



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 12 OF 2017

JUSTIN MWANGO CHONGA.....PLAINTIFF

VERSUS

1. MWAROME MUNGA JANJI.....1ST DEFENDANT

2. LUTU CHIBO MUNDU.....2ND DEFENDANT

3. SALIM CHIBO MUNDU.....3RD DEFENDANT

4. GEORGE MUNGA JANJI.....4TH DEFENDANT

5. REGISTRAR OF LANDS (KILIFI).....5TH DEFENDANT

JUDGMENT

By a Complaint dated 25th January 2017, the Plaintiff herein sued the Defendants jointly and severally for the following orders:

a. Declaration that the Plaintiff herein is the lawful beneficial owner of the suit property, situate at Kilifi and identified as Title No. 689 Chonyi/Bedzombo/Kitsoeni, (hereinafter referred to as “the suit Property”)

b. An order directing the District Land Registrar Kilifi to rectify the Land Register by deleting and cancelling the Registration of the Defendants as the proprietors and restoring the property in the plaintiff’s name.

c. Any other relief deemed just and expedient and costs of this suit.

The 1st to 4th Defendants though duly served only entered appearance but did not file any defences.

The 5th Defendant filed a statement of defence but did not defend the suit during the hearing though served with a hearing notice. The matter therefore proceeded for formal proof where the plaintiff and his witness gave evidence.

PLAINTIFF’S CASE

PW1 adopted his witness statement and the list of documents as his exhibits dated 25th January 2017. PW1 testified that he bought the suit land sometime in October 1982 from one Mwalune Karisa Goryo, now deceased and immediately took possession and started cultivating thereon.

PW1 stated that he conducted a search in 2017 and was surprised to find that the defendants had illegally and fraudulently without his knowledge caused themselves to be registered as the proprietors of the suit land during the adjudication process.

It was PW1’s evidence that he is the rightful owner of the suit land and prayed for the orders to be granted as prayed in the complaint as the defendants had fraudulently transferred his land in their names.

PW2 Dr. Mathias Kai also adopted his witness statement and stated that he contributed to the purchase of the suit land, the plaintiff being his cousin. He corroborated the plaintiff’s evidence and stated that the plaintiff is the rightful owner of the suit land having bought and taken

possession of the same.

The 1st to 4th defendants filed a memorandum of appearance but failed to file a defence as required by law within the stipulated time. The 5th defendant filed a defence but never defended the suit though served with a hearing notice.

Counsel for the plaintiff filed submissions and reiterated the evidence of the plaintiff and relied on section 26 (1) of the Land Registration Act, 2012 which provides as follows:

" 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 title 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. "

Counsel also relied on the case of **MUNYU MAINA V HIRAM GATHIHA MAINA [2013] eKLR** where the Court held thus:

"... when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

Mr Magiya submitted that the defendants did not place any evidence to show how they acquired the title to the suit land and urged the court to find in favour of the plaintiff.

Counsel further relied on the case of **Elmbukara Limited v Alice Waithira Kimani & 2 others [2017] eKLR** where Okon'go J applied section 26 (1) and found that the plaintiff had proved that the title had been fraudulently acquired.

Counsel also urged the court to be guided by section 80 (1) of the Land Registration Act and rectify the land register in favour of the Plaintiff.

ANALAYSIS AND DETERMINATION

This is a matter that was undefended by the defendants. The 1st to 4th defendants entered appearance but neither filed a defence nor appeared in court during the hearing. The 5th defendant filed a defence but did not participate in the hearing of the suit although served with a hearing notice. It seems they were not interested in defending the suit.

Be as it may the fact that a suit is undefended does not mean that the plaintiff's burden of proof shifts. The plaintiff is still under a duty to prove his or her case to the required standard.

A defence filed without being subjected to cross examination remains as such and the court is not under any duty to consider it if the defendant is not interested in defending the suit. The 5th Defendant's Defence therefore remains mere allegations and the Plaintiff's evidence remains uncontroverted.

In the case of **Kenya Power & Lighting Co Ltd v. Rassul Nzembe Mwadzaya [2020] eKLR** the Court held that;-

It is noteworthy that the Appellant in its amended Statement of Defence filed on 15th October 2012 denied all the allegations raised by the Respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of Edward Muriga through Stanley Muriga...Vs...Nathaniel D. Schulter, Civil Appeal No.23 of 1997, where the Court of Appeal stated: -

"In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".

13. Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the defence, such averment stand as such as mere statement. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted.

The issue for determination is whether the plaintiff is entitled to the orders sought and whether he has proved his case.

The Plaintiff gave evidence and produced documents to show how he entered into an agreement for sale with one Mwalume Karisa Goryo a relative of the defendants, paid the purchase price and took immediate possession of the suit land where he still resides. It was further his testimony that he carried out a search and found out that the defendants had registered their names fraudulently without his knowledge.

The plaintiff's evidence was uncontroverted as the defendants were given an opportunity to explain how they became registered as owners of the suit land but entered appearance but failed to file a defence. Where fraud has been proved section 26 (1) allows the court to impeach a title that has been procured fraudulently or unprocedurally.

The court is further empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any registration to be cancelled or amended if it is satisfied that any registration was obtained, made or committed by fraud or mistake.

Section 80 (1) of the Land Registration Act, 2021 provides as follows:

"Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or committed by fraud or mistake. "

In the case of **ELIJAH MAKERI NYANGW'RA v STEPHEN MUNGAI NJUGUNA & another [2013] eKLR** where the Court held as follows:

"Is the title impeachable by virtue of Section 26(1) (b) ? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.

The evidence in this case puts no one in doubt that the title to the 1st defendant was *obtained illegally, unprocedurally or through a corrupt scheme*. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1st defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st defendant and his registration as proprietor of the suit land. The plaintiff should be registered as owner of the suit land. It is regretful that the 1st defendant was snared by the scheme perpetuated by the 2nd defendant. I sympathize with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land"

I find that the plaintiff has proved his case and is therefore entitled to the orders sought and specifically grant the orders as follows:

- a. A Declaration is hereby issued that the Plaintiff herein is the lawful beneficial owner of the suit property, situate at Kilifi and identified as Title No. 689 Chonyi/Bedzombo/Kitsoeni.**
- b. An order is hereby issued directing the County Land Registrar Kilifi to rectify the Land Register by deleting and cancelling the registration of the Defendants as the proprietors and restoring the property in the plaintiff's name.**
- c. Costs of the suit to the plaintiff.**

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF NOVEMBER, 2021

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.