



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 346 OF 2016**

**ALPHONCE MUNGA SHESHE.....PLAINTIFF**

**AND**

**OLIVER MTENGO KALAMA**

**RITTA RATTOS**

**KASERU CONSTRUCTION LIMITED.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By his Plaint filed herein on 16<sup>th</sup> December 2016, Alphonce Munga Sheshe prays for Judgment against the three (3) Defendants jointly and severally for:-

***a) Vacant possession of the suit property;***

***b) An order of a permanent injunction restraining the Defendants from trespassing upon or dealing in any manner with the suit property;***

***c) Payment of mesne profits;***

***d) Costs and interest thereon.***

2. The Plaintiff avers that he is the beneficial owner of all that parcel of land known as Kilifi/Roka/46 measuring approximately 12.4 acres (the suit property). On or about 14<sup>th</sup> January 2016 he leased a portion of the land to an entity known as M/s Jawanga Enterprises to excavate building stones therefrom. The said firm which had leased stone cutting machines from Ritta Rattos (the 2<sup>nd</sup> Defendant) carried out the activity until May 2016.

3. Unknown to the Plaintiff, Oliver Mtengo Kalama (the 1<sup>st</sup> Defendant) who had a long standing dispute with the Plaintiff over the suit property held himself out as the true owner thereof and purported to sell the land to the 2<sup>nd</sup> Defendant who then leased it to Kaseru Construction Ltd (the 3<sup>rd</sup> Defendant).

4. The Plaintiff avers that the said 3<sup>rd</sup> Defendant has now with the connivance of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespassed into the suit property, brought in its own stone cutting machines and has now commenced excavation of stones and earth material therefrom. The Plaintiff contends that the Defendants activities constitute a blatant travesty to his right to property and unless the same are restrained by this Court the same will cause irreparable and irreversible harm to the property and the Plaintiff's interest thereon.

5. In his Defence and Counterclaim, the 1<sup>st</sup> Defendant denies that the Plaintiff is the legal owner of the suit property. It is his case that the said piece of land was initially allocated to one Gatonye Muriu before being allocated to himself. The 1<sup>st</sup> Defendant avers that upon being allocated the same, he paid all the requisite fees and was subsequently on 26<sup>th</sup> August 2006 issued with a title deed thereto. He accuses the Plaintiff of fraudulently procuring another title deed for the same land knowing well that he, the 1<sup>st</sup> Defendant, was the true owner thereof.

6. The 1<sup>st</sup> Defendant further asserts that in the exercise of his proprietary rights, he sold the land to the 2<sup>nd</sup> Defendant and insists that the

Plaintiff has no proprietary rights over the same and is thus not entitled to the reliefs sought.

7. By way of Counterclaim, the 1<sup>st</sup> Defendant accuses the Plaintiff of fraudulently colluding with the Kilifi District Land Registrar (the 2<sup>nd</sup> Defendant in the Counterclaim) to acquire ownership documents of the suit property. Accordingly, he prays for Judgment against the Plaintiff, the 2<sup>nd</sup> Defendant in the Counterclaim as well as the Honourable the Attorney General (the 3<sup>rd</sup> Defendant in the Counterclaim) for:-

***a) A declaration that the 1<sup>st</sup> Defendant was the true and rightful owner of the suit property which he legally sold to the 2<sup>nd</sup> Defendant;***

***b) Cancellation of the title deed issued to the Plaintiff;***

***c) Costs of the suit and the Counterclaim.***

8. Ms Ritta Rattos (the 2<sup>nd</sup> Defendant) is equally opposed to the Plaintiff's claim. In a Statement of Defence dated and lodged herein on 31<sup>st</sup> March 2017, she denies that the Plaintiff is the owner of the suit property and/or that she was under any duty to lease the property from him.

9. The 2<sup>nd</sup> Defendant avers that all the legal documents pertaining to the suit property recognise the 1<sup>st</sup> Defendant as the owner thereof. She further avers that having bought the land from the true owner, it was within her right to lease the same and to alienate or sell it to third parties as she did with the 3<sup>rd</sup> Defendant.

