



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 104 OF 2017

SOLOMON MAGANA KAMITI

[suing as father and administrator of the Estate of the late

DAVID GIKONYO KAMITI].....PLAINTIFF

VERSUS

MOSES KWERI KINYA.....1ST DEFENDANT

PETER KIMEMIA NJOROGE.....2ND DEFENDANT

JOHN KURIA NJOROGE.....3RD DEFENDANT

BILHA NGONYO ISAAC.....4TH DEFENDANT

JOSEPH KITSAO KARISA KATSOMA

IRUNGU MWANGI KABUTSA

GUNI BATI GUNI [sued on behalf of

MAISHA MAPYA SELF HELP GROUP.....5TH DEFENDANT

THE REGISTRAR OF LANDS, MOMBASA.....6TH DEFENDANT

THE ATTORNEY GENERAL.....7TH DEFENDANT

JUDGEMENT

Background

1. By a Plaintiff dated 4th May 2017 and filed herein on 5th May 2017, Solomon Magana Kamiti suing as the father and Administrator of the Estate of David Gikonyo Kamiti [the Plaintiff] prays for judgement against the Seven [7] Defendants for:

1. A declaration that the sale and transfer of the suit land from the name of the 5th Defendant into the name of the 4th Defendant and the subsequent transfer of the suit land to the 1st, 2nd and 3rd Defendants were fraudulent and illegal [and were] therefor null and void;

2. An order directing the 6th Defendant to cancel all entries and registration of title in the names of the 4th Defendant and subsequently in the names of the 1st, 2nd and 3rd Defendants herein and rectify the register by inserting the name of the Plaintiff as the owner of Plot No. 10719/120 Malindi Municipality;

3. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit premises;

5. Vacant possession of the suit property

6. A permanent injunction restraining the Defendants jointly or severally by themselves, servants, agents, employees, or any other person claiming interest through them from trespassing, entering, remaining and or dealing with the suit property in any manner whatsoever;

7. Costs to this sit;

8. General damages for trespass;

9. Interest on 7 above at court rates; and

10. Any other relief this Honourable court may deem fit to grant in the circumstance.

2. The prayers arise from the Plaintiff's contention that at all times material he was the registered owner of the suit property having obtained a grant of Letters of Administration for the estate of the late David Gikonyo Kamiti who had purchased the said property from one Kaingu Kombe Kaingu

3. The Plaintiff avers that the said Kaingu Kombe Kaingu who is now deceased had earlier on purchased the suit property from officials of Maisha Mapya Self – Help Group [the 5th Defendant]. In recognition of the said purchase, the 5th Defendant had on 19th June 1999 given consent to the late David Gikonyo Kamiti to construct residential/commercial premises on the suit property.

4. The Plaintiff avers that vide Civil Suit No. 11 of 2011, he was declared the owner of the suit property after the court determined that the late David Gikonyo Kamiti had bought the suit property from the late Kaingu Kombe Kaingu. However, on or about 27th August 2016, the Plaintiff found a newly built perimeter wall around the suit property and upon enquiry established that the 5th Defendant during the pendency of the said Civil suit no. 11 of 2011 had fraudulently caused the property to be transferred and registered in the name of the 4th Defendant who in turn transferred it and had it registered in the names of the 1st, 2nd and 3rd Defendants.

5. The Plaintiff asserts that the actions of the Defendants are illegal as the sales, transfers and registration of the property in favour of the 4th Defendant and thereafter in favour of the 1st, 2nd and 3rd Defendants were meant to defeat his legal rights thereto and the same ought to be recalled, rescinded and/or nullified.

6. But in their Statement of Defence dated 17th November 2017 and filed herein on 20th November 2017, Joseph Kitsao Karisa Katsoma, Irungu Mwangi Kabutsa and Guni Bahati Guni sued herein as officials of and on behalf of Maisha Mapya Self- Help Group [the 5th Defendant] aver that Plot No. 10719/120 Malindi Municipality does not form part of the Estate of the late David Gikonyo as the certificate of confirmation of Grant lists a different property described as Plot No Malindi/Municipality 719/120.

