



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 103 OF 2015

NELSON RUTO KORIR.....PLAINTIFF

VERSUS

EUGINA NJOKI

REGISTRAR OF TITLES.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Plaint dated 27th June 2015 and filed herein on 30th June 2015, Nelson Ruto Korir (the Plaintiff) prays for Judgment against the Defendants and for:-

a) A declaration that the Plaintiff is the rightful owner of that parcel of land situated at North of Mombasa Municipality in Mombasa District measuring 0.0336 Ha or thereabouts and being CR No. 38322 Plot Subdivision No.2679 (Original No. 34/27) Section III Mainland North as delineated on Land Survey Plan No. 180554;

b) A cancellation of the transfer registered as No. CR 4286/56 and cancellation of Certificate of Title CR No. 57064 issued to the 1st Defendant on 8th January 2015 for the said Parcel of land;

c) General and exemplary damages for trespass, malicious destruction of property, flagrant and forceful takeover of the Plaintiff's property without following due process;

d) A permanent injunction restraining the 1st Defendant either by herself or through her agents, servants, proxies and employees from interfering with the Plaintiff's quiet possession and occupation of the said parcel of land and a mandatory injunction compelling the 1st Defendant to give vacant possession of the same; and

e) Costs and interest.

2. Those prayers arise from the Plaintiff's contention that on 14th October 2004, he became the registered proprietor of the described property. Since then he has enjoyed peaceful and quiet possession thereof. However on or about 4th June 2015, the 1st Defendant wrote a demand letter to the Plaintiff's agent and caretaker of the suit property claiming ownership thereof and urging the said agent and caretaker to yield vacant possession thereof within seven days.

3. The Plaintiff has since learnt that the 1st Defendant is in possession of another Certificate of Title issued on 8th January 2015 for the same piece of land. It is the Plaintiff's case that he has never transferred the suit property to the 1st Defendant and that the said Certificate of Title was issued to her in a manner that is fraudulent.

4. It is the Plaintiff's case that despite his protestations, on or about 13th June 2015, the 1st Defendant in the company of officials from the County Government of Kilifi, the Police and a gang of youths armed with crude weapons invaded the suit property and destroyed all structures therein, constructed a perimeter wall and evicted the Plaintiff's caretaker therefrom.

5. The Plaintiff asserts that the Defendant's actions are not only illegal but criminal and hence the orders sought herein.

6. In her Statement of Defence and Counterclaim dated and filed herein on 1st February 2017, Eugenia Njoki Ndau (the 1st Defendant) denies that the Plaintiff is the registered proprietor of the suit property and asserts that she is the rightful owner thereof. While admitting having demanded that the Plaintiff's caretaker vacates the suit property, she denies that her claim to the property is based on a fraudulent Certificate of title.

7. The 1st Defendant avers that she bought the suit property from one Abdillahi Kibwana Khamis who was the beneficial owner thereof and asserts that it is the Plaintiff's claim which is based on a fraudulent Certificate of title.

8. By way of Counterclaim, the 1st Defendant prays that the Plaintiff's suit as against herself be dismissed with costs and that instead, Judgment be entered in her favour for:-

a) A declaration that the suit property herein belongs to herself;

b) A cancellation of the Transfer registered to the Plaintiff' on 14th October 2004 in regard to the suit property and a declaration that the same is fraudulent;

c) A permanent injunction restraining the Plaintiff either by himself, his agents, servants or employees from interfering, dealing with or managing the suit property;

d) Costs of the Counterclaim and interests thereon at such rate as this Court may deem fit to grant; and

e) Such further or other reliefs as the Honourable Court may deem appropriate in the circumstances.

9. Similarly in his Statement of Defence dated and filed herein on 9th November 2017, the Registrar of Titles (the 2nd Defendant) denies that the Plaintiff is the registered proprietor of the suit property and invites him to strict proof. The 2nd Defendant further denies the allegations of fraud as particularized at paragraph 10 of the Plaintiff and asserts that any document issued by the office of the Registrar of titles was done in compliance with the law.

The Plaintiff's Case

10. At the trial herein, the Plaintiff called two witnesses in support of his case.

11. PW1-Nelson Ruto Korir is the Plaintiff. He testified that he bought the suit property from one Mwanisha Kibwana Hamisi on 14th October 2004 and was issued with a Title Deed therefor on the same day. Sometimes in 2013 he learnt of some interference with the land. When they followed up with his lawyer, they discovered that another title had been issued in the 1st Defendant's name on 13th July 2012.

12. PW1 testified that he did not understand how the 1st Defendant was issued with the title when he already had one for the same parcel of land. It was his case that before filing the suit, there had been an attempt to destroy his structures on the land and to evict his caretaker. He came to Court and got orders of injunction.

13. On cross-examination he told the Court that he had never met the seller of the land in person but had dealt with him through an agent known as Kenny. He bought the land for Kshs 150,000/- but he could not recall carrying out a search on the property before he bought the same.

14. PW2-Emily Mwendu Makasi is a neighbour of the Plaintiff and doubles up as the Plaintiff's Caretaker on the land. She told the Court that she took possession of her parcel in 1996 and that the Plaintiff became her neighbour in 2004 after buying the land from the same person she had bought her parcel from.

15. PW2 told the Court that one day a lady called Florence went to the Plaintiff's land and started claiming it. The lady later went back in the company of County Council Staff and destroyed the Plaintiff's fence. PW2 then called the Plaintiff who resides in Eldoret and informed him of what had transpired.

16. On cross-examination she told the Court that she had bought her Plot from one Salim Kibwana. She had not been involved when the Plaintiff acquired his portion and she could not tell whether or not it was acquired fraudulently.

The Defence Case.

17. In support of their respective cases, the 1st Defendant called two witnesses while the 2nd Defendant called one witness.

18. DW1-Florence Kimunyu is the daughter of the 1st Defendant and the donee of a Power of Attorney from the 1st Defendant. She told the Court that sometime in June 2015, she learnt of this case after a friend took to her the Plaintiff and an application filed herein by the Plaintiff.

19. DW1 told the Court that her mother bought the parcel of land on 3rd June 2011 from Abdillahi Kibwana Khamis who was the owner thereof. DW1 was one of the witnesses to the Sale Agreement and was entrusted to follow up on the process of registration at the Lands Office, Mombasa.

20. When DW1 went to the Lands Offices, she was surprised to be told the land was already registered in the Plaintiff's name. They complained to the seller who told them he did not know the Plaintiff and promised to follow up the matter. The Vendor then told them he had reported the matter to the Police but the Plaintiff refused to show up at the Police Station to facilitate investigations.

21. DW1 testified that the Vendor then went to the 2nd Defendant's office in Mombasa and upon being told of the same; the 2nd Defendant rectified the position and issued a proper title to the 1st Defendant. Thereafter DW1 proceeded to the suit property to take possession but found PW2 on the land. PW2 claimed to have been allowed to occupy the land by the Plaintiff. They then issued PW2 with notice to vacate. Instead of her vacating, DW1 was served with the suit papers herein.

22. On cross-examination, DW1 told the Court that prior to purchasing the land, they were not aware that the Plaintiff had title thereto. She told the Court that it was the Vendor who took to her the title deed for the land after they complained. She could not tell whether the Plaintiff's title was cancelled prior to the issuance of her Mother's title.

23. DW3- Abdillahi Kibwana Hamisi is the one who sold the suit property to the 1st Defendant. He told the Court he became the owner as a beneficiary of the original parcel of land known as sub-division No. 34/111/MN following succession of the Estate of his late father Kibwana Bin Khamis.

24. DW2 told the Court that on 3rd June 2011, he entered into a Sale Agreement in which he sold the land for Kshs 800,000/- to the 1st Defendant. He testified that he was surprised when he later lodged the transfer documents at the Lands Registry in December 2011, that the sub-division No. 2679/III/MN had already been registered in the name of the Plaintiff. He did not know the Plaintiff and he therefore proceeded to lodge a complaint with the Police at Mtwapa but the Plaintiff failed to turn up.

25. DW2 further told the Court that he lodged a complaint with the 2nd Defendant on 22nd October 2014 and his complaint was acted on 8th January 2015 when a new title was issued in the 1st Defendant's name. In October 2014, the Plaintiff had complained to DW2 that there was a lady occupying the suit property. DW2 visited the land and found PW2 on the land. He immediately gave her notice to vacate. Thereafter he learnt that the Plaintiff had gone to Court.

26. On cross-examination, DW2 admitted that after the death of his father his estate was administered by the Public Trustee before being distributed to the beneficiaries. He further admitted that his sister Mwanaisha Kibwana was one of the heirs of the estate but stated that every beneficiary was given their portions of the estate. He denied that his sister sold the land to the Plaintiff.

27. DW3-John Wanjohi Gichuhi is the Land Registrar, Mombasa. He told the Court that the dispute is over the same parcel of land. The land was subjected to sub-division and fresh titles were issued. DW3 told the Court that for one to be issued with a title after sub-division, one must present the original title, the Original Deed Plan and other supporting documents. From their records only the 1st Defendant's documents were in their records.

28. During cross-examination, DW3 conceded that there was no indication from their records that the Plaintiff's title had been cancelled. Their office had been unable to locate the file in respect of CR No. 38322 and he was therefore unable to say if there had been a transfer in the name of the Plaintiff.

Analysis and Determination

29. I have perused and considered the pleadings herein, the oral testimonies of the witnesses and the evidence produced before this Court. I have also considered the submissions and authorities placed before me by the Learned Advocates for the parties.

30. The main issue is for this court to determine who between the Plaintiff and the 1st Defendant, is rightfully registered as the owner of the parcel of land Known as Sub-division No. 2679 (Original No. 34/27) Section III Mainland North (the Suit Property). Both are holders of title deeds said to have been issued by the 2nd Defendant pursuant to two transfers registered at the Mombasa Lands Registry on two different dates.

31. It is the Plaintiff's case that he became the registered proprietor of the suit property on 14th October 2004 pursuant to a transfer registered as Number CR 4286/44 and that he had always enjoyed peaceful and quiet possession thereof until sometime in 2013 when the 1st Defendant started interfering therewith on the purport that she was the owner of the land.

32. The 1st Defendant on her part avers that she purchased the land from Abdillahi Kibwana Khamis (DW2) on 3rd June 2011. However when she presented the transfer and Deed Plans for registration at the Mombasa Lands Registry, she was surprised to be told that the suit property had already been registered in the name of another person-the Plaintiff herein.

33. When the 1st Defendant confronted the Vendor with the said information, the Vendor informed her that he did not know the Plaintiff and that he had never sold the land to him. The Vendor then wrote a complaint to the 2nd Defendant who on receipt thereof proceeded to rectify the position and issued a new title being Number CR 57064 in the name of the 1st Defendant.

34. Testifying before this Court, the Plaintiff asserted that he bought the land from Mwanaisha Kibwana Hamisi on 14th October 2004, the same day the property was transferred to his name. He then entrusted Emily Mwende(PW2) who owned the adjacent parcel of land to take care of the same.

35. The Plaintiff told the Court that he enjoyed quiet possession of the property until sometime in 2013 when someone asked him to report to

the Police. He did not go to the Police but caused his lawyer to write to the 2nd Defendant asserting his ownership of the suit property and urging that his proprietary interests be secured. It is then that they discovered that another title had been issued to the 1st Defendant on 13th July 2012. When the 1st Defendant moved to evict his caretaker from the land, the Plaintiff filed this case.

