



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MOMBASA

ELC NO. 151 OF 2015

FATUMA OMAR SHEIKH.....PLAINTIFF

VERSUS

SARA MBAYA & 3 OTHERS.....RESPONDENTS

JUDGEMENT

1. Mama Fatuma Omar Sheikh brought her claim against the 4 respondents by way of a petition dated 10th December 2014 and filed on 11th December 2014. The petitioner pleaded that she purchased the unsurveyed parcel of land identified as plot no 29, 30 and 31 situated at Kanana in Lunga Lunga within Kwale County. The petitioner pleaded that she purchased the land in 1996 from Juma Hamisi Siminga for Kshs5000/= and has been in occupation since then.

2. The petitioner pleaded further that she has learnt that the 3rd respondent has re-allocated her land to the 1st and 2nd respondents who are now putting up a stone building without any due regard to the petitioner's right to property. That the 1st and 2nd respondents have chased away the petitioner from the suit land and are threatening to destroy her house standing on the plots. She therefore urged the court for orders that;

(a) A declaration that the Petitioner's constitutional rights to property have been breached.

(b) A declaration that the Petitioner is the lawful owner and proprietor of the un-surveyed plots known and marked as nos. 29, 30 and 31 Kanana, Lunga Lunga, Kwale County.

(c) A declaration that the 1st and 2nd Respondents has no rights on the plots nos 29, 30 and 31 Kanana.

(d) A declaration that any alleged re-allocation of the said plots by the 3rd Respondent is unconstitutional and thus illegal.

(e) Any other relief the Court may deem fit and just to grant.

3. The petition is opposed by the 1st, 2nd and 4th Respondents. The 1st and 2nd Respondents filed a replying affidavit sworn by Serah Mueni Nzioki on 16th February 2015. She deposed that the suit land did not belong to Juma Hamisi at any given time. Miss Mueni also deposed that one of the witnesses to the agreement Mr Rumba Yogar has denied appending his signature on the petitioner's sale agreement and or appearing before any advocate to execute it. She annexed an affidavit sworn by the said Rumba Yogar to corroborate her averment. The 1st and 2nd Respondents also deposed that Mr Juma Hamisi has denied selling the land to Swale Mohamed. Instead Mr Juma deposed that he only sold coconut trees adding that the suit plots belong to Mzee Maibu Hassan. Mr Juma also swore an affidavit which was annexed as "SM 3". The 1st and 2nd Respondents deposed that the suit land does not belong to the Petitioner and urged the court to dismiss the petition with costs.

4. The Attorney General for 4th Respondent filed his grounds in response to the petition on 24th March 2016. He pleaded inter alia that the petition is brought hopelessly out of time as the matter of the suit property arose in 1996. That the said Petitioner had upto 2008 within which to file for adjudication in accordance with the law. Furthermore that the petitioner has failed to establish ownership by any legal process or otherwise of the unsurveyed plots identified as nos. 29, 30 and 31. That the agreement relied on is voidable, unreliable and invalid. Lastly the 4th Respondent pleads that the petitioner is not entitled to the equitable reliefs sought because she has not done equity. The 4th Respondent also urged the court to dismiss the petition with costs.

5. The Petitioner called two witnesses while the 1st and 2nd Defendants called 6 witnesses. The Petitioner gave her evidence on 3rd May 2017 as PW1. She testified that she knew Juma Hamisi who sold to her the suit plot in 1996. That the agreement was done before an advocate and the village elders. PW1 produced the sale agreement as P ex 1. That before filing this suit, she visited the Chief Executive Committee member for Lands Kwale County Government to issue her with an allotment letter. That the CEC asked her to first get a letter from the

elders which PW1 said she obtained and presented to the county official.

6. PW1 continued that she was promised feedback after committee meeting which feedback she never got. She produced letters sent to the 3rd defendant as P ex 2 and to the National Land Commission as P ex 3. That National Land Commission wrote back saying the government had taken that land and PW1 should be compensated letters produced as MFI P4 & 5.

7. PW1 stated further that she planted coconut trees and mangoes on the suit land. She also built a house which house is currently occupied by his son. The house is shown in the photograph produced as P ex 6. PW1 also said she was given a PDP map by the 3rd defendant MFI P-9 to corroborate her evidence that the plot was to be taken by the County Government for building an open air market. She concluded her evidence by asking the court to give her back the plot.

8. In cross-examination, PW1 said that the agreement was drawn by J. M. Njenga advocate-deceased. That Lumba Yogar was not a clan elder at the time. That Muibu Hassan is her neighbour, PW1 admitted that P ex 6 was constructed by Micheal Munyoki – deceased. PW1 said she paid Micheal to build the house. PW1 denied that the suit plots belong to Muibu Hassan or the county government. That Thomas Mwingi is like her caretaker.

9. Simon Kazungu Karisa testified as PW2. PW2 said he lives in Mtwapa and works with Institute of Government & Human Rights. PW2 said he knew the plaintiff while he was working with MUHURI. PW2 stated that the plaintiff had come to lodge a complaint about her plot in Kanana. He took PW1 to meet the officers of Kwale County Government over the plot where the chief officers confirmed that they will issue eviction notices to owners of land that fell within public utilities. On receipt of this information, PW2 stated that he wrote to the National Land Commission, on behalf of the family – P ex 6.

10. PW2 continued that the National Land Commission wrote to the CEC in charge of lands recommending compensation for the Petitioner as shown in the letter now produced as P ex 4. PW2 said that the Petitioner later came to inform them that the place was now under construction which prompted them to write the letter dated 25th August 2014 now produced as P ex 7. PW2 also produced the letter from National Land Commission dated 24th November 2014 asking the county government to stop the on-going construction. This letter was produced as P ex 5.

11. In cross-examination, PW2 said he did not meet the witnesses to the agreement. That he visited the suit land before the proposed sub division by the County Government and there was only one mud thatched house on the land. That according to P ex 5 – the dispute was compensation of the Petitioner. This marked the close of the petitioner's case.

12. The 1st Defendant testified as DW1 on 8th October 2018. She is a teacher and lives in Tudor, Mombasa. DW1 said she bought a plot located at Kanana measuring 50 by 100 before the vendor later adding her more land measuring 80 of 100ft. that the agreement was witnessed by several people which agreement she produced as D ex 1. DW1 said she did not know the petitioner before this case. That she has never seen the agreement produced by the petitioner. That people in that area know each other and where she was sold there was no house. DW1 said she is the one who built the house on the land which house does not have a roof.

13. DW1 also said she has not seen anyone living in the hut being claimed by the Petitioner. DW1 stated that she only knew Juma Hamisi an old man who is her neighbour.

14. In cross-examination, DW1 conceded that her **Exhibit 1** does not have the identification numbers of the people named in the agreement. That the witness statement is signed by Sara Mbaya but DW1 is Sara Mueni Nzioka. DW1 said the graves on the land belong to relatives of Mzee Muibu who sold her the land. That Micheal Munyoki is her neighbour. In re-examination, the witness said she was sued for building on the land in question. That even the Petitioner's agreement does not have ID numbers.

15. Erick Kioko Mbaya, the second Defendant testified as DW2. He said that Sara Kessi Mbaya came to buy a plot where he lives. Sera invited him to go view the plot. DW2 confirmed he witnessed DW1's agreement as witness number 5. That the land in question does not have a title. DW2 said they were taken round the plot by Zainab Muibu and Muibu's wife. DW2 also said he has never seen the petitioner at Kanana. That there is a house built next to the plot that Sera bought. That it is said that house was built by Micheal Munyoki. DW2 also said that Siringa lived there before them. DW2 said he went to the land in 1984. That as far as he knows, the portion sold to DW1 belonged to Hassan Muibu.

16. Mr Nyange, learned counsel for the Petitioner put question to DW2. DW2 said Sara did not sign the agreement (D ex 1). That witness no 3 is called Sera Mueni Mbai. That Hassan Muibu has been blind for a long time from the 1990's. In re-examination, DW2 said that his wife is called Sera Mueni Mbai who was witness number 3 while the buyer is called Sara Mueni Nzioka.

17. Muibu Hassan testified as DW3. The Mzee said he has lived in Kanana for 78 years, married 3 wives and one is deceased. DW3 said she did not know the plaintiff or where she lived; has never met her. DW3 however knew Micheal Munyoki as his neighbour. That Micheal built a house on DW3's land on agreement that he would vacate any time DW3 wanted to use that portion.

18. DW3 also stated that Juma Hamisi was his client who lived on his plot. That Juma planted coconut trees and mangoes on this plot. DW3 stated that he never sold the land to Juma Hamisi. DW3 admitted selling a portion of his land to the 1st defendant. It is his evidence that the suit plot does not belong to the Petitioner.

19. In cross-examination, DW3 said he sold the land to Sara for Kshs130,000/= not Kshs80,000/=. That he was present when the agreement was being drawn and as far as he is concerned, the 1st defendant also signed the agreement. DW3 said he permitted Juma Hamisi to live on the land but there was no written agreement. That there is nothing written to show that he asked Micheal to leave the land. DW3 could not remember if Juma sold the coconut or mango trees. He does not know the size of his land but said he knew its boundaries.

20. Zainab Muibu testified as DW4. She is the daughter of DW3. She told court that she was born on the land, has been living there but has never met the petitioner. That Micheal Munyoki was their neighbour. That Micheal built on their portion of the land and died before demolishing the house. That Juma Hamisi is DW4's brother-in-law. That Juma was allowed to live on the land by DW3.

21. In cross-examination, DW4 said that their land is big but she does not know the size. That she was present when Juma was permitted to build but there was no written agreement. That they also complained when Micheal built but the complaint was not reduced into writing. That Juma sold the trees but not the land. In further cross-examination by Mr. Makuto, the state counsel, DW4 said she is aware of only one sale agreement signed by the 1st Respondent. That she got married when she was 18 years old but returned home after 2 years. DW4 concluded that the whole area of land is unregistered.

22. Ms Agnes Majongo adopted her witness statement dated 24th July 2018 as her evidence. She stated that she is married to Juma Hamisi Kimunya and have lived in Kanana area for over 40 years. That they requested Mzee Muibu for a place to build on in 1972 as they were staying far away from the road and were experiencing constant breakings and theft. That after a while, they went back to their land and left their house to Albano Mswahili. DW5 said they did not sell this portion to anyone. DW5 also stated that the structure next to their house built by Micheal Munyoki – deceased. That she has never met the Petitioner.

23. In cross-examination, DW5 said Mzee Muibu gave them a place to build on. That they were allowed to live with no set timelines. That they planted fruit trees which they opted to sell when they decided to go back to their land. When they went there, they found Micheal.

24. Albano Mswahili testified as DW6. He lives in Kanana, Kwale County and he is 55 years old. DW6 said Mzee Muibu is his neighbour from birth. DW6 says he has never met the Petitioner or seen her at the place where they live. DW6 confirmed that Micheal had built a house, Agnes (DW5) lived on the suit plot but later left and that Sara Mbaya bought her portion from Mzee Muibu.

25. On cross-examination, DW6 said that Micheal built a house on part of the land. DW6 did not know where Micheal got the money to build. That he was not present during the sale between Muibu and the 1st Respondent. That what he has stated is what he was told. This evidence marked the close of the 1st and 2nd defendants' case. No evidence was presented on behalf of the 4th – 5th Respondents or the 3rd Respondent.

26. The Petitioner & 1st and 2nd Respondents advocates' filed written closing submissions. In support of her case, the Petitioner relied on the sale agreement dated 5th April 1996 between herself and Swaleh Mohamed as purchasers and Juma Hamisi Sinunga as vendor. Clause 4 of the agreement provided that the plot sold shall vest upon the purchasers immediately on execution of the agreement and no one including the vendor's agent giving the purchaser liberty to file injunction proceedings against the intruder. The parties signatures were witnessed by a Mr. J. M. Ngenga advocate and Mswahili Mangoni and Lumba Yogar.

27. The plot number was not given in the agreement because it is said the area is unsurveyed. This plot "belonging" to the Petitioner appears was later sold to the 1st Respondent by Muibu Hassan. The 1st Respondent proceeding on the terms of this agreement commenced development of the plot hence the present dispute. The 1st and 2nd Respondents on their part called six (6) witnesses to thrush out the Petitioner's claim.

28. The conflicting interests on who is entitled to the plot in dispute situated at Kanana is what this court is tasked to determine. Both have sale agreement in support of their claim over the land. Assuming that both agreements are valid, the Petitioner's agreement was the first in time i.e 5th April 1996 while the 1st Respondent's was drawn on 10th August 2013.

29. The 1st Respondent's witnesses comprised of DW2-DW6 who live in the area where the land is located all denying ever seeing the Petitioner or being aware of her buying the suit plot. Their only evidence that agrees with the Petitioner's is that there is a house built on a portion of the suit land by Micheal Munyoki who is deceased. So did Juma to sell to the Petitioner and Swaleh Mohamed? DW5 said she was the wife of Juma Hamisi. She confirmed that they had lived on the land for 40 years. That they were given permission to build by Muibu Hassan in 1972. When they moved out, DW5 says they left their house to Albano (DW6) and sold the trees to a Mr. Juma.

30. DW5's husband swore an affidavit dated 16th February 2015. In paragraph 4 of this affidavit, he stated that he could only recall selling 7 coconut trees on the land to one Juma but not the land. That as far as he remembers, the land belongs to Muibu. Mr Juma however did not deny the signature on P ex 1 was his. Secondly Mr Juma did not present the sale agreement for the coconut trees or have the buyer of those trees corroborate his statement. Thirdly Mr Juma Hamisi did not come to present evidence in court. No explanation was given for him not testifying and why the wife who was not a party to either of the agreements instead coming to give evidence which evidence in my opinion is hearsay.

31. Still on the evidence of DW5, she said they left their house to Albano Mswahili. Albano said nothing about this arrangement other than stating that he also lives in that neighbourhood, knew DW5 left her house to Juma and that he had never seen the petitioner. The said Albano (DW6) was also not a party to the sale agreement of 5th April 1996 produced as P ex 1. Neither did he say he had any relationship with Juma Hamisi or Mswahili Mangoni who are named as witnesses in P ex 1. I hold that his evidence does not add value to this suit as what is required to be proved was whether Juma had a plot to sell. Further all the Respondents' witnesses said the portion being claimed by the Petitioner belonged to Mzee Maibu who admitted the area is unsurveyed thus he does not have a title to his land. Mzee Muibu also said that he does not know the size of his land but he knew the extent of its boundaries.

32. Whether Mzee Muibu gave Juma land to temporarily live on or it was Juma's land as of right poked holes on the defence evidence that Juma had no land to sell for the following reasons;

(a) There was no agreement in writing to set the duration and size of the land given to Juma.

(b) DW5's evidence that they had lived on the land for 40 years and still want the court to believe the land is not theirs.

(c) No evidence to show that the vendor's signature on the Petitioner's agreement was forged.

(d) That Mzee Muibu had been blind for a long time including at the time of selling to the 1st Respondent.

(e) Lack of evidence that the part given to Juma Hamisi is what Mzee Muibu intended to sell and did sell to the 1st Respondent.

33. The 1st Respondent claiming purchaser's interest relied on her sale agreement dated 10th August 2013 and produced as Dex 1. On the face of the document, she did not sign it. This is indeed a fatal mistake as to her case in accordance to the provisions of Section 3 (3) of the Law of Contract Act. Section 3(3) (a) (ii) provides thus;

“No suit shall be brought on a contract for the disposition of an interest in land unless the contract is signed by all the parties thereto.”

34. The 1st and 2nd Defendants annexed the case of **Vivo Energy Kenya Ltd –versus- George Karunji (2014) eKLR** in their submissions. The case relates to an application for striking out a defence and made reference to Order 2 rule 15(1) of the Civil Procedure Rules and Section 49 of the Sale of Goods Act. The scenario in this case are completely different from the facts in the authority cited. I also found no reference made to it in the submissions.

35. The 1st and 2nd Respondents also cited the ruling on injunction in the case of **Muthengi Mutemi –versus- Munyoki Kikwu & Another (2018)** where the Judge held that an injunction order cannot issue over unsurveyed land which cannot be protected by a court of equity. The Petitioner in this case was specific on the area of land she was claiming that area was ascertainable and or identifiable by the house built by Micheal. All the defence witnesses confirmed this house is in existence. The Petitioner's evidence is that she is the one who contracted Micheal to build that house. None of the defence witnesses contradicted this evidence since all they said was that the house belonged to Micheal which house is not on the portion sold to the 1st Respondent.

36. In light of the evidence adduced that both parties are claiming purchaser's interest in respect of their portions and taking into consideration that the vendors were different. Further in view of the fact of the person who sold to the petitioner having not denied the sale, I do conclude that the petitioner has indeed proved her case. And in the absence of documentary evidence of agreement for sale of the trees presented to support the respondents' averment that all Juma Hamisi sold were trees on the land but not the land. Consequently I enter judgement for the petitioner in terms of prayer **(a), (b) and (c) of the petition**. I do not find the 3rd and 4th respondents to be liable, in any way to the petitioner. Each party to bear their costs of the petition.

Dated, Signed and Delivered at Mombasa this 4th day of July 2019.

A. OMOLLO

JUDGE.