7. The 5th Defendant further asserts that the suit property was acquired from itself by one Kenga Kashuru and not the late Kaingu Kombe Kaingu as alleged by the Plaintiff. The 5th Defendant further avers that it could not have given consent to the Plaintiff to start construction on the suit premises on 19th June 1999 as the receipts produced by the Plaintiff demonstrate that by then the Plaintiff was yet to complete payment for the land.

8. The 5th Defendant further denies receiving any money from the Plaintiff as alleged or at all and asserts that the receipt produced by the Plaintiff is a forgery. In addition, the 5th Defendant avers that it was not a party to Civil Suit No. 11 of 2011 and that in any event, the decision or judgment made therein is not binding on this court.

9. The 5th Defendant asserts that the suit property was acquired from itself by the said Kenga Kashuru who subsequently sold it to the 4th Defendant. As at the time of the said sale, the ownership documents were still in the name of the 5th Defendant and upon request by the said Kenga Kashuru on 26th July 2008, it transferred the property directly to the 4th Defendant. The 5th Defendant accordingly asserts that it did not commit any irregular or fraudulent act and urges the court to dismiss the Plaintiffs suit.

10. Similarly in their joint Statement of Defence and Counterclaim dated 24th October, 2017 as filed herein on 31st October 2017, Moses Kweri Kwinya , Peter Kimemia Njoroge and John Kuria Isaac [the 1st , 2nd and 3rd Defendants respectively] deny that the Plaintiff has any proprietary rights to the suit property.

11. The 1st , 2nd and 3rd Defendants aver that the contract between the late Kaingu Kombe Kaingu and David Gikonyo Kamiti did not materialize and/or was not completed as the said David Gikonyo Kamiti failed to pay the full consideration required thereunder. It is further their case that the late Kaingu Kombe Kaingu failed to pay the requisite sum to the 5th Defendant to enable it be allocated the suit property and hence the property reverted to the 5th Defendant.

12. The 1st , 2nd and 3rd Defendants assert that they are *bona fide* purchasers for consideration without notice of the Plaintiff's interests in the property and assert that they duly conducted a search at the Registrar of Lands Mombasa [the 6th Defendant] before purchasing the property.

13. By way of their Counterclaim, the 1st, 2nd, and 3rd Defendants aver that they duly executed a contract of sale with Bilha Ngonyo Isaac [the 4th Defendant] who had in turn purchased the property from the 5th Defendant. They assert that they paid the entire purchase price to the

4th Defendant who in turn requested the 5th Defendant to execute transfer documents in their favour.

14. Having followed all laid down conveyancing protocols, the 1st, 2nd and 3rd Defendants aver that they were properly registered and issued with title documents in regard to the suit property. They have since developed the same by constructing permanent structures thereon.

15. Accordingly the 1st, 2nd and 3rd Defendants pray for judgement against the Plaintiff for;

a. A permanent injunction restraining the plaintiff his agents, servants, employees, beneficiaries and/or any other person acting on his behalf from claiming and /or interfering in any manner with the ownership of Plot No. 10719/120 Malindi registered in their names; and

b. Costs and interest of the suit.

16. The Registrar of Lands Mombasa and the Honourable the Attorney General [the 6th and 7th Defendants respectively] are similarly opposed to the suit. In their statement of Defence dated 25th May 2021, they deny that they carried out any illegal or fraudulent registration of the suit property and invite the Plaintiff to strict proof thereof.

17. The 6th and 7th Defendants asserts that they acted within the law at all material times and urge the court to dismiss the suit for failing to disclose any reasonable cause of action against themselves.

18. Bilha Ngonyo Isaac [the 4th defendant] did not enter appearance and/or file any response to the Plaintiff's suit.

The Plaintiff's Case

19. At the trial herein, the plaintiff called a sole witness who testified in support of his case.

20. PW1 Solomon Majana Kamiti is a resident of Gatanga in Murang'a and the Plaintiff herein. He told the court he is the Administrator of the Estate of the late David Gikonyo Kamiti having obtained Letters of Administration vide Thika CM's Succession Cause No. 259 of 2007.

21. PW1 testified that the late David Gikonyo Kamiti was his son and that prior to his death, he had purchased the suit property from one Kaingu Kombe Kaingu who had also since passed away. PW1 told the court the late Kaingu became possessed of the suit premises after acquiring the same from the 5th Defendant. Thereafter in 1998, the late Kaingu sold the land for KSh. 120,000/= to PW1's son, David.

22. PW1 further told the court that his son paid for the land in installments with the last payment of KSh. 35,000/= being made on 22nd June, 1999. Earlier on 19th June 1999, the 5th Defendant gave its consent to David to construct residential/ commercial premises on the suit property. Subsequently on 13th April 2006, David paid a sum of KSh. 20,000/= to the 5th Defendant for purposes of processing a deed plan which was required before the property could be transferred to David's name.

23. PW1 testified that David died shortly thereafter on 30th May 2006. Thereafter in the year 2009, the Plaintiff sued one Kenga Kashuru who was in occupation of the suit property vide Malindi CMC No. 169 of 2011 claiming ownership thereof. The court declared the Plaintiff as the owner of the land, a decision which was upheld by the High Court in Civil Appeal No. 11 of 2011.

24. PW1 further told the court that a warrant to the Court bailiff to give vacant possession of the suit land was subsequently issued by the High Court on 18th July 2016 and that the same was executed on 25th July 2016. However, on 27th August 2016 when PW1 conducted a survey to confirm the ground position and status of the land, he found a newly built perimeter wall around the same.

25. PW1 testified that he then conducted a search at the Lands Registry from where he established that the 5th Defendant had during the pendency of the said suit fraudulently caused the land to be transferred and registered in the name of the 4th Defendant on 1st November 2013. In turn, the 4th Defendant had transferred the land to the 1st, 2nd and 3rd Defendants on 20th February 2015.

26. PW1 told the Court that pursuant to the said transfer, the 1st, 2nd and 3rd Defendants have since wrongfully entered into the suit premises and erected thereon a perimeter wall and gate.

27. On cross – examination, PW1 conceded that he was not present when his son executed the agreement with Kaingu Kombe. He further conceded that he had not sued the 1st, 2nd and 3rd Defendants in Malindi CMCC No. 169 of 2009.

The Defence case

28. On their part the defence called two witnesses in support of their case.

29. DW1 – Peter Kimemia Njoroge is the 2nd Defendant and testified on his own behalf and on behalf of the 1st, 2nd and 3rd Defendants.

30. DW1 told the court that having received an oral notice from the 5th Defendant that the subject property herein was on sale, he approached his friends – the 1st, 2nd and 3rd Defendants with a view to pulling resources to purchase the same. DW1 testified that further they did due

diligence by visiting the Lands Registry at Mombasa, and upon consultation with officials of the 5th Defendant, they established that the 4th Defendant was the lawfully registered owner of the property.

31. Subsequently, DW1 told the Court they paid a deposit and transferred the land to themselves before making the final payment. The transfer was registered at the Mombasa Lands Registry on 27th February 2015. They have since developed the property by erecting a permanent perimeter wall and other structures.

32. On cross – examination, DW1 told the Court he had gone and seen the land before they purchased it. They established that it belonged to the 4th Defendant.

33. DW1 further told the court that they had bought the land for Ksh. 1,500,000/= even though the indenture only shows that the land was sold for ksh. 25,000/=. He further told the court he was not aware that the land was subject of Malindi CMCC No. 169 of 2009.

34. DW2- Guni Bati Guni is one of the officials of the 5th Defendant. He told the Court that the suit property was acquired from the 5th Defendant by one Kenga Kashuru and not Kaingu Kombe as alleged by the Plaintiff. He further denied that the 5th Defendant gave its consent to the Plaintiff to commence construction on the land.

35. DW2 further told the court that the 5th Defendant was not a party to Malindi CMCC NO. 259 of 2007 and the judgment emanating therefrom was therefore not binding upon itself

36. DW2 told the court the land in question was acquired from itself by Kenga Kashuru who subsequently decided to sell the same to the 4th Defendant. As at that time, the ownership documents were still in the name of the 5th Defendant and therefore upon request by the said Kenga Kashuru vide his letter dated 26th July 2008, the 5th Defendant directly transferred the suit land to the 4th Defendant.,

37. On cross examination, DW2 conceded that the receipts provided by the plaintiff show that payment was made by Kaingu Kombe. He told the Court that the person who was found on the ground at the time of allocation was required to pay the sum of Ksh. 25000/=. The receipts showed that Kaingu Kombe had paid the said Ksh. 25,000/=.

