



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 200 OF 2016

KAZUNGU KAINGU PEMBE as legal representative of

KAINGU PEMBE MWACHAKA.....PLAINTIFF

VERSUS

1. KITSAO NGONYO

2. GEORGE KATANA YERI

3. FENYSON CONSTRUCTION LTD.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Plaint dated and filed herein on 3rd August 2016, Kaingu Pembe Mwachaka (the Plaintiff) prays for Judgment against the Defendants for: -

a) An order to the Land Registrar to cancel the registration of the 1st and 3rd Defendants as owners of Title No. Ngomeni Squatter Settlement Scheme/1359 and (to register) the said title in the name of the Plaintiff as the absolute owner thereof;

b) An order to the Land Registrar to cancel the registration of the 2nd and 3rd Defendants as owners of Title No. Ngomeni Squatter Settlement Scheme/1375 and (to register) the said title in the name of the Plaintiff as the absolute owner thereof;

c) Costs of this suit and interest thereon at Court rates; and

d) Any other relief that this Honourable Court may deem just to grant.

2. Those prayers arise from the Plaintiff's contention that he is the registered owner entitled to possession of all that parcel of land known as Ngomeni Squatters Settlement Scheme/1298 which was measuring 4.76 Ha prior to the planning, mapping, demarcation and identification of settlers within the Scheme. The Plaintiff maintains that during the mapping and demarcation exercise, two parcels of land were fraudulently created on the eastern side of his said parcel.

3. The Plaintiff asserts that one of the parcels measuring 1.5 Ha was created as Ngomeni Squatter Settlement Scheme/1359 and allocated to the 1st Defendant while another one measuring 1.94 Ha was given the Title No. Ngomeni Squatter Settlement Scheme/1375 and was allocated to the 2nd Defendant. As a result, the Plaintiff's parcel of land was fraudulently reduced to 0.95 Ha.

4. The Plaintiff maintains that he was and still is the sole occupant in possession of the entire parcel of land measuring 4.76 Ha as the 1st and 2nd Defendants were neither residents, occupants or settlers on the respective parcels of land allocated to them. The allocation and registration of the two parcels of land to the 1st and 2nd Defendants was therefore made by mistake, omission, misrepresentation and/or fraud.

5. The Plaintiff further contends that the two parcels of land being Nos. 1359 and 1375 do not exist on the ground as the same were created and superimposed unlawfully on the Plaintiff's parcel of land.

6. The Plaintiff accuses the 1st and 2nd Defendants of subsequently purporting to sell the two parcels of land to the 3rd Defendant. He maintains that the said transfer did not confer any valid title to the 3rd Defendant on account of the mistake, omission, fraud and misrepresentation. The Plaintiff further contends that the transfer and registration of the 3rd Defendant as the proprietor of Title No. Ngomeni Squatter Settlement Scheme/1359 and 1375 was null and void and did not confer any valid title to the 3rd Defendant.

7. Kitsao Nkonyo and George Katana Yeri (the 1st and 2nd Defendants respectively) did not file any statement of defence even though they appeared and participated in person in these proceedings.

8. But in a Statement of Defence dated and filed herein on 13th September 2016, Fenysan Construction Limited (the 3rd Defendant) denies that the Plaintiff is the owner of Ngomeni Squatter Settlement Scheme/1298. The 3rd Defendant further states that the Plaintiff and the 1st Defendant did on 11th September 2007 settle the dispute over the said property by an agreement signed by all parties and the Plaintiff henceforth ceased to have any interest in the properties in question.

9. The 3rd Defendant avers that the variance in the acreage of the Plaintiffs parcel can only be attributed to the land officers and not to itself. In addition, the 3rd Defendant asserts that it is in sole occupation of Plot No. Ngomeni Squatter Settlement Scheme/1359 and it no longer has any interest in Plot No. Ngomeni Squatter Settlement Scheme/1375 as the same has since been transferred to Himalayas Properties Ltd.

The Plaintiff's Case

10. The Plaintiff called a total of three witnesses in support of his case during the trial.

11. PW1- Kaingu Pembe Mwachaka is the Plaintiff himself and a farmer in Mjanaheri within Ngomeni Settlement Scheme. Relying on his recorded Statement filed herein on 3rd August 2016, PW1 told the Court that he is the registered owner of parcel number Ngomeni Squatter Settlement Scheme/1298 which contains by measurement 4.7 Ha. He told the Court the said parcel of land was allocated to himself in the year 2007 and he had duly paid the requisite charges.

12. PW1 testified that before the mapping, demarcation and identification of settlers within the Scheme he was the sole owner, occupant and settler on the said parcel of land that was bordering the Indian Ocean. During the mapping and demarcation however, two parcels were created and hived off the eastern side of his parcel of land. The resultant parcel number Ngomeni Squatter Settlement Scheme/1359 measuring 1.5 Ha was allocated to the 1st Defendant while Ngomeni Squatter Settlement Scheme/1375 measuring 1.94 Ha was allocated to the 2nd Defendant.

13. As a result, PW1 told the Court that his own parcel was fraudulently reduced to 0.95 Ha even though he remains the sole occupant and in possession of the entire parcel of land measuring 4.76 Ha. PW1 further told the Court that the two newly created parcels do not exist on the ground even though the 1st and 2nd Defendants had thereafter purported to sell them to the 3rd Defendant who is now appearing as the registered owner thereof.

14. In cross-examination, PW1 denied that he had gone with the 1st Defendant to a broker seeking to sell his parcel of land and denied signing any agreement to sell his land. He however conceded that he had lodged a complaint against the 2nd Defendant with the National Land Commission at Mombasa. He told the Court the land remains empty as he has not built anything thereon.

15. PW2 – Said Ali Menza is also a farmer in Mjanaheri and a neighbor to the Plaintiff. He told the Court he had known the Plaintiff since 1943 and that their parcels of land bordered each other. PW2 told the Court that the Plaintiff was the proprietor of the parcel Number Ngomeni Squatter Settlement Scheme/1298 and that before demarcation and adjudication in the area, the parcel of land extended upto the Indian Ocean.

16. PW2 testified that sometime in the year 2008, the 1st Defendant claimed that he was the registered owner of a parcel of land known as Ngomeni Squatter Settlement Scheme/1359. He had fraudulently transferred that parcel to his name before selling it to the 3rd Defendant. That portion of land was previously part of the Plaintiff's land.

17. PW2 testified that before the demarcation of the land, the 1st and 2nd Defendants had never owned or occupied any land near the suitland. They were not even present during the process which PW2 attended and witnessed. PW2 told the Court that the 2nd Defendant was then the Mambui area Councillor and that he used his influence to get the land title No. Ngomeni Squatter Settlement Scheme/1375 which was also hived off the Plaintiff's land.

18. On cross- examination, PW2 told the Court he was unable to recall the number for his own parcel of land as he had sold the same in 1994. He told the Court his plot used to be some three (3) plots away from the ocean and that one plot separated his land from the Plaintiff's. He further told the Court both himself and the 1st Defendant were members of the demarcation Committee and that they were both present during the process.

19. PW3 – Karisa Fundi Bahushi is a resident of Shali Shali Village and a neighbor to the Plaintiff. He told the Court the Plaintiff occupies Parcel Number Ngomeni Squatter Settlement Scheme/1298 and reiterated the averments made by PW2 in regard to the ownership thereof.

The Defence Case

20. Similarly, on their part, the Defendants called a total of three (3) witnesses in support of their case at the trial.

21. DW1- Kitsao Ngonyo Hinzano is a resident of Mjanaheri and the 1st Defendant herein. He told the Court that as far as he is aware Plot No. 1359 belongs to him. He testified that Ngomeni Scheme was initially Government land and that the Government went to the ground and allocated each one the land they were already occupying.

22. DW1 testified that he knew the Plaintiff and that the Plaintiff's parcel was Plot No. 1298. He told the Court that he later sold his land to a White man by the name Sandorf. The Plaintiff was aware of the sale and did not raise any issues initially. The Plaintiff only started claiming the land after one Abeid Ali Islam told him that DW1's land belonged to him and undertook to file a case for the recovery thereof on his behalf.

23. DW1 further told the Court that they went to the National Land Commission in Mombasa which Commission determined wrongly that his land belonged to the Plaintiff.

