



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 83 OF 2007

ALEX NDEGWA.....PLAINTIFF

VERSUS

JACKSON NJOROGE.....DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by a plaint dated 1st March 2006 and amended on 5th November 2009. The case was initially filed in the Senior Resident Magistrate's Court Kwale but was later transferred to this court. The Plaintiff is seeking the following orders.

1. A mandatory injunction compelling the Defendant, his servants and/or agents to demolish any and all illegal structures unlawfully built by the Defendant or his servants and to vacate and to remove any item or structures currently encroaching onto the Plaintiff's portion measuring 0.032 Ha within that parcel known as KWALE/UKUNDA/2986.

2. A declaration that the Defendant was a registered owner in trust of a portion measuring 0.032 Ha within all that parcel known as KWALE/UKUNDA/2986 for the beneficiaries of the original owner of the said parcel.

3. In the alternative an order that the Defendant is wrongfully and unlawfully through fraud registered as the proprietor of the portion measuring 0.032 Ha comprising all the parcel now known as KWALE/UKUNDA/2986.

4. A declaration that the Plaintiff has a legal and equitable interest in that portion measuring 0.032 Ha from all the parcel known as KWALE/UKUNDA/2986.

5. An order for rectification of the Register by directing the Land Registrar that the Registration of the portion measuring 0.032Ha from that parcel known as KWALE/UKUNDA/2986 in favour of the Defendant be cancelled and the cancellation be substituted by registration of the Plaintiff as the sole proprietor instead of the Defendant.

6. That the Defendant do execute all relevant transfer documents and effect transfer in favour of the Plaintiff and in default the Deputy Registrar of this Honourable Court to execute all the necessary documents to facilitate the transfer of the portion measuring 0.032 Ha from that parcel known as KWALE/UKUNDA/2986.

7. An order extending time for securing the relevant consent in respect of the portion measuring 0.032 Ha in that parcel known as KWALE/UKUNDA/2986.

8. Costs of this suit.

2. The Plaintiff's suit as pleaded is that at all material times to this suit the Plaintiff was the actual and beneficial owner of a portion of KWALE/UKUNDA/2986 measuring 0.032Ha while the Defendant is the beneficial and actual owner of all that piece of land known as KWALE/UKUNDA/2986 measuring 0.025Ha. The Plaintiff stated that by an agreement dated 19/6/2003 the Defendant admitted that the portion measuring 0.032 Ha does not belong to him and the said portion was thereafter purchased by the Plaintiff. The Plaintiff avers that despite numerous reminders the Defendant has neglected and/or refused to sign the relevant documents for securing a consent from the Land Control Board and subsequent transfer. The Plaintiff avers that the Defendant, his agent, employee and/or surveyor by mistake and/or fraud purported to register a subdivision of the property in the terms of Mutation Form No.163064 encroaching on the Plaintiff's portion of KWALE/UKUNDA/2986 and restricting access to the Plaintiff's property. The Plaintiff has accused the Defendant of wrongfully and unlawfully and/or fraudulently causing the transfer of 0.032Ha now comprising land parcel KWALE/UKUNDA/2986. The Plaintiff avers that the Defendant is trespassing on his property.

3. The Plaintiff (PW1) and his wife Doris Wamboi Nguthuri (PW2) testified before Azangalala, J (as he then was) on 10.6.2009. The Plaintiff testified that he bought a piece of Land from the Defendant measuring 0.032Ha out of title no. UKUNDA/KWALE/2986. The Plaintiff testified that the Defendant introduced him to the initial owners of the suit land who were 3 brothers and a sister namely, Ali Athmani, Said Athmani, Muganda Athmani and Mariga Athmani who came with their uncle Hassan Musa. That they negotiated the purchase price and agreed at Kshs.170,000 and entered into a sale agreement on 19/6/2003 which he produced as p.exhibit 1. The Plaintiff stated that he gave the money to the Defendant and the three brothers and their sister. The Plaintiff testified that the Defendant is the one who had the title and told the Plaintiff that he was the trustee of the owners. That two months later, they called the Assistant Chief of Diani sub location for formal handing over of the plot to the Plaintiff which was reduced into writing. That the Defendant confirmed that he was a trustee and would return the property to the owners then transfer to him. He produced the handing over agreement as p.exhibit 2.

4. The Plaintiff further testified that the owners of the plot were in possession of the plot and that Mariga Athmani and Muganda Athmani had houses on the piece of land. He stated that he asked them to leave but they requested for a month after which they left. The Plaintiff testified that he then took possession and developed the plot. That he built a toilet with the assistance of the Defendant who lives within the same plot 2986 and had a permanent building surrounded by a wall. That the Defendant's plot borders that of the Plaintiff. The Plaintiff testified that he has put up rental houses and at the time of testifying, had reached 3rd floor and the project was ongoing. The Plaintiff stated that the Defendant fully participated in the said Plaintiff's development up to 2006 and even sold 32 iron sheets to the Plaintiff and never stopped the Plaintiff from developing the plot. The Plaintiff produced photographs showing his house, the Plaintiff, the Defendant and a worker near the Plaintiff's toilet as P.exhibits 3(a), (b) and (c). It was the Plaintiff's evidence that the portion has not been transferred to him by the Defendant despite numerous requests. That in 2006, the Defendant changed and demanded that the Plaintiff buys the piece of land from him. That he also put up a house on the Plaintiff's access road and where the Plaintiff intended to build a septic tank. The Plaintiff stated that he tried in vain to stop the Defendant by going to the chief and then decided to file suit.

5. During cross-examination, the Plaintiff stated that he bought the piece of land from the former owners and not the Defendant. That the Defendant invited him as a trustee of the former owners who are the three brothers and their sister. The Plaintiff admitted that the four siblings had no title and did not show him a Grant of Representation of Musa (deceased) whom the Defendant bought the land from. The Plaintiff further admitted that there was a difference in the identity card numbers of the Defendant in both p.exhibit 1 and 2 and that p.exhibit 1 does not show the size the Plaintiff bought. That p.exhibit 2 was not dated and the size of 0.032 Ha was indicated after the survey. The Plaintiff further admitted that the property was agricultural and subject of Land Control Board, but he had not obtained consent of the Land Control Board.

6. Doris Wamboi Nguthuri the Plaintiff's wife testified as PW2. She stated that the Defendant is their neighbour and that he is the one who found the plot for them. That the Defendant's wife told her the plot was for sale. That there were houses there owned by the former owners. She stated that she was present when the agreement for sale was signed and that the Defendant received the purchase price and promised to transfer the sold portion to the Plaintiff. PW1, however, admitted signing only p.exhibit 2 and not p.exhibit 1.

7. PW3, Hassan Musa Mwakenza stated that he knew both the Plaintiff and the Defendant who are neighbours. That the Defendant was sold his plot by his father, Musa Mwakenza Moyo, his brother Athumani Musa Mwakenza and himself. The original plot was no.651 but on subdivision became plot 2986. That he did not remember the size of the plot. That his sister, Mejumaa Musa owned an adjacent plot which was not sold. That it was this portion that was sold to the Plaintiff by Binti Athumani, Said Athumani and Muganda Athumani. That he signed the agreement (p.exhibit 1) as a witness. That the purchase price was paid to the Defendant who in turn handed it over to them.

8. PW4 Joseph Wandega Kariuki alias Machari testified that he knew both the Plaintiff and the Defendant. That in 2003, the Plaintiff informed him that he wanted to buy a plot and requested him to be a witness. That the plot was sold for Kshs.170,000 out of which the Plaintiff paid Kshs.110,000 to the Defendant who in turn handed over to the lady who was selling the plot. He stated that the sale agreement had already been prepared.

9. The Defendant responded to the Plaintiff's claim by way of further amended statement of defence and counter-claim dated 28th April 2008. The Defendant denied the contents of the plaint and averred that he is the registered owner of plot no. KWELE/UKUNDA/2986 measuring 0.06Ha and registered under the provisions of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) from 6th July 1992. The Defendant averred that he has absolute ownership and occupational rights of the subject plot from 1992 and denies that the Plaintiff owns any part thereof and sates that it is the Plaintiff who is unlawfully trespassing by building unlawful structures thereon. The Defendant seeks to have the Plaintiff suit against him dismissed with costs. In his counter-claim, the Defendant prayed for vacant possession, mesne profits and/or damages for trespass as well as an order compelling the Plaintiff to withdraw the caution or the Land Registrar Kwale to deregister and/or remove the caution registered on 31/7/2006, plus costs.

10. The Defendant testified that he purchased the entire PLOT NO.KWALE/UKUNDA/2986 measuring 0.06 Ha from Musa Moyo Mwakenza (deceased) in 1992 and produced the title deed in his name registered on 6/6/1992 as D.exhibit 2. That the land was agricultural and the vendor had to obtain consent from the Land Control Board, Msambweni. He stated that he attended the Land Control Board, Msambweni with the deceased vendor and his two sons. That before they attended the Land Control Board, the land was surveyed. It was the Defendant's evidence that the children of the late Musa Moyo Mwakenza were all aware of the sale. That one of the deceased's children by the name Mejumaa Musa Mwakenza who was mentally challenged, occupied a portion of the plot until her demise. The Defendant stated that he erected a perimeter wall around the space he set aside for his residential house purposely for security reasons and denied that the perimeter wall marks the boundary between his portion and that claimed by the Plaintiff. The Defendant stated that the grandchildren of Musa Moyo never owned any portion of plot No. KWALE/UKUNDA/2986 which they could sell to the Plaintiff. That in 2002, Mganda Athumani Mwakugomba trespassed on his plot and cut a tree, prompting the Defendant to report the matter at Diani Police Station after which he was arrested and bonded to appear in court to answer to the charge of trespass. The bond was produced as D.exhibit 3. That the matter was however settled out of the court after discussion. The Defendant states that in 2005, the Plaintiff started encroaching on his plot and wanted to dig a pit latrine but he stopped him. However, the Plaintiff continued and the matter was reported to the police. The Plaintiff later reported the matter to the area chief who summoned the Defendant. After perusing the title documents, the chief found that the matter was beyond his jurisdiction. The Defendant, instructed his advocates to issue a demand letter dated 27/2/2006 (D.exhibit 9). In response, the Plaintiff filed Kwale SRMCC No.78 of 2006. The Defendant produced some correspondences between his advocates and that of the Plaintiff.

11. On cross-examination the Defendant maintained that he bought the suit property from Musa Moyo Mwakuenza but had no agreement. He stated inter alia that he knew Hassan Musa Mwakuenza who is a son to Musa Moyo Mwakuenza and who was living within the property, but away from the Defendant. That Hassan Musa Mwakuenza was the one to remove Mejuma Musa Mwakuenza but she died before she could be removed. The Defendant stated that he was not aware that the Plaintiff had bought the suit plot and stated that even though his name was on the agreement, the identity card number and signature thereon were not his. He stated that the development in the suit land is a storey building which must have taken time to build. That he did not apply for an injunction and only filed his counter-claim upon being sued.

12. The Plaintiff filed his submissions on 27/5/19 and supplementary submissions on 27th September 2019 while the Defendant filed his submissions on 19th July 2019. I have considered the pleadings, the evidence adduced by the parties as well as the submissions on record. The issues for determination are:

- i. Whether the Defendant is the legal owner of the entire 0.06Ha in the suit property KWALE/UKUNDA/2986.**
- ii. Whether the Plaintiff has any claim on a portion measuring 0.032 Ha out of the property KWALE/UKUNDA/2986**
- iii. Whether the Defendant is the registered owner in trust of a portion measuring 0.032 Ha within the property KWALE/UKUNDA/2986 for the beneficiaries of the original owner of the said parcel of land.**
- iv. Whether the Plaintiff is entitled to the orders sought in the amended plaint.**
- v. Whether the Defendant is entitled to the orders sought in the counter-claim**

13. I will address the first and second issues jointly. It is common ground that the property KWALE/UKUNDA/2986 measuring 0.06Ha was registered in the name of the Defendant on 6th July 1992. The Defendant produced the title deed in his name as D.exhibit 2. It is also common ground that the suit land was initially owned by Musa Moyo Mwakuenza (deceased). Whereas the Plaintiff's case is that the Defendant did not purchase the entire portion of 0.06Ha of the suit property, and that a portion measuring 0.032Ha thereof was available for the Plaintiff to purchase, the Defendant on his part maintained that he purchased the entire plot. In his evidence, the Plaintiff testified that he bought a portion comprising 0.032 Ha from the Defendant. At the same time, the Plaintiff stated that the Defendant told him the owners of the plot he bought were Ali Athumani, Said Athumani, Muganda Athumani and Manga Athumani who are siblings. The Plaintiff produced an agreement dated 19th June 2003 (p.exhibit 1) signed by the four siblings and allegedly witnessed by their uncle, Hassan Musa Moyo and the Defendant. That he gave the money to the Defendant who in turn handed it over to the 3 brothers and their sister. That the Defendant told him that he held the title in trust for the said owners.

14. I have perused p.exhibit 1. The same is between the Plaintiff as the buyer, and Binti Athumani alias Mariga Athumani, Mwakugomba, Saidi Athumani, Mganda Athumani and Ali Athumani as seller(s). The agreement indicates that the sellers were selling a portion of their PLOT KWALE/UKUNDA/2986 to the Plaintiff for an agreed price of Kshs.170,000 out of which the buyer paid a deposit of Kshs.110,000 receipt of which was acknowledged. The Plaintiff further stated that after two months, they called the Assistant Chief of Diani Sub Location for formal handing over of the plot to the Plaintiff. I have also perused the document produced by the Plaintiff as p.exhibit 2.

15. From the evidence adduced, it is clear that the Plaintiff's claim is premised on the two documents which were produced as p.exhibits 1 and 2. I note however, that whereas the alleged sale agreement is between the Plaintiff and four sellers, it is only Binti Athumani who signed. The other three did not sign yet they are named as sellers. Further, the size of the alleged portion that was subject of the alleged agreement was not indicted. I further note that p.exhibit 2 is not dated and the Defendant' identity card number indicated thereon is different from that shown in p.exhibit 1. The court has also taken note that whereas in p.exhibit 1, Binti Athumani appended her signature, P.exhibit 2 is not signed by her, instead it is thumb printed. The question that arises is, if indeed the two documents were signed by the same person, why then was one signed and the other thumb printed by the same person within a span of only two months.

16. It will also be noted that the agreement produced as p.exhibit 2 was over a sale of a plot of Mejuma Musa Mwakuenza (deceased). It stated that the children of the deceased have agreed to sell the plot to the Plaintiff. There were no Grant of Letters of Administration produced in respect to the estate of Mejuma Musa Mwakuenza who it is not denied, had died before P.exhibits 1 and 2 were executed. It is trite law that the estate of a deceased person can only be represented in any legal transaction by a person who is duly authorized to do so on behalf of the estate. Only a person who had been issued grant of letters of administration has capacity to represent the estate of a deceased person. The powers of the personal representation are set out under Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya which provides as follows:

82. Personal representative shall subject only to any limitation imposed by their grant, have the following powers: -

- a) to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representative;**
- b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best;**
 - i. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased and**
 - ii. no movable property shall be sold before confirmation of the grant.**
- c) to assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof;**

17. Section 80 provides when grant takes effect and states:

- 1. A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.**
- 2. A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.**

It is clear therefore that a party cannot purport to act on behalf of the estate of the deceased person without letters of administration and where a transaction is undertaken without letters of administration in respect of a deceased estate such an action is null and void ab initio.

18. In light of the foregoing and in view of the fact that the Plaintiff has admitted that the portion of the suit land belonged to a deceased person and considering that the persons who purported to sell him the property had not taken out letters of administration, it is my finding that the persons who sold the Plaintiff the suit property lacked the requisite locus standi to enter into the alleged sale agreement and had no legal capacity to transact and the same is incompetent, null and void.

19. Turning to the other issues, it is not disputed that at the time the Plaintiff alleged that he bought the suit property, the same was already registered in the Defendant's name. The Defendant's evidence is that he purchased the entire plot from Musa Moyo Mwakuenza (deceased) in 1992, long before the Plaintiff entered into the sale agreement dated 19th June, 2003. The land was registered in the Defendant's name on 6th July 1992. There was no evidence adduced to show that the Defendant held a portion measuring 0.032 Ha or any part thereof in trust for the beneficiaries of the original owner. The Defendant produced the title deed in his name to prove ownership. Section 26 (1) of the Land Registration Act No.3 of 2012 provides as follows:

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 title of that proprietor shall not be subject to challenge, except-

- a. On ground of fraud or misrepresentation to which the person is proved to be party; or**
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

20. Whereas the Plaintiff has accused the Defendant of wrongfully, unlawfully and/or fraudulently causing the transfer of the portion measuring 0.032 Ha now comprising LAND PARCEL NO. KWALE/UKUNDA/2986, however, the Plaintiff failed to tender any evidence to demonstrate that the registration and transfer in favour of the Defendant were tainted with illegality or breach of statutory provisions. In the absence of any tangible evidence implicating the Defendant in any fraudulent, illegal or corrupt scheme, I am not persuaded that the Defendant is not holding a good title. It is therefore my finding that the Defendant acquired his title procedurally and his title is valid. It is trite law that any allegations of fraud must be pleaded and strictly proved. The Plaintiff alleged fraud on the part of the Defendant. The burden to prove those allegations lay squarely on the Plaintiff who failed to discharge that burden.

21. Moreover, I note from the evidence on record that the Plaintiff's testimony was contradictory. For instance, the Plaintiff was not certain as to the person he purchased the plot from. At times, the Plaintiff named four sellers, and other times he indicated one seller and in yet another occasion, he alleged it was the Defendant who sold him the plot. In addition, whereas the Plaintiff testified that he paid out the purchase price to the Defendant who in turn handed over to the 3 brothers and their sister, the documents produced by the Plaintiff as exhibits indicate that the purchase price was paid to the sellers themselves. In any case, the sale agreement was between the Plaintiff and the four siblings and in my considered view, the Plaintiff can only enforce the same against them but not against the Defendant who was not a party. The evidence on record shows that the Defendant was only a witness, if at all he participated. I find that the said documents are not binding on the Defendant. In any event the property which was allegedly being sold had already been sold to the Defendant and the same was registered in the Defendant's name at the time of the purported sale.

22. From the evidence on record, I am satisfied that the Defendant is the absolute and indefeasible owner of the suit property. As the absolute proprietor of the suit property, the Defendant is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party. The Defendant has asserted that the Plaintiff entered the suit property and started utilizing a portion of the property and went ahead to build structures thereon. The Plaintiff has admitted occupying a portion of the Defendant's land. On the basis of the evidence on record, I am satisfied that the Plaintiff entered the suit property unlawfully and constructed buildings and structures thereon. The Plaintiff having unlawfully entered the suit property without the permission of the Defendant is a trespasser on the suit property and the Defendant is entitled to judgment against him as prayed in the counter claim.

23. The upshot of this is that this court is not satisfied that the Plaintiff has proved his case against the Defendant on a balance of probability. On the other hand, this court is satisfied that the Defendant has proved his case against the Plaintiff. Accordingly, I make the following orders:

- a. The Plaintiff's suit is dismissed with costs to the Defendant.**
- b. The Defendant's counter-claim is allowed in terms of prayers (a), (c) and (d) thereof.**
- c. The Plaintiff is hereby ordered to vacate and deliver vacant possession of PLOT NO. KWALE/UKUNDA/2986 within sixty (60) days from the date of delivery of this judgment, in default, the Defendant shall be entitled to an order of eviction for the forcible removal of the Plaintiff from and demolition of the structures on the suit plot.**

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of January 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Sitonik for Plaintiff

Ms. Okumu for Defendant

Yumna Court Assistant

C.K. YANO

JUDGE