



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO. 130 OF 2015

SHARIFF MOHAMED A. OMAR.....1ST PLAINTIFF

BOUGAINVILLAEA COTTAGES LIMITED.....2ND PLAINTIFF

VERSUS

ORNELLA BONTEMPI LUIGI (Defending in the capacity of legal representative of the estate of

Bontempi Luigi- deceased).....1ST DEFENDANT

RAKESH RAJPAL.....2ND DEFENDANT

SAHALE ABDALLA SALIM.....3RD DEFENDANT

REGISTRAR OF LANDS TITLES MOMBASA.....4TH DEFENDANT

JUDGMENT

By a plaint dated 31st July 2015 and amended on 8th January 2020, the Plaintiffs herein sued the Defendants jointly and severally seeking the following orders: -

- a) That the Defendants, their agents, servants, auctioneers or successors in title {if any} be restrained from transferring, charging, selling, leasing or in any way dealing with sub-division numbers 3044 (Orig. No. 26/1) Malindi, Plot Number 8980, 7861 (hereinafter referred to as the suit properties).***
- b) A declaration on the property has been illegally transferred to the Defendant and that any dealings on the property subsequent to the filed transfer and all are null and void and of no effect.***
- c) An order directing to the Registrar of Lands to revoke annul and/or cancel the titles in favour of the Defendants and rectify the entries to reflect the Plaintiffs and the proper successors in title.***
- d) General damages for the Plaintiffs loss of income.***
- e) Costs and interests for this suit.***
- f) Any other order this court may deem fit to grant.***

In response to the Amended Plaint, the 3rd Defendant filed a Statement of Defence and Counterclaim dated 22nd September 2020 wherein she averred that she is the registered proprietor of L.R 8980 having purchased the same from Luigi Bontempi at a consideration of Kshs. 2,500,000/- vide a Sale Agreement dated 28th April 2016. The 3rd Defendant prayed for the following orders:

- a) A declaration that she is the true owner of the suit plot being Plot No. 8980 (Original No. 28/34) Malindi.***
- b) An order of a permanent injunction restraining the Plaintiffs by themselves or their servants, heirs, employees, agents, assigns, from interfering in any manner whatsoever with the 3rd Defendant's use, occupation, possession and quiet enjoyment***

of Plot No. 8980 {Original No. 28/34} Malindi.

c) The cost occasioned by this Counter-claim and interest thereon.

PLAINTIFFS CASE

PW1 adopted his statement and testified that the Plaintiffs are a limited liability company with three shareholders namely the 1st Defendant, the 1st Plaintiff and Bontempi Claudio and that during the course of business, the 1st Defendant embezzled money from the company and purchased personal property which included the suit properties herein.

It was PW1's testimony that during the pendency of the suit the Defendant entered into a Sale Agreement for the transfer of the property to Rakesh Patel, 2nd Defendant and Sahale Abdalla Salim, the 3rd Defendant. This necessitated the amendment of the plaint to plead fraud, irregular transfer of property and include the Defendants.

PW1 stated that he sued the Defendant in Mombasa High Court in **HCC NO.255 OF 1995 SHARIFF MOHAMED & ANOTHERS VS BONTEMPI LUIGI** where Justice Serگون on the 26th of July 2007 in allowing the Plaintiffs' suit agreed that the Defendant ought to account for the proceeds that came into his possession on behalf of the 2nd Plaintiff.

It was PW1's further evidence that the Defendant being dissatisfied with the judgment appealed to the Court of Appeal but the court dismissed the Appeal with costs and re-affirmed the High Court's findings.

PW1 stated that he filed this suit after the Court of Appeal affirmed that the decision of the High Court which held that the Defendant used the proceeds from the company to purchase property hence had to account. That the 1st Defendant purchased properties with monies from the company but registered them in his sole name. He simultaneously filed an injunction application restraining the Defendant from dealing with the properties until the determination of the suit which order was issued on 22nd September 2016.

3RD DEFENDANT'S CASE

DW1 Hussein Abdalla Salim testified on behalf of the 3rd Defendant. He adopted his written statement dated 21st September 2021 and that of the 3rd Defendant dated 22nd September 2020. DW1 testified that the Plot LR No. 8980 originally belonged to the 1st Defendant who bought the same from one Said Abdalla Salim in the year 1994.

He further stated that the 3rd Defendant vide a Sale Agreement dated 28th April 2016, bought the properties 8979 and 8980 from the 1st Defendant at Kshs. 2,500,000/- each. It was DW1's testimony that the 3rd Defendant did due diligence before purchasing the same and was registered as the owner of the two plots.

DW1 stated that she is the registered owner of the Plot No. 8980 (Orig. No. 28/34) Malindi which was transferred to her vide an Indenture dated 30th December, 2016 registered at the Mombasa registry on 27th March, 2017 as LT-37 Folio 221A and File No. 6303 where she has enjoyed peaceful and quiet occupation since then.

On cross examination that DW1 testified that she deposited the purchase price money into Luigi Bontempi's wife's account and was not aware of any court case between Bontempi and the Plaintiff in respect of the suit plots. It was DW1's further evidence that there was no restriction registered against the title when she conducted a search.

PLAINTIFFS SUBMISSIONS

Counsel reiterated the evidence of the parties and submitted that the 3rd Defendant was not an innocent purchaser and that she fraudulently conspired with the 1st Defendant to unlawfully transfer a property from a person with no proprietary interest.

Mr. Matheka relied on the case of **Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another [2013] eKLR** to buttress the issue of fraudulent acquisition of the suit land by the 1st and 3rd Defendants. Counsel further stated that the Defendants failed to show proof of payment of the purchase price, stamp duty and registration fees and that a mere possession of a title did not imply that the same could not be challenged and relied on the case of **Alberta Mae Gacci v AG & 4 Others [2006] eKLR**.

Counsel therefore urged the court to find that the Plaintiff has proved his case on balance of probabilities.

3RD DEFENDANT'S SUBMISSIONS

Counsel for the 3rd Defendant listed the following issues for determination by the court:

a) Whether or not the 1st Plaintiff has capacity to sue on behalf of the 2nd Plaintiff.

b) Whether or not the 3rd Defendant acquired Plot No. 8980 Originally No. 28/34 Malindi Lawfully and procedurally.

c) Whether or not the particulars of fraud by the Plaintiffs have been proved with regards to the 3rd Defendant.

d) Whether or not the Plaintiffs are entitled to the orders sought in the Amended Complaint dated 27th January 2021.

On the first issue as to whether the 1st Plaintiff has capacity to sue on behalf of the 2nd Plaintiff, counsel submitted that the Plaintiff did not have authority to sue hence the suit should be struck out as it did not comply with the provisions of Order 4 rule 1 of the Civil Procedure Rules, 2010.

Counsel cited the case of **Kenya Commercial Bank Limited v Stage Coach Management Limited [2014] eKLR**.

On the second issue as to whether the 3rd Defendant acquired the suit property legally and procedurally, counsel submitted that the 3rd Defendant demonstrated the legality of how she acquired ownership rights in respect of L.R 8980 and further that she was issued with an indenture dated 27th March 2017 which was conclusive proof that she was the indefeasible proprietor of L.R 8980 by virtue of section 26 of the Land Registration Act No. 3 of 2012.

It was counsel's submission that the 3rd Defendant demonstrated that she acquired the suit properties legally by doing the following:

a) performed due diligence by conducting an official search at the Mombasa Registry before preparation of the Sale Agreement by the present advocates on record. The official search disclosed that LUIGI BONTEMPI was the registered owner of the suit portion and there were no encumbrances of any nature registered against the suit portion being Plot No. 8980 (Orig. No. 28/34) Malindi.

b) Apart from the official search the transfer LUIGI BONTEMPI went ahead to issue the 3rd Defendant herein with his original indenture between himself and SAID ABDALLA BAKSHUWEIN which was registered in the lands registry at Mombasa on 7th October 1994.

c) After conducting due diligence, the 3rd Defendant went ahead to instruct the advocates on record to prepare a Sale Agreement dated 28th April 2016 for the subject portion.

d) The 3rd Defendant went ahead to have an Indenture prepared as an instrument of transfer of the subject portion between herself and LUIGI BONTEMPI dated 30th December 2016 which was registered at the Mombasa Lands District Registry on 27th March 2017 as LT37 Folio 221A File No. 6303

Counsel relied on the case of **Munyu Maina v Hiram Gathiho Maina, Civil Appeal No. 233 of 2009**, where the court held that when a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. Counsel urged the court to dismiss the Plaintiffs case with costs.

The 2nd and 4th Defendants neither entered appearance nor file a defence.

ANALYSIS AND DETERMINATION

The issues for determination in this case are: -

a) Whether the 1st Plaintiff has capacity to sue on behalf of the 2nd Plaintiff.

b) Whether the 1st Defendant bought the suit properties with proceeds from the plaintiff company.

c) Whether the 1st 2nd and 3rd Defendants fraudulently acquired the suit land.

d) Whether the 3rd Defendant is an innocent purchaser for value and whether the Counterclaim is merited.

e) Whether the Plaintiffs are entitled to the orders sought.

On the first issue whether the 1st Plaintiff has capacity to sue on behalf of the 2nd Plaintiff, it is undisputed that the 1st Plaintiff is one of the directors and shareholders of the 2nd Plaintiff. It was also clear that the 1st Plaintiff was suing the Defendants on behalf of the 2nd Plaintiff Company, for the very reason that the suit properties were allegedly purchased by the 1st Defendant using the company's funds.

The Plaintiffs filed a copy of the company's board resolution and the court is cognizant of the fact that a company is separate legal person which has powers to sue and be sued. Therefore, the proper Plaintiff for wrongs committed against the company is the company, which acts through the majority of its shareholders. {See **Foss -v- Harbottle [1843] 2 HARE 461**, the ruling of the High Court in **Dadani -v- Manji & 3 Others [2004] 1 KLR 95**).

It is also on record that the 1st Plaintiff is the largest shareholder of the company who owns 150 shares out of the 200 shares as per the agreement produced in court and that the 1st Defendant and one Bontempi Claudion owns 25 shares each. I find that the 1st Plaintiff was

within his rights to exercise the rights of the 2nd Plaintiff and that the 2nd Plaintiff was also a party to the suit.

The Court of Appeal case between the Plaintiffs and 1st Defendant herein, and others in **Bontempi Luigi & 2 others v Shariff Mohammed A. Omar & another [2015] eKLR**. determined this issue as follows: -

“It was a proper case in which the company was acting through the majority shareholder. As Jenkins LJ stated in EDWARDS V. HALLIWELL [1950] 2 ALL ER 1064, the will of the majority as against that of the minority is really the will of the company and to say that the company is the proper plaintiff in actions concerning its affairs is another way of saying that the majority, within the limits of their power to ratify decisions, have the sole right to determine whether or not a dispute ought to be brought to court.”

The court further held that the company was sued in its own name hence was a party to the suit and stated that:

“Subsequently however matters changed fundamentally through amendment of pleadings duly sanctioned by the Court. The company henceforth became a plaintiff in the suit in its own name and of its own right. At the end of the day, before the High Court, Omar had his own claim while the Company, separately and in its own name, was pursuing its own claims against Luigi, Turato and Ngege.”

On the second issue as to whether 1st Defendant bought the suit properties with proceeds from the Plaintiff company, there has been a protracted litigation between the Plaintiffs and the 1st Defendant in other similar suits in the High Court at Mombasa which culminated in a Court of Appeal decision which affirmed the High Court finding that the 1st Defendant bought the suit properties with the proceeds of the company hence was required to account.