10. In their Defence to the Counterclaim dated 30<sup>th</sup> October 2018 the Kilifi Land Registrar and the Honourable the Attorney General (the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively in the Counterclaim) deny that they participated in any fraud, illegality or wrong doing as alleged by the 1<sup>st</sup> Defendant (Plaintiff in the Counterclaim).

They aver that if the suit property was registered in the name of the Plaintiff, then the said registration was conducted in good faith and in strict adherence to the law.

#### **THE PLAINTIFF'S CASE.**

11. The Plaintiff testified as the sole witness in support of his case. Testifying as PW1, he told the Court that he first entered the suit property in 1984. Later on in 1990 he was issued with a title deed for the property and he has since been in occupation thereof using it for farming and rearing livestock.

12. PW1 told the Court that later on he leased the land to M/s Jawanga Enterprises for extraction of building materials. Later on the 2<sup>nd</sup> Defendant came to the land claiming to have been sold the land by the 1<sup>st</sup> Defendant. They later brought the 3<sup>rd</sup> Defendant to help them in extracting stones.

13. PW1 testified that the Defendants were selling the stones at Kshs 28/- per stone and that they have now consumed about four acres of the suit property. He produced a Valuation Report prepared by Basemark Valuers Ltd (Pexh 'c') in support of his case.

14. W1 told the Court that the land did not belong to the 1<sup>st</sup> Defendant as he had purported. The 1<sup>st</sup> Defendant's land was previously given the number 46 'A' but had since become Plot No. 431. He urged the Court to restrain the Defendants from damaging the land.

#### **THE DEFENCE CASE**

15. The Defendants equally called one witness in support of their case.

16. DW1-Oliver Mtengo Kalama is the 1<sup>st</sup> Defendant. He testified that the suit land belongs to him but he has since sold the same. He was issued with a Title Deed for the land on 29<sup>th</sup> August 2006 and he sold it to the 2<sup>nd</sup> Defendant in 2011. He told the Court that he was not aware that there was another title in relation to the parcel of land.

17. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the main suit and in the Counterclaim neither testified nor adduced any evidence at the trial.

#### **ANALYSIS AND DETERMINATION**

18. I have perused and considered the pleadings filed by the parties, the oral testimonies of the witness and the evidence adduced at the trial. I have equally perused and considered the Written Submissions placed before me by the Learned Advocates for the parties.

19. The Plaintiff's case is that he is the beneficial owner entitled to the exclusive possession of the suit property described in Paragraph 4 of the Plaint as a parcel of land situated at Roka within Roka Settlement Scheme containing by measurement 12.4 acres or thereabouts. He produced a Copy of the Title Deed for the property described therein as Kilifi/Roka/46 which was registered in his name on 8<sup>th</sup> September 1980. He was issued with a Title Deed on 21<sup>st</sup> December 2006.

20. The Plaintiff told the Court that prior to the dispute herein, he had leased a portion of the suit property to an entity known as Jawanga Enterprises to excavate building stones. The said entity then leased stone cutting machines from the 2<sup>nd</sup> Defendant. A dispute then arose

between the said Jawanga Enterprises and the 2<sup>nd</sup> Defendant over the use of the machines that went all the way to Court and they ceased the excavation activities.

21. Subsequently the 1<sup>st</sup> Defendant came to the scene claiming to own the suit property and went ahead to sell the same to the 2<sup>nd</sup> Defendant. Consequent to the sale transaction, the 2<sup>nd</sup> Defendant proceeded to lease a portion of the land to the 3<sup>rd</sup> Defendant who is now engaged in excavation and sale of building stones from the land.

22. The 1<sup>st</sup> Defendant refuted the Plaintiff's claim to the property and asserted that he is the lawfully registered proprietor thereof. In this respect, he produced a copy of a Title Deed indicating that the land was registered in his name on 26<sup>th</sup> August 2006. On that same day, he was issued with a Title Deed thereto.

23. It is the 1<sup>st</sup> Defendant's case that in exercise of his proprietary rights, he sold the suit property to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not testify at the trial herein. In a Statement of Defence lodged herein on 31<sup>st</sup> March, 2017 however, