



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC CASE NO. 16 OF 2020

KUGEUKA LIMITED.....PLAINTIFF

VERSUS

HAMISI ATHMAN NDEKWA & 3 OTHERS.....DEFENDANTS

RULING

(Application by plaintiff to be declared the bona fide owner of the suit land and for the court to issue orders to rectify the register; orders identical to the prayers in the plaint; orders cannot be granted without the matter first being heard and evidence tendered; application dismissed)

1. This suit was commenced by way of a plaint dated and filed on 5 February 2020, where the plaintiff has pleaded that she is the *bona fide* and registered owner of the land parcel known as Kwale/Ramisi Kinondo/99 (hereinafter, “the suit land”). It is the case of the plaintiff that she purchased the suit land from the 1st defendant (Hamisi Ndekwa) who at that time was the registered owner of the suit land as per the search conducted in the lands office. The plaintiff has averred that she complied with all the legal requirements, and on 25 September 2013, was issued with the certificate of title by the 3rd defendant (The Land Registrar Kwale). The plaintiff has further pleaded that in the year 2020, he lodged an official search, and the result of the search instead showed that the 2nd defendant (Mark Steven Sarginson) is the registered owner of the suit land. It is the case of the plaintiff that the 1st to 3rd defendants have defrauded her of the suit land, and she prays for *inter alia* a declaration that she is the legal and rightful owner of the suit land, and that the court should issue an order for rectification of the register by cancelling or revoking the title held by the 2nd defendant.

2. Alongside the plaint, the plaintiff filed a notice of motion application which is the subject of this ruling. The plaintiff is seeking the following orders:-

a) Spent

b) That this honorable court be pleased to issue a declaration that the plaintiff is the legal and rightful owner and holds an indefeasible title to the suit property until the contrary is ordered by this honorable court.

c) That this honorable court be pleased to issue an order for the rectification of the register by cancelling or revoking the title held by the 2nd defendant (Mark Steven Sarginson).

d) That if prayer 2 and 3 are not granted then this honorable court be pleased to issue an order for the indemnification of the plaintiff by the 3rd defendant (The Land Registrar Kwale) and the 4th defendant (The Attorney General).

3. So far, the 1st and 2nd defendants have not entered appearance and did not file anything towards the application.

4. The 3rd defendants (the Land Registrar, Kwale and the Attorney General, respectively) have however filed a defence through the State Law Office. Inter alia, it is pleaded that the first owner of the suit land was one Abdalla Juma, who then transferred his interest to the 2nd defendant. It is pleaded that what the plaintiff holds is a fraudulent title. There is further pleading that the title herein emanated from a subdivision of a larger parcel of land for which there is ongoing litigation.

5. I invited counsel to canvass the application by way of written submissions and I have taken note of the submissions filed by Mr. Matende, learned counsel for the applicants, and Ms. Njau, learned counsel for the 3rd and 4th defendants.

6. In the written submissions of the 3rd and 4th defendant, Ms. Njau has submitted that the prayers that the plaintiff is seeking cannot be granted at an interlocutory stage, since they require production of evidence. Counsel also referred me to the dispute regarding the larger parcel of land from which the suit land emanated from.

7. On his part, Mr. Matende referred me to relevant provisions of the law to put emphasis on his claim that because his client holds a certificate of title issued by the registrar, there is a *prima facie* evidence that he is the indefeasible owner of the suit land. Mr. Matende also referred me to Section 80 of the Land Registration Act where the court is given powers to rectify the register in instances of fraud or mistake. He submitted that the plaintiff's title was acquired legally because due diligence was exercised.

8. I have considered the pleadings, and the rival submissions by counsel. I will be very brief in my delivery because it is clear to me that the orders sought cannot be granted through such an application. It is indeed apparent to me that what the plaintiff seeks at this stage is precisely what he seeks in this suit. I cannot determine the suit through an application such as this. The plaintiff will need to present her case after which the court can then determine whether the title that she holds is the genuine title or not. Indeed, the 3rd and 4th defendants have presented some material that would cast doubt as to the genuineness of the title held by the plaintiff. This is therefore a matter that requires ventilation after a full hearing. It is not the sort of matter where judgment can be entered on a whim based on allegations that are yet to be proved.

9. There is really no need of me to say more. This application has absolutely no merit and it is hereby dismissed with costs to the 3rd and 4th defendants.

10. Orders accordingly.

DATED AND DELIVERED THIS 21ST DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA