



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 391 OF 2017**

**FUNZI VIEW CO. LTD.....PLAINTIFF**

**VERSUS**

**SAMMY NYAMBATI NYABOISI & 2 OTHERS.....DEFENDANTS**

**JUDGMENT**

1. The plaintiff, Funzi View Company Limited instituted this suit by a plaint dated 31<sup>st</sup> October, 2017 and filed on even date. The plaintiff is seeking for judgment against the defendants jointly and severally for:

**a. A declaration that the plaintiff is the registered as an absolute and indefeasible owner of LAND REFERENCE KWALE/FUNZI ISLAND/256.**

**b. A declaration that the Title issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect of the plaintiffs parcel of land KWALE/FUNZI ISLAND/256 was issued irregularly, procedurally (sic), fraudulently, unlawfully and illegally and is therefore invalid, null and void.**

**c. An order directed to the Registrar of Lands Kwale to revoke, cancel, destroy, void and/or nullify the Certificates of Titles and the Green Card in respect of Land Reference No. Kwale/Funzi island/256 issued in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and publish the said revocation, cancellation, destruction and/or nullification in the Kenya Gazette.**

**d. A permanent injunction to issue restraining the Defendants jointly and severally, their agents, servants, relatives and/or any person under instructions from the defendants from further interfering and/or in any way dealing with LAND REFERENCE NO. KWALE/FUNZI ISLAND/256.**

**e. Alternatively, the defendants jointly and severally compensate the plaintiff for the loss and damage suffered as enumerated hereinabove and for the costs of the investment made by the plaintiff on the said parcel of land.**

**f. Costs of this suit and interest thereon and other orders.**

2. The plaintiff's case is that at all times material to this suit, the plaintiff was and remains the registered owner of PROPERTY TITLE NO.KWALE/FUNZI ISLAND/256 measuring approximately 0.5 hectares (approximately 1.235 acres) situate in Kwale District Funzi Location. The plaintiff avers that it acquired the suit land sometime on 14<sup>th</sup> February 2014 from one Seif Ali Mohamed for valuable consideration of Kshs.1,800,000/= paid to the said Seif Ali Mohamed and transfer was subsequently registered on 30<sup>th</sup> April 2014 and Title Deed issued in the plaintiff's name on 30<sup>th</sup> April 2014. The plaintiff avers that the suit property was acquired by Seif Ali Mohamed on 16<sup>th</sup> December 2010.

3. The plaintiff avers that immediately after the transfer was done and title deed issued, it conducted a search and was issued with an official search dated 30<sup>th</sup> April 2014 indicating the plaintiff as the registered owner of the land. It is the plaintiff's contention that it conducted due diligence prior to acquiring the suit land as it conducted a search on 10<sup>th</sup> February 2014 which indicated that the registered owner was Seif Ali Mohamed. That on the strength of the said official search obtained at the Kwale District Land Registry and issued by Mr. Ngetich, the District Land Registrar, the plaintiff proceeded to enter into the said agreement for sale with the said Seif Ali Mohamed.

4. The plaintiff avers that the 1<sup>st</sup> and 2<sup>nd</sup> defendants, with the assistance of the District Land Registrar, Kwale and without due regard to the laid down procedures and the law illegally, irregularly and unlawfully and through fraudulent means procured a title issued on 11<sup>th</sup> February 2009. The plaintiff avers that the Certificate of Title registered in its name is absolute and indefeasible.

5. The plaintiff states that sometime in April 2016 while on a routine check to confirm the status of its parcel of land at the Kwale Lands Registry through a search dated 7<sup>th</sup> April 2016, it surprisingly discovered that the parcel of LAND KWALE/FUNZI ISLAND/256 was registered in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiff avers that the 3<sup>rd</sup> defendant, without any colour of right, unlawfully and without any regard to the sanctity of the plaintiff's title, intentionally, deliberately, illegally and without due regard to the law, revoked and/or cancelled the plaintiff's Green Card and the Certificate of Title without following the due process of law. The plaintiff further avers that the Land Registrar's action to arbitrarily nullify, cancel and/or revoke its certificate of title, transfer, Green Card and opening of a new Green Card is illegal and that the Registrar acted with gross negligence and reckless. The plaintiff has given the particulars of illegality and negligence.

6. The plaintiff avers that as a result of the said acts by the defendants, the plaintiff has been denied its constitutional right of fair administrative action and right to property and has suffered loss and damage amounting to Kshs.1,916,000/= as it has been unable to utilize the property as it intended to.

7. Paul Van Beveren testified on behalf of the plaintiff and stated that he is the owner of the plaintiff company. He relied and adopted his witness statement dated 31<sup>st</sup> October, 2017 as his evidence-in-chief in which he reiterated the plaintiff's claim. He produced the entire list of documents dated and filed on 31<sup>st</sup> October, 2017 and produced them as p.exhibits 1-11. The documents produced are the plaintiff's Certificate of Incorporation, Certificate of Title for KWALE/FUNZI ISLAND/256 in the plaintiff's name, agreement for sale dated 14<sup>th</sup> February, 2014 between the plaintiff and Seif Ali Mohamed, Letter of Consent from Msambweni Land Control Board dated 29<sup>th</sup> January 2014, Valuation Requisition for stamp duty, transfer dated 30<sup>th</sup> April 2014, Certificate of Official Search dated 10<sup>th</sup> February 2014 and another dated 30<sup>th</sup> April 2014, Copy of Green Card, Spousal Consent and Stamp Duty payment receipt. PW1 also produced the authority given him by the plaintiff company to act for the plaintiff company in the suit. The witness stated that the plaintiff is in possession and occupation of the suit land and did not know how the 1<sup>st</sup> and 2<sup>nd</sup> defendants were entered in the Green Card. He urged the court to grant the plaintiff the reliefs sought in the plaintiff.

8. The defendants were served with summons to enter appearance but the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not enter appearance or file defence and upon request by the plaintiff, interlocutory judgment was entered against them on 5<sup>th</sup> November, 2018.

9. The 3<sup>rd</sup> defendant filed defence on 25<sup>th</sup> April 2018 in which he denied the plaintiff's claim in total. When the matter came up for hearing on 3<sup>rd</sup> May 2019, the 3<sup>rd</sup> defendant did not attend and therefore did not lead any evidence in support of the filed defence. The plaintiff filed its written submissions on 29<sup>th</sup> May 2019 while the 3<sup>rd</sup> defendant filed on 14<sup>th</sup> October, 2019.

10. The court has carefully considered the evidence on record and the submissions made. The issue that calls for determination is whether the plaintiff had proved its case to the required standard and whether it is entitled to the prayers sought.

11. The plaintiff has tendered documentary evidence to show that it purchased the suit property from one Seif Ali Mohamed. The plaintiff produced the sale agreement dated 14<sup>th</sup> February, 2014 between Seif Ali Mohamed and the plaintiff company. The plaintiff also produced a Letter of Consent to transfer dated 29<sup>th</sup> January 2014 as well as the transfer dated 30<sup>th</sup> April 2014 and receipts showing that stamp duty was paid. In addition, the plaintiff produced the Title Deed in its name together with the certificate of official searches. The defendants did not call any evidence to challenge the plaintiff's evidence. The plaintiff's evidence therefore remains uncontroverted. There was no evidence availed to show how the 1<sup>st</sup> and 2<sup>nd</sup> defendants became registered as owners of the suit land when the plaintiff is holding title to it. Therefore it is my finding that the process of registration of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as proprietors of the suit land was not done above board and was fraudulent. Their registration as owners could not have been in accordance with the law as one parcel of land cannot have the same title at the same time and the cancellation of the plaintiff's name from the Green Card has not been explained.

12. In light of the above, it's my finding that the plaintiff has proved fraud against the defendants. Consequently, it is my finding that the suit property was not lawfully registered in the 1<sup>st</sup> and 2<sup>nd</sup> defendants names.

13. The upshot of this is that this court is satisfied that the plaintiff has proved its case against the defendants on a balance of probabilities. Accordingly, I enter judgment for the plaintiff against the defendants jointly and severally in terms of prayers (a), (b), (c), (d) and (f) of the plaintiff.

**DATED, SIGNED and DELIVERED at MOMBASA this 3<sup>rd</sup> day of February 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Kanyatta holding brief for Salim for Plaintiff

No appearance for 1<sup>st</sup> and 2<sup>nd</sup> defendants

Ms. Kiti for 3<sup>rd</sup> defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**