



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 16 OF 2012

PRISCILLA ADERO ONYANGO.....PLAINTIFF

VERSUS

BROLIA MBUKA OMBAJO.....1ST DEFENDANT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. The suit was commenced in the subordinate court, CMCC No.1822 of 2010 by a Plaintiff dated 2nd July 2010 and filed in court on 6th July, 2010. The Defendant filed a statement of defence and counter-claim dated and filed on 13th September, 2010. The 1st Defendant subsequently filed **Mombasa High Court Misc. Civil Application No.721 of 2011** seeking to transfer the matter from the subordinate court to this court. On 15th December, 2011 Kasango, J granted the orders withdrawing the suit from the subordinate court to the High Court for trial and disposal. The 2nd and 3rd Defendants were also added as parties in the suit.

Plaintiff's case

2. It is the Plaintiff's case that at all material times, she was the registered legal owner of all that piece of land known as SHANZU/SETTLEMENT SCHEME/976 while the 1st Defendant is the registered owner of an adjacent land known as SHANZU/SETTLEMENT SCHEME/977. The Plaintiff averred that in early 2009 the 1st Defendant trespassed on her land, removed the identification beacons and commenced construction of a permanent structure on the Plaintiff's land. The Plaintiff further averred that the 1st Defendant proceeded to fence portions of the said land. The Plaintiff averred that she sought the assistance of the Ministry of Lands District Survey Office Mombasa who carried out investigations and by a letter dated 13th May, 2010, the District Surveyor clearly set out the boundaries of the two parcels and confirmed that the 1st Defendant had trespassed into the Plaintiff's land.

3. The Plaintiff seeks the following orders as against the 1st Defendant:

- a. **An order requiring the 1st Defendant herein to vacate the said land and demolish his structure forthwith.**
- b. **A permanent and/or perpetual injunction restraining the 1st Defendant, his agents or servants or otherwise from entering and/or carrying out any activity on the Plaintiff's parcel of land.**
- c. **General damages arising from trespass**
- d. **Costs and interest of this suit.**
- e. **Any other or further relief as this Honourable court may deem just.**

4. The Plaintiff relied on her pleadings, witness statement and documents that were filed and served. The Plaintiff stated that in 2007 she purchased a kiosk from one Juliana Clement. She produced the sale agreement dated 10th July 1996 as p.exhibit No.1. That later the land

was surveyed and she was issued with a title deed for TITLE NO. SHANZU/SETTLEMENT SCHEME/976 (p.exhibit no.2). The Plaintiff stated that before she was issued with the title deed, she was given a letter of offer dated 1st November, 2007 (p.exhibit no.3) and made payment and was issued with a receipt dated 23rd January 2008 (p.exhibit no.4). The Plaintiff stated that she has never used the plot because the same was fenced off by the 1st Defendant who put up a perimeter wall around it and put up some structures. The Plaintiff also produced the District's Surveyor's report dated 13th May, 2010 and a sketch map as p.exhibit no. 5. The Plaintiff denied being a member of the Adjudication Committee. She named the committee members as Leonida Ouko (deceased), Mzee Tito Liech, Peter Charo and Abdalla Rashid among others. The Plaintiff further stated that she received a notice from Bamburi Police Station who informed her that her kiosk would be demolished under their supervision, and was advised to seek legal redress. That while she went to see her lawyer, she received information that her kiosk was being demolished under the supervision of the police. The Plaintiff denied having been served with any pleadings except the warrant to give possession in **SRMCC No.2826 of 2009 Ezekia Evans –v- Priscilla Adero Anyango**

1st Defendant's case

5. In his defence and counter-claim, the 1st Defendant denied the Plaintiff's claim. The 1st Defendant averred that the Plaintiff in collaboration with the District Land Adjudication and Settlement Officer fraudulently and without any colour of right hived off a portion of the 1st Defendant's land which was originally **Plot No.990** in SHANZU SETTLEMENT SCHEME MEASURING 0.025 of a hectare to produce two **Plots Nos. 976 and 977**. That the 1st Defendant's plot now measures 0.0222 of a hectare. The 1st Defendant averred that he has occupied the entire 0.025 hectares since 1997 when he bought **Plot No.990** from its original owner, Khamis Said Babu and has carried out developments since then including on the portion now claimed by the Plaintiff. It is the 1st Defendant's contention that the Plaintiff's claim would ordinarily be defeated by limitation of time. The 1st Defendant further averred that the Plaintiff did not even know where **Plot No.976** was on the ground as she had made claim on portion of **Plot No.1118** alleging that it was part of **Plot No.976**, and that she was sued for trespass and evicted in **Mombasa RMCC No.2826 of 2009, Ezekia Evans –v- Priscilla Adero Onyango**

6. In his counter-claim, the 1st Defendant averred that on 22nd April, 1997, he purchased **Plot No. 990** Shanzu Settlement Scheme from one Khamis Said Babu, and that by a letter dated 15th May, 1999 the Director of Land Adjudication and Settlement offered and the 1st Defendant accepted the plot measuring 0.025 hectares. The 1st Defendant states that having met the conditions, he had the plot surveyed and boundary beacons identified or placed in their respective places. That he immediately fenced the area and commence the developments and put up permanent structures now being claimed to be trespass by the Plaintiff.

7. The 1st Defendant states that he later received another letter of offer from the Director of Land Adjudication and Settlement dated 1st November, 2007. The plot number had changed to **Plot No. 977** and the area reduced to 0.0222 hectares. That upon inquiry, the 1st Defendant was informed that a small portion of his plot had been hived off to cater for a road reserve. However, after further investigations, the 1st Defendant stated that he discovered that his original plot no. 990 had been subdivided into two plots now numbered as SHANZU SETTLEMENT SCHEME /976 registered in the Plaintiff's name and SHANZU SETTLEMENT SCHEME/977 registered in the 1st Defendant's name. The 1st Defendant averred that the Plaintiff was a member of the committee that dealt with allotments in that scheme. It is the 1st Defendant's contention that the subdivisions without his knowledge and consent and that the registration of **Plot No.976** in the Plaintiff's name was done fraudulently as the Plaintiff had no dealings by way of sale or purchase between him and/or the original owner, Khamis Said Babu. The 1st Defendant prays that the Plaintiff's suit be dismissed with costs and in the alternative seeks for the following orders against the Plaintiff:

a. A declaration that the title now held by the Plaintiff on PLOT NO. SHANZU SETTLEMENT SCHEME/976 is null and void as it was acquired and registered fraudulently.

b. A declaration that the 1st Defendant is the rightful owner of the suit premises comprised in SHANZU SETTLEMENT SCHEME/976 and SHANZU SETTLEMENT SCHEME/977 totaling 0.025 hectares and that the land registrar issue a new title for that acreage in the name of the 1st Defendant.

c. A permanent injunction against the Plaintiff restraining her from dealing, interfering with or in the suit premises in any manner.

d. In the further alternative, general damages against the 3rd Defendant

e. Any other relief as this Honourable Court may deem just.

8. The 1st Defendant produced the agreement for sale dated 22/4/97 between him and Mr. Khamis Said Babu as D.exhibit No.1, the letter of offer dated 15th May, 1999, (D.exhibit No.2), Receipts dated 6/2/2002 and 10/1/2008, (D.exhibits 3 (a) and (b)). He stated that he begun developing the plot in 1997 and nobody raised any objection. The 1st Defendant stated that he complained through a letter dated 27/3/09 (d.exhibit 4) about the letter of offer dated 1/11/07 which showed the area of his plot as 0.0222 hectares but did not get a response. He later received a letter dated 24/6/09 (d.exhibit 5) from the area Assistant Chief who came and stood where the kiosk which belonged to Ezekia Evans was and went away. That later, the Plaintiff brought in people from the Lands office who came and placed new boundaries. That Ezekia Evans filed **CMCC No.282 of 2009** against the Plaintiff. The 1st Defendant produced the old map as d.exhibit No.6 and the new map as d.exhibit 7. The 1st Defendant maintained that the Plaintiff fraudulently allotted part of his plot and denied demolishing the Plaintiff's kiosk as the same was demolished by Ezekia Evans pursuant to a court order.

9. The 2nd and 3rd defendants entered appearance but did not file a statement of defence.

Submissions

10. The Plaintiff and the 1st Defendant filed written submissions as directed by the court. The Plaintiff's submissions dated 3rd April 2019 were filed in court on 5th April 2019 and the 1st Defendant's submissions dated 3rd April 2019 were filed in court on 4th April 2019.

Determination

11. I have reviewed and considered the pleadings, the evidence by the parties and the submissions by the parties. Although the parties did not file any agreed issues for determination, the plaintiff and 1st defendant have on their part submitted on the issues that they consider to arise for determination. The court however identified the following issues for determination:

- i. Whether the Plaintiff is the bona fide owner of the TITLE NUMBER SHANZU SETTLEMENT SCHEME/976.**
- ii. Whether the 1st Defendant has trespassed on the Plaintiff's parcel of land title number Shanzu settlement scheme/976.**
- iii. Whether the 1st Defendant is entitled to both TITLE NUMBERS SHANZU SETTLEMENT SCHEME/976 and SHANZU SETTLEMENT SCHEME/977.**
- iv. Whether the register of titles NUMBER SHANZU SETTLEMENT SCHEME/976 and SHANZU SETTLEMENT SCHEME/977 should be rectified and the Land Registrar should issue a new title for 0.025 hectares in the name of the 1st Defendant.**
- v. Whether the Plaintiff is entitled to the prayers sought in the plaint.**
- vi. Whether the 1st Defendant is entitled to the reliefs sought in the counter-claim.**
- vii. Who bears the costs of the suit?**

12. As relates to issue no. (i) whether the Plaintiff is the bona fide owner of TITLE NUMBER SHANZU SETTLEMENT SCHEME/976, it is evident from the evidence and material on record that the Plaintiff holds title deed to the said parcel of land. The Plaintiff testified that she initially purchased a kiosk from one Juliana Clement when the land was still public land and had not been adjudicated. In her evidence, the Plaintiff stated that sometime in 2007, the Land Adjudication and settlement officers came to the ground to adjudicate and survey the land. It was the Plaintiff's evidence that those who were found on the ground were allocated land, the land having been made a settlement scheme. The Plaintiff testified that following that survey, she was allocated the parcel of land in which the kiosk she had purchased was standing on and in which she was already in occupation of. The Plaintiff produced the sale agreement between her and Juliana Clement in which the Plaintiff purchased a kiosk. The Plaintiff also produced a letter of offer dated 1st November, 2007 in which the government, through the settlement fund trustees offered her **Plot No. 976** of approximately 0.0170 hectares. In addition, the Plaintiff produced the title deed in her name for TITLE NUMBER SHANZU SETTLEMENT SCHEME/976 issued on 30th October 2007.

13. Under Section 26 (1) of the Land Registration Act, the title of a registered proprietor is *prima facie* evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and/or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Section 26 (1) provides:

26. (1) 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 titles 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.**

14. The 1st Defendant testified that the Plaintiff was fraudulently registered as the owner of TITLE NUMBER SHANZU SETTLEMENT SCHEME/976. It is the 1st Defendant's contention that his **Plot No.990** was unlawfully and unprocedurally subdivided to form two plots now TITLE NUMBER SHANZU SETTLEMENT SCHEME/976 registered in the Plaintiff's name and the TITLE NUMBER SHANZU SETTLEMENT SCHEME/977 in the 1st defendant's name. The 1st Defendant accuses the Plaintiff and the other Defendants of fraud.