38. DW2 conceded that by 2013 he was a committee member of the 5th Defendant. He however told the Court he was unaware at the time that a Court had already made a determination that the land did not belong to Nichodemus Kenga Kashuru and that he therefore had no interest in the land.

39. DW2 further told the court he was unaware if the 4th Defendant had paid the requisite Ksh. 25,000/= before the allocation. He further told the court the owners of the parcel could sell them even before registration and issuance of titles. Their secretary kept the records and register of members although they were unable to trace the same after their secretary died.

Analysis and Determination

40. I have carefully considered the pleadings as filed by the parties, the testimonies of various witnesses who testified herein and the evidence adduced at the trial. I have similarly considered the submissions and authorities placed before me by the Learned Advocates acting for the parties herein. Though served by way of substituted service, the 4th defendant neither entered appearance nor did she file any response to the Plaintiff's claim.

41. The Plaintiff herein is the father and Administrator of the estate of one David Gikonyo Kamiti [David] who passed away on 30th May 2006. It was the Plaintiff's case that prior to his death, his son had sometime in the year 1998 purchased all that parcel of land known as Plot No. 101719/120 Malindi Municipality from one Kaingu Kombe.

42. The Plaintiff told the court that the said Kaingu Kombe who is now deceased came into possession of the suit property after acquiring the same from the 5th Defendant, a Self-Help Group registered under the Societies Act, Cap 108 of the Laws of Kenya. The Plaintiff told the Court that by the time of his death, David had made all payments for the transfer of the suit property from the 5th Defendant.

43. The Plaintiff asserts that despite acquisition of the property and the payments made to the 5th Defendant by David, the 5th Defendant has fraudulently transferred the suit property to the 4th Defendant who in turn transferred the same to the 1st, 2nd and 3rd defendants.,

44. It is the Plaintiff's case that prior to the fraudulent transfer, he had instituted Malindi CMCC No. 169 of 2009; Solomon Magani Kamiti – vs – Kenga Kashuru in order to eject the said Kenga Kashuru [also known as Nicodemus Kenga] who was then in occupation of the property that had been purchased by David. That suit was on 13th November 2011 decided in favour of the Plaintiff.

45. It was accordingly the Plaintiff's case that the transfer of the suit property to the 4th Defendant and subsequently to the 1st, 2nd and 3rd Defendants was meant to defeat his rights as determined by the judgment and decree of the said Court.

46. In response to the Plaintiff's claim, the 5th Defendant told the Court that it was a stranger to the person named as Kaingu Kombe who was said to have sold the suit land to David. On the contrary, the 5th Defendant asserted that it had originally allocated the land to Nicodemus Kenga Kashuru who was a member of the Self – Help Group. The 5th defendant told the court that afterwards, the said Nicodemus Kenga Kashuru sold the land to the 4th Defendant who as it turned out, subsequently re-sold the land to the 1st, 2nd and 3rd Defendants.

47. According to the 5th Defendant, the correct procedure for acquiring property under its scheme was that consent to develop the land would only be granted to members who had made full payments to itself. In this respect, the 5th Defendant told the Court that when Nicodemus Kenga Kashuru decided to sell the land, it approached the 5th Defendant to transfer the property directly to the 4th Defendant as the documents of ownership were still in the name of the 5th Defendant.

48. In support of that position, the 5th Defendant produced a copy of a sale agreement dated 26th July 2008 between the said Nicodemus Kenga Kashuru and the 4th Defendant herein. In addition, the 5th Defendant produced a note dated the same day 26th July 2008 from Nicodemus Kenga Kashuru authorizing the 5th Defendant to process a Deed Plan in the name of the 4th Defendant. The 4th Defendant was eventually issued with a title on 1st November, 2013.

49. From the material placed before me however, it was not very clear to me how the Plaintiff's son David initially acquired the suit property. I say so because while the Plaintiff states that the said Kaingu Kombe who sold the land became possessed of the same after acquiring it from the 5th defendant in 1999, David is said to have acquired the land from the said Kaingu Kombe in 1998.