24. On cross- examination, DW1 told the Court they had gone to a lawyer with the Plaintiff where they agreed that each one would retain his portion of the land. He insisted that he had been a Squatter on the land even though he had only planted coconut trees and was yet to build a house on the land. He further told the Court he was also allocated Plot No. 1141 wherein he lives to-date during the same exercise. He told the Court that one would be given as many plots as he had been utilizing before.

25. DW2- George Katana Yeri is a resident of Kangumbani Mambui and the 2nd Defendant. He told the Court he was allocated Plot No. 1375 which plot he had been utilizing even before the area was demarcated and allocated to the squatters.

26. On cross- examination, DW2 testified that he got his title in the year 2007 and that the Plaintiff only started claiming the land in 2016. He further told the Court he had been on the disputed property since 1978. He conceded he was a Councillor for Magarini Ward around the time of allocation but insisted he was still a Squatter on the land.

27. DW3- Salvo Palliari is a resident of Mambui and a director of the 3rd Defendant. He told the Court that he bought Plot No. 1359 from the 1st Defendant in the year 2007 – 2008. He later came to discover there were double title deeds issued for the area.

28. DW3 told the Court they also bought Plot No. 1375 from the 2nd Defendant. All the parcels were now in the 3rd Defendant's name.

29. On cross- examination, DW3 testified that he had visited the land before the 3rd Defendant company bought them. There was no one on the land and he did not see any beacons. He further told the Court that other than the 1st and 2nd Defendants, he had also bought other parcels of land from other residents of the area. He told the Court the Plaintiff started complaining even before he had paid for full purchase price to the 1st Defendant. He then paid Kshs 50,000/- to the Plaintiff and his brother but they kept on shifting positions.

Analysis and Determination

30. I have perused and considered the pleadings as filed herein, the testimonies of the witnesses and the evidence adduced before this Court. I have also considered the rival submissions and authorities placed before me by all the parties herein. In the course of the trial and after he had testified herein, the Plaintiff passed away and his name was thereafter substituted by that of his Legal Representative Kazungu Kaingu Pembe.

31. The Plaintiff's case is that before the establishment of the Ngomeni Squatter Settlement Scheme, the parcels of land now known as Title No. Ngomeni Squatter Settlement Scheme/1298, 1359 and 1375 comprised one big parcel of land measuring some 4.76 Ha. The entire parcel of land measuring 4.76 Ha that extended all the way to the Indian Ocean on the east was then solely under the ownership and occupation of the Plaintiff.

32. The Plaintiff told the Court that following the establishment of the Scheme and the mapping, demarcation and identification of the squatters on the once hitherto Government land, two separate parcels of land were created and hived off the Plaintiffs parcel. The first one, being Ngomeni Squatter Settlement Scheme/1359 and measuring some 1.5 Ha was subsequently allocated to the 1st Defendant who was a member of the Committee in-charge of the mapping, demarcation and identification of Squatters in the Scheme. The second sub-divisions being Ngomeni Squatter Settlement Scheme/1375 measuring some 1.94 Ha was then allocated to the 2nd Defendant who was an influential Councillor in the area.

33. Thus, following these fraudulent creations of those two parcels of land, it was the Plaintiff's case that he was left with his original parcel of land- Ngomeni Squatter Settlement Scheme/1298 but whose size had now been reduced to a mere 0.95 Ha and it no longer borders the Indian Ocean. The Plaintiff further told the Court that having processed titles for the two parcels of land hived of his property, the 1st and 2nd Defendants purported to sell them to the 3rd Defendant company. It was his case that the 1st and 2nd Defendants had no valid title to pass to the 3rd Defendant and urged the Court to find that the subsequent transfer and registration of the two titles to the 3rd Defendant were null and void and of no consequence.

34. On their part the 1st and 2nd Defendants denied the Plaintiff's claim and told the Court that just like the Plaintiffs, they had been bonafide squatters on the land as at the time the Settlement Scheme was established. The two told the Court that they were on the ground when the adjudication process was done in the area and that they followed all the requisite protocols to acquire their respective parcels of land before selling and transferring the same to the 3rd Defendant sometime in the year 2008.

35. In support of his case, the Plaintiff produced a copy of an official receipt for Kshs 5,783/- issued to him by the District Land Adjudication Office Malindi on 28th February 2013 in regard to the suit property. He also exhibited a copy of the title deed issued to him for the Parcel No.

1298 measuring 0.95 Ha on 24th June 2015. The Plaintiff has also exhibited the other titles issued to the 1st and 2nd Defendants which give the date of issue as 27th July 2007.

36. While the Plaintiff pegged his claim on what the position was before and after the establishment of the Ngomeni Settlement Scheme, he and his witnesses did not tell the Court when the Scheme was established. It was however evident that the parties had been in the disputed area for quite some time. During his cross-examination by the 2nd Defendant, the Plaintiff's neighbor Said Ali Menza (PW2) told the Court he knew the 2nd Defendant and that between 1978 and 1987, they had had a case that was involving all the residents of the land.

37. The same PW2 told the court that there used to be one parcel of land separating his own with that of the Plaintiff. Asked about the reference number for his parcel of land, PW2 told the Court he could not remember the same as he had sold it way back in 1994. Incidentally, the year 1994 is also the same one cited by the 2nd Defendant as the time when the parcels of land were allocated to the squatters.

38. While it was not clear when the Scheme was established, it was apparent that by the year 2007, the process had reached an advanced stage as to enable the 1st and 2nd Defendants to be issued with their titles. That same year on 27th July 2007 to be precise, the Plaintiff's title was created and charged to the Settlement Fund Trustees. The title would later be discharged on 24th June 2015, the same day the Plaintiff was issued with his title deed.

39. Accordingly, and from the material placed before me, it was evident to me that the Plaintiff's title and those of the 1st and 2nd Defendants arose from an adjudication process conducted pursuant to the Land Adjudication Act, Cap 284 of the Laws of Kenya. Under the said Act, any person who is not satisfied with the boundaries or acreage of his parcel of land is required to raise the same with the adjudication officer in charge of the process. Section 26 of the Act provides in this respect as follows:

“Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may within sixty days of the date upon which notice of completion of the register is published object to the adjudication officer in writing saying in what respect he considers the adjudication register to be incorrect or incomplete.”

40. There was no evidence of any such objection having been lodged by the Plaintiff and/or the determination thereof. I think, before seeking recourse to the Court, a party ought to exhaust all available remedies provided for under the Act unless there was a valid reason demonstrated as to why one was prevented from following the laid down procedure. In this respect it is to be noted that Section 29 of Cap 284 provides as follows: -

(1) Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-

a) Delivering to the Minister an appeal in writing specifying the grounds of appeal; and

b) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall-

a) Alter the duplicate adjudication register to conform with the determination; and

b) Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificates to the Chief Land Registrar, who shall alter the adjudication register accordingly.”

41. As the Court of Appeal stated in *Speaker of the National Assembly –vs- James Njenga Karume (1992) e KLR: -*

“.....where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

42. In the matter before me, the Plaintiff does not appear to have followed the laid down procedure. He did not explain why he waited until the year 2016 to challenge the allocation that was done when the Ngomeni Settlement Scheme was established by the Government way back in 1994 or thereabouts. Nor was I persuaded that the Plaintiff had any more-right than the 1st and 2nd Defendants to what was then Government land prior to the creation of the Scheme and the allocation of the respective parcels to the squatters who were residents in the area.

43. The Plaintiff did not place any restriction on the two titles and the 3rd Defendant acquired the same from the registered owners some eight years before the Plaintiff instituted this suit. Under Section 26(1) of the Land Registration Act No. 3 of 2012, a certificate of title issued upon registration or to a proprietor upon transfer is prima facie evidence that the person named therein is the absolute and indefeasible owner thereof and the same is subject to challenge only on the ground of fraud, misrepresentation or where the certificate was acquired illegally, unprocedurally or through a corrupt scheme.

44. I am not persuaded by the evidence adduced by the Plaintiff that the 1st and 2nd Defendants acquired the titles they subsequently transferred to the 3rd Defendant fraudulently or through misrepresentation or that the titles were acquired illegally or through a corrupt scheme.

45. It follows that the Plaintiff has failed to prove his case on a balance of probabilities. I find no merit in the claim and thereby dismiss his suit with costs to the 3rd Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021.

J.O. OLOLA

JUDGE