15. The law is clear on issues of fraud. In the case of **Vijay Morjavia –v- Nansingh Madhusingh Darbar & Another (2000)KLR** the Court of Appeal held that:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must, of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

16. As regards the standard of proof, the Court of Appeal in the case of **Kinyanjui Kamau –v- George Kamau (2015)eKLR** expressed itself as follows:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo –v- Ndolo (2008)IKLR (G&F) 742 wherein the court stated that:

.....we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him.

Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases....” In case where fraud is alleged, it is not enough to simply infer fraud from the facts. ”

17. Although the 1st Defendant has pleaded that the adjudication and subdivision of the initial **Plot No.990** was done fraudulently, in my view the 1st Defendant failed to tender sufficient evidence to prove the allegations. The 1st Defendant mainly relied on the letter dated 10th October 2011 (d.exhibit 10) which allegedly confirmed that the Plaintiff was a local land committee member for **Shanzu Squatters Settlement Scheme** in 2007. There were no minutes or other credible documents produced to confirm that allegations. The Plaintiff herself denied having been a committee member and therefore it was incumbent upon the 1st Defendant to avail sufficient evidence to disprove her. And even if the Plaintiff was a committee member, it was incumbent upon the 1st Defendant to avail evidence to show that the Plaintiff used her position inappropriately. Moreover, I note from the evidence on record that the 1st Defendant was also beneficiary of his **Plot No.977** which was offered to him and title deed issued on the same date as that of the Plaintiff. On the first issue, I would therefore hold and find that the Plaintiff holds a valid title and is the bona fide owner of the land parcel known as TITLE NUMBER SHANZU SETTLEMENT SCHEME/976

18. As regards the issue whether the 1st Defendant has trespassed on the Plaintiff’s parcel of land TITLE NUMBER SHANZU SETTLEMENT SCHEME/976, it is evident that both the Plaintiff and the 1st Defendant holds title deeds to their respective parcels of land. The Plaintiff is the holder of TITLE NO.SHANZU SETTLEMENT SCHEME/976 measuring 0.0170 hectares while the 1st Defendant holds TITLE NUMBER SHANZU SETTLEMENT SCHEME/977 measuring 0.0222 hectares. Both parcels were allotted to the two parties by the Government through the settlement fund trustees pursuant to letters of offer issued by the 2nd Defendant, the Director of Land Adjudication and Settlement. Both the Plaintiff and the 1st Defendant were issued with their respective letters of offer dated 1st November 2007 and were issued with title deeds for their respective plots on 30th October 2007.

19. From the evidence on record, it is apparent that there was another dispute **Mombasa SRMCC No.2826 of 2009** between the Plaintiff and one Ezekia Evans over the kiosk that the Plaintiff bought from one Juliana Clement. In her evidence, the Plaintiff testified that she was allocated the land where the kiosk she had purchased stood, and in which she was already in occupation. In **Mombasa SRMCC No.2826 of 2009 – Ezekia Evans –v- Priscila Adero Anyango**, the dispute was over the Plaintiff’s said kiosk. In that case, the court ordered for the Eviction of the Plaintiff herein from the piece of land known as SHANZU SETTLEMENT SCHEME/1118 and for the demolition of all the structures erected thereon by Priscila Adero Anyango, the plaintiff herein. The Plaintiff herein was also ordered to pay general damages for trespass of Kshs.60,000/= as well as costs of the suit. Indeed a warrant to court bailiff to give possession was issued and the Plaintiff was evicted and her kiosk demolished.

20. From the proceedings and the orders issued in **Mombasa SRMCC No.2826 of 2009** it is evident that the Plaintiff’s kiosk was standing on LAND PARCEL NUMBER SHANZU SETTLEMENT/1118. In this case, the Plaintiff is accusing the 1st Defendant who is the proprietor of **Plot No.977** of trespass. However from the material placed before me and in particular the proceedings and orders in **Mombasa SRMCC No.2826 of 2009** the Plaintiff’s kiosk was standing on a different parcel of land. It appears the Plaintiff is not sure where her **Parcel Title Number/976** is on the ground. Whereas the Plaintiff alleges that she was not aware and was never served with the pleadings and was therefore not aware of the proceedings in **Mombasa SRMCC No.2826 of 2009**, other than the warrants to give possession, it is my view that the Plaintiff had the option to make an application to set aside the proceedings and orders in that case. This is so because the evidence on record show that the Plaintiff’s kiosk which she was categorical was standing on her parcel of land, was demolished by the owner of **Plot No.1118** pursuant to orders in **Mombasa SRMCC No.2826 of 2009** and not the 1st Defendant herein. On the second issue, I would therefore hold and find that the Plaintiff has not proved that the 1st Defendant has trespassed on her TITLE NUMBER SHANZU SETTLEMENT SCHEME/976. Moreover, even if the issue was over boundary dispute between the Plaintiff’s PARCEL NUMBER SHANZU SETTLEMENT SCHEME/976 and the 1st Defendant’s TITLE NUMBER SHANZU SETTLEMENT SCHEME/977, the court is prohibited by Section 18 (2) of the Land Registration Act, 2012, from entertaining the dispute unless the boundaries have been determined.

21. The other issue is whether the 1st defendant is entitled to both title NUMBERS SHANZU SETTLEMENT SCHEME/977 and SHANZU SETTLEMENT SCHEME/976 and whether the register of the two titles should be rectified and the Land Registrar be ordered to issue a new title for 0.025 hectares in the name of the 1st Defendant. The 1st Defendant testified that he purchased and was allocated **Plot No.990** measuring 0.025 hectares but was later allocated and issued with title for PARCEL NUMBER SHANZU SETTLEMENT SCHEME/977 measuring 0.0222 hectares. The letter of offer dated 15th May, 1999 (D.exhibit 2) was valid for 90 days from the date of that letter within which period the 1st Defendant should have paid 10% deposit for the plot and be documented accordingly, failure to which would lead to cancellation of the offer. There was no evidence showing that the 1st defendant complied with those conditions. The 1st Defendant produced receipts dated 6th February 2002 and 10th January 2008 (d.exhibits 3 (a) and (b)). These receipts were made after the stipulated period. On the contrary, the 1st Defendant also produced a second letter of offer dated 1st November 2007. I note that the said letter had the remarks “cleared” and it was the same plot number that was registered in the 1st Defendant’s name as TITLE NUMBER SHANZU SETTLEMENT SCHEME/977 and title issued on 30th October 2007. It would thus in my view follow that the 1st Defendant did comply with the conditions in the second letter of offer and was duly registered as the owner of the **Plot Number 977**. The processing of title to his name using the

second letter of offer must have been with the 1st defedndant's knowledge and consent. On the basis of the documents tendered, I am not satisfied that the 1st Defendant had acquired good title to **Plot No.990** and could therefore not claim the same. Similarly, the Plaintiff had been offered **Plot No.976** and was issued with a title deed for the same without any objection raised. I have earlier on in this judgment already found that the Plaintiff holds a valid title to **Plot No.976**. Having held and found that the Plaintiff holds a valid title for PARCEL NUMBER SHANZU SETTLEMENT SCHEME/976 while the 1st Defendant holds a valid title for PARCEL NUMBER SHANZU SETTLEMENT SCHEME/977, my view is that the 1st Defendant is not entitled to be registered in both titles and therefore the registers of the two titles cannot be rectified as sought.

22. Having considered and reviewed all the evidence and material placed before the court, I find and hold that the Plaintiff has not proved her case against the Defendants and I order that the same be and is hereby dismissed. I am also not satisfied that the 1st Defendant has proved his counter-claim on a balance of probabilities and I order that the same be and is hereby dismissed.

I order that each party meet their own costs of the suit and counter-claim.

JUDGMENT DATED, SIGNED and DELIVERED at MOMBASA this 8th day of July 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Adiga holding brief for Dr. Mbogoh for Plaintiff.

Anyanzwa for 1st Defendant

Mwandege for 2nd and 3rd Defendants

Yumna Court Assistant

C.K. YANO

JUDGE