36. It was however telling that while the Plaintiff testified that he bought the parcel of land from Mwanaisha Kibwana Hamisi, he conceded during cross-examination that he has never met the said Mwanaisha. Instead he bought the land through an agent whose name he could only recall as Kenny.

37. As it were neither Mwanaisha nor the said Kenny came to testify as to their ownership of the land prior to the sale. And while the Plaintiff insisted that he executed a Sale Agreement buying the land from Mwanaisha for Kshs 150,000/- he did not have a Copy of the Sale Agreement and it was never produced in evidence. Similarly, the Plaintiff could not produce a Copy of the Deed Plan that was used to transfer the property to his name.

38. On the other hand, the 1st Defendant produced in evidence a Copy of a Sale Agreement dated 3rd June 2011 executed between herself and Abdillahi Kibwana Khamis (DW2). Testifying at the trial herein as DW2, Abdillahi told the Court that the land in dispute was a sub-division of a larger parcel of land known as title No. 34/III/MN whose original title was registered in the name of his father Kibwana Bin Khamis.

39. When DW2's father died, the original title was sub-divided into several Plots and shared out amongst the beneficiaries of the estate. While confirming that Mwanaisha was his sister, Abdillahi told the Court that his sister could not have sold the land as each beneficiary had their distinct portions and he was the one in possession of the Original Deed Plan therefor.

40. DW2 further told the Court that after he sold the land to the 1st Defendant, they were informed upon lodging the transfer documents that the land was already registered in the Plaintiff's name. He had never sold or transferred his land to the Plaintiff and he therefore wrote a formal complaint dated 22nd October 2014 to the 2nd Defendant urging him to investigate how the property came to be registered in the Plaintiff's name and urging him to recall the title and to cancel the same.

41. DW2 further testified that the 2nd Defendant later acted on his complaint rectified the record and issued a proper title to the 1st Defendant herein.

42. John Wanjohi Gichuhi (DW3) was the Land Registrar in Charge of the Mombasa Registry. Confirming the position taken by DW2, he told the Court that the titles herein were issued as a result of the sub-division of Plot No. 34/III/MN. DW3 explained that for one to be issued with a title after the sub-division, the applicant must first present an Original Deed Plan and where it was being registered in the name of another person other than the original owner, a duly registered transfer would be required.

43. DW3 told the Court that they could not trace from their records the respective transfer documents and Deed Plan that were used to register the Plaintiff as a proprietor of the suit property. The only records available were copies of transfer documents and the Deed plan that was used by DW2 to transfer the property to the 1st Defendant. It was therefore DW3's conclusion that the Plaintiff's registration was unsupported by documentation in their office and that the registration of the 1st Defendant was done upon compliance with all requirements for such registration.

44. Arising from the foregoing and in the absence of any evidence by the Plaintiff as to how he came to be registered as the proprietor of the suit property, it was clear to me that the 2nd Defendant's act of issuing title to the 1st Defendant was not fraudulent or in furtherance of any fraudulent acts but the same was informed by facts which were duly considered.

45. As it were, Section 79(2) of the Land Registration Act gives the Registrar the power to rectify or direct the rectification of a register or a document where the document in question has been obtained by fraud.

46. Having failed to demonstrate how he obtained the title and or to produce an agreement of sale through which he acquired the same, the mere fact that the Plaintiff's title was issued much earlier than that of the 1st Defendant does not give him a better title to that of the 1st Defendant. As the Court of Appeal stated in *Munyu Maina –vs- Hiram Gathiha Maina (2013) eKLR:-*

“.....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.”

47. In the circumstances herein, I did not find any merit in the Plaintiff's case and the same is dismissed with costs.

48. On the other hand, I was persuaded that there is merit in the 1st Defendant's Counterclaim and Judgment is accordingly entered for the 1st Defendant as prayed in the Counterclaim.

Dated, signed and delivered at Malindi this 23rd day of January, 2020.

J.O. OLOLA

JUDGE