50. In support of the claim for ownership, the plaintiff has produced a copy of a receipt dated 19th June 1999 in the name of the said Kaingu Kombe indicating that he paid the sum of Ksh. 25,000/= being payment for buying a Plot No. 101. While there was no dispute that this was the previous reference for what later became the suit property upon survey and subdivision, a copy of the sale agreement produced by the Plaintiff [exhibit 3] indicates that David acquired the land on an undisclosed date and month in the year 1998 and that the completion date was March 1999.

51. That being the case, it would appear to me that as at the time the late David is said to have acquired the suit property from the late Kaingu Kombe, the said Kaingu Kombe had no proprietary interest in the suit property which he could pass to David or any other person.

52. The common law rule of *nemo dat quod non habet*, literally means one cannot give what he has not. It means that a seller of goods cannot give the buyer thereof a better title than he himself has in the goods. That rule is intended to protect the title of the true owner. The rationale behind the rule is that whoever owns the legal title of property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner thereof generally has no legal effect. That means that the proper owner thereof continues to hold the title to the property while the person who received the invalid title owns nothing.

53. While indeed there are exceptions to the rule such as where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner, the plaintiff herein has not made any attempt to bring himself within those exceptions and it was apparent that the 5th Defendant did not consent to the sale and/or transfer of the title.

54. Acting on the belief that his son had rightfully acquired the property from the said Kaingu Kombe, the plaintiff instituted Malindi civil suit no. 169 of 2009 against Kenga Kashuru. While the pleadings in the said suit were not availed to this Court for scrutiny, it was evident from the title thereof that the said suit was instituted in the year 2009. From the material placed before me, it would appear that the said suit was instituted a year after the Defendant in the said suit had transferred his interests in the land to the 4th Defendant herein.

55. The said 4th Defendant was not sued in the said proceedings. Even more crucial, while it was evident that the documents of title up to and until then remained registered in the name of the 5th Defendant, the 5th Defendant was not enjoined as a party in the said suit. There was indeed no evidence that the 5th Defendant had been served with the decree emanating from the Court resulting from the judgment rendered on 13th April 2011 as at the time the property was transferred to the 4th Defendant on 1st November 2013.

56. That being the case, I cannot but agree with the 1st, 2nd and 3rd Defendants that they are *bona fide* purchasers of the suit property for value without notice. I say so because upto and until the 20th day of February 2015 when the 4th Defendant sold to them the suit property, there was nothing registered on the title that indicated the Plaintiff's interest thereon.

57. Black's Law Dictionary, 8th Edition defines a "*bona fide* purchaser" as -

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title, one who has in good faith paid reliable consideration for the property without notice of prior adverse claims."

58. In *Eunice Grace Njambi Kamall & another –vs- the Honourable the Attorney General & 5 others, Civil Suit No. 976 of 2012*, the Court cited the case of *Fletcher –vs – Peck 101 US 87 [1810]* to illustrate how other jurisdictions have handled the issue of sanctity of the title and the plight of innocent third parties in the said *Fletcher –vs – Peck case*, Marshall J. had this to say:

"If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him."

He has paid money for a title good at law, he is innocent whatever may be the guilt of others and equity will not subject him to the penalties attached to that guilt. Titles would be insecure, and intercourse between man and man would be very seriously obstructed if this principle be overturned."

59. I am in full concurrence with the dictum of Marshal J. Whereas the intending purchaser of a property ordinarily is expected to carry out due diligence to verify the details and particulars of the property, it cannot be expected that the scope of such due diligence would extend beyond what the law provides as being sufficient. That includes official searches and inspection of survey records unless there is on the face of it apparent need to carry out further investigation.

60. In the premises I am not persuaded that the Plaintiff has proved his case on a balance of probabilities. On the contrary, I am persuaded that the 1st, 2nd and 3rd Defendants were bona fide purchasers of the suit property for value without notice of any defect on the title and that they are hence entitled to this Court's protection

61. Accordingly, I dismiss the plaintiff's case in its entirety and allow the Counter claim by the 1st, 2nd and 3rd Defendants.,

62. In the circumstances of this case, I think it is fair that each party shall bear their own costs

63. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF AUGUST, 2021.

J.O. OLOLA

JUDGE