In the Court of Appeal case **Bontempi Luigi & 2 others v Shariff Mohammed A. Omar & another (supra)** the court held that

“We are satisfied that taken in totality and in context, the evidence on record demonstrates systematic misappropriation of the company’s funds by Luigi. Consequently, the use of those funds to purchase and transfer Plot No. 3104 to his wife Ngege, gives rise to a constructive trust by which she holds the said Plot in trust to the company. This ground of appeal equally lacks merit and must also fail.”

This case has a bearing on the current case which was filed after the court found that the 1st Defendant had misappropriated funds for the company for personal use to buy properties in his name which was traced to the cheques from the company produced in court. Even though the case is in respect of Plot Nos 3043, 3044 and 3045, the same was an indictment of the 1st Defendant on misappropriation of funds for personal use and that the properties were bought during the same period that triggered the filing of this suit.

Issue number two is answered in the affirmative there being evidence that the cheques that were used to purchase the properties were from the company and further this is fortified by the above case determined by the Court of Appeal.

On the third issue as to whether 1st, 2nd and 3rd Defendants fraudulently acquired the suit land, having found that the suit properties were bought from the proceeds from the company which were misappropriated from the company, it follows that the 1st Defendant intended to defraud the company that is why it did not account for the proceeds and fraudulently bought the land and transferred to 3rd parties. The 1st and 3rd Defendants were used to perfect the fraud by allowing themselves to be registered as proprietors while the case questioning the 1st Defendant’s title was pending in court.

The 1st, 2nd and 3rd Defendants were active participants in the fraud as they were not able to prove the integrity of acquisition of their title. The root of a title is very important hence dangling a title to show indefeasibility is not enough in this day and age of crafty individuals who produce fake titles with impunity or who want to beat the system by being ahead.

On the fourth issue as to whether the 3rd Defendant is an innocent purchaser for value and whether the Counterclaim is merited, the 3rd Defendant claimed that she is a bona fide purchaser for value without notice. For a person to rely on this doctrine, he/she must prove the following ingredients as was enunciated in the case of **KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173** where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- a) he holds a certificate of title;***
- b) he purchased the property in good faith;***
- c) he had no knowledge of the fraud;***
- d) he purchased for valuable consideration;***
- e) the vendors had apparent valid title;***

f) he purchased without notice of any fraud;

g) he was not party to any fraud.”

The 3rd Defendant has enumerated how she acquired the suit land and the processes taken but I find that she does not qualify as innocent purchaser for value without notice as the 1st Defendant had no authority to sell the land to her. The 1st Defendant could therefore not pass a good title to the Defendant. If she has any claim to the land then her remedy lies at the doorstep of the 1st Defendant who purportedly sold the land to her who did not have a good title to pass.

Section 26 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

Section 80(1) of the Land Registration Act No. 3 of 2012 gives the court powers to order for rectification of a register. It provides as follows:

“Subject to subsection (2), the court may Order rectification of the registrar by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

Section 80(2) of the same Act, it is provided as follows;

“The register shall not be rectified to effect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

I have considered the pleadings, the evidence and submissions by counsel and find that the Plaintiff has proved his case against the Defendants and that the 3rd Defendant's has not proved her Counterclaim and is therefore dismissed with costs to the Plaintiffs. On the issue of general damages for loss of income, I find that the Plaintiffs did not lead any evidence to prove loss of income, this limb therefore fails. I therefore grant the following specific orders:

a) That the Defendants, their agents, servants, auctioneers or successors in title (if any) are hereby restrained from transferring, charging, selling, leasing or in any way dealing with sub-division numbers 3044 (Orig. No. 26/1) Malindi, Plot Number 8980, 7861 (hereinafter referred to as the suit properties).

b) A declaration is hereby made that the property was illegally transferred to the Defendant and that any dealings on the property subsequent to the filed transfer and all are null and void and of no effect.

c) An order is hereby issued directing the Registrar of Lands to revoke annul and/or cancel the titles in favour of the Defendants and rectify the entries to reflect the Plaintiffs and the proper successors in title.

d) Costs and interests for this suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.