further testified that when they carried out a search, they found out that Ada Transporters Limited was incorporated in the year 2010 yet it was given title deed in 1998. The plaintiffs later found that the property was already transferred and was in the name of the 2nd defendant. He urged the court to grant the orders sought, or alternatively, the plots be valued and the plaintiffs compensated at the current market rates. PW1 produced the documents in their list dated 27th February, 2012 as P.exh. 1 to 15.

8. The 1st plaintiff Peter Kirigha, testified as PW1 and adopted his witness statement dated 24th October, 2018 and filed in court on 25th October, 2018 as his evidence-in-chief. His evidence was that on 19th April 2009, he purchased a piece of land measuring 0.5 acres from two brothers, Kiti Kahi Kiti and Kenga Kalu Kiti for consideration of Kshs.40,000/=. That the transaction was witnessed by the area Assistant Chief, Mr. Sammy Charo Kombe. That after buying the land, he used it without interference for farming and to rear livestock until on 6th September, 2011 when the 1st defendant laid a claim to it, dug trenches and put up a perimeter wall around it. He reiterated the evidence by the 4th plaintiff.

9. The 2nd plaintiff, William Motaya Aosa, testified as PW1 and adopted his witness statement dated 24th October, 2018 and filed in court on 25th October, 2018 as his evidence-in-chief. He stated that he bought a piece of land measuring 1³/₄ acres at Kshs. 110,000/= from two brothers, Kiti Kahi Kiti and Kenga Kalu Kiti and that the agreement was witnessed by the area Assistant Chief, Sammy Charo Kombe. That upon purchasing the land, he used it for farming and to rear livestock interference until on 6th September, 2011 when the 1st defendant carried out the aforementioned actions. His other evidence mirrored that of PW1.

DEFENCE CASE

10. The 1st defendant entered appearance on 27th October, 2011 through the firm of Messrs Khatib & Company Advocates. From the court record, it appears no defence was filed as there is no defence in the court file. On 24th April, 2018, the firm of Messrs Khatib & Company Advocates filed an application for leave to cease from representing the 1st defendant and that application was allowed by the court on 22nd May, 2018. The 2nd defendant did not enter appearance despite being served. Although both defendants were served with a hearing notice, none of them attended court during the hearing.

SUBMISSIONS

11. In their submissions dated 1st July 2020 and filed on 16th July, 2020, the plaintiffs identified the issues for determination to be whether the defendant's title is legal and whether the plaintiffs are entitled to the reliefs sought. It was the plaintiffs submission that the 1st defendant which according to the search from the Registrar of Companies shows was incorporated on 22nd September, 2010, was not in existence in the year 1996 or 1998 and that the 1st defendant could not have contracted in any capacity in the acquisition of title to the suit property. That this is a violation of the provisions of Section 3 (3) of the Law of Contract Act. The Plaintiffs' counsel relied on the case of **Flavemart Enterprise Limited –v- Kenya Railways Corporation (2019)eKLR** which referred to the case of **Charles Karaithe Kiarie & Others –v- Administrators of the Estate of John Wallace Mathare & Others (2013)eKLR** and **Newborn –v- Sensolid (Great Britain) Ltd (1954) 1KQ 45**. The plaintiffs submitted that as the geographical location of the title issued to the 1st defendant was in the South East of Mariakani Trading Centre instead of the correct geographical and/or actual location being the North West of Mariakani Trading Centre underlines that the 1st defendant obtained registration of the suit property in a fraudulent, illegal, unprocedural and irregular manner. The plaintiffs' counsel submitted that the law requires allegation of fraud to be strictly proved as was stated in the case of **R. G Patel –v- Lalji Makanji (1957) EA 314** where the court held that:

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

The plaintiffs submitted that they proved their case on a balance of probability and that the 1st defendant's title was acquired through fraudulent, illegal and unprocedural means. The plaintiffs further submitted that this court finds that the transfer of the subject property to the 2nd defendant was illegal and unprocedural and that that title is also a nullity in the eyes of this court as it was acquired in utter disregard of the lis pendens doctrine. They relied on the case of **Elijah Makeri Nyangwara –v- Stephen Mungai Njuguna & Another (2013) eKLR** and **Merit Development Limited –v- Lenana Investment Limited & 2 Others (2018)eKLR**. The plaintiffs submitted that they have proved their case on a balance of probability and that they are entitled to the reliefs sought herein.

ANAYLYSIS AND DETERMINATION

12. I have considered the pleadings, the evidence tendered and the submissions filed. The court finds that the issues for determination are as follows:

- i) Who is the registered owner of the suit property PLOT NO.23921 MARIAKANI**
- ii) Whether the defendants' titles were obtained fraudulently, illegally and through unprocedural means.**
- iii) Whether the plaintiffs have proved their case on a balance of probability.**
- iv) Whether the plaintiffs are entitled to the reliefs sought in the re-amended plaint.**
- v) Who is to bear costs of the suit?**

13. There is no doubt from the court records that the suit property was initially registered in the name of the 1st defendant, Ada Transporters Limited vide a Grant dated 20th August, 2010 who later transferred the properties to DIM Properties Limited, the 2nd defendant herein. It is also evident from the pleadings and the exhibits produced in court that the plaintiffs case is that they are owners of parcels of land which they separately and at different times between 2002 and 2009 acquired by purchase from named vendors. It is also evident that the plaintiffs assert their right to their respective plots of land through the sale agreements allegedly signed between them and the named vendors who are said to be the “original” occupants of what they claim is trust land who had been in occupation of the land for over 30 years.

14. The principle of sanctity of title under the Registered Titles Act (now repealed) as upheld by the Court of Appeal in **Wreck Motors Enterprises Ltd –v- Commissioner of Lands & 3 Others (1997) eKLR** cited with approval in **Maharus –v- J. B Glass (2005)KLR 289** provides that a registration of title under Section 13 of the Registration of Titles Act (now repealed) gives an indefeasible title to the proprietor which can only be challenged on the grounds of fraud or misrepresentation to which he is shown to be a party. Section 26 (1) of the Land Registration Act provides that:

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except: -

a) On the ground of fraud or misrepresentation to which the person is proved to be a party

Or,

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

15. The plaintiffs have alleged and submitted that the 1st defendant obtained registration of the suit property in a fraudulent, illegal, unprocedural and irregular manner and that the transfer to the 2nd defendant was also illegal and unprocedural. In their attempt to show fraud on the part of the 1st defendant the plaintiffs point to the company's incorporation number CPR/2010/32027 to suggest that it was incorporated in the year 2010. The plaintiffs also produced a Certificate of Search from the Company Registry to support this allegation and argued that the 1st defendant company could not therefore have been allocated the land in 1996.

16. The standard of proof in cases of fraud is higher than the ordinary standard of balance of probabilities in civil cases. In the case of **R.G Patel –v- Lalji Makanji (supra)**, it was held that “allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.” Further, in the case of **Koinange & 13 Others –v- Koinange (1968)KLR 23**, it was held that “allegations of fraud must be strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings.”

17. The bare insinuation of fraud by reference for which the plaintiffs allege is indicated by the date of incorporation of the 1st defendant company is without more in my view insufficient to discharge the heavy burden and high standard of proof on the allegation of fraud. A higher degree of probability on the 1st defendant involvement in fraudulent dealings in relation to its registration as proprietor of the land was necessary. The plaintiffs' further allege that the description of the geographical location of the title issued to the 1st defendant being South East instead of North West of Mariakani Trading Centre is taken to mean that the 1st defendant obtained registration of the suit property in a fraudulent, illegal, unprocedural and irregular manner. In my considered view, such allegation is too general and does not prove such serious allegation as fraud. Moreover, the plaintiffs' assertions on fraud on the defendant's title appear to have been an afterthought coming only after the 1st defendant had produced its title deed in the replying affidavit sworn by its director on 27th November, 2011. No allegations of fraud were made and particulars given in the initial plaint. Accordingly, I am unable to find that the plaintiffs have proved the alleged fraud on the part of the defendants in the registration and transfer of the suit property. Moreover the plaintiffs' assertion on fraud against the Town Council of Mariakani cannot stand because the said entity was not made a party to these proceedings to enable it respond to the allegations made against. This omission was fatal, considering that under the Trust Land Act (repeal) the council was empowered under Section 13 of the Act to set apart land for use by any person or persons in accordance with procedure set down in the Section. Further Section 53 of the said Act empowered the Commissioner for Lands to execute a grant of title on behalf of the County Council as happened in this case. On the material before the court, there is no evidence presented on the breach of any provisions of the Trust Land Act (repealed) in the allocation and subsequent registration of the land in the 1st defendant's name. There was also no search certificate on the parcel of land suggesting fraud. Moreover, in accordance with Section 41 (a) (v) of the Limitation of Actions Act, no prescriptive title may be acquired by adverse possession of Trust Land vested in County Councils. Furthermore, as occupants of Trust Land, whether “Original” or recent occupants, the purported vendors had no right to the land capable of disposable by sale. Under the repealed Act, it was the relevant County Council or local authority which held the proprietary rights to alienate the trust land in accordance with the provisions of the Act. Without title to land which the purported vendors could transfer to the plaintiffs, it is immaterial that the agreement for sale offend the Law of Contract Act. Accordingly, while I sympathize with the plaintiffs for their plight, having bought portions of land from purported vendors who had not acquired title in the land they purported to transfer so that in the end they could not pass a better title than they had, I am unable to grant the prayers sought in the further amended plaint herein.

18. Having considered and reviewed all the evidence and material placed before the court, I find and hold that the plaintiffs have not proved their case against the defendants on a balance of probabilities. Accordingly, the plaintiffs' suit is dismissed. As the defendants did not participate in the hearing, I make no order as to costs.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 3rd day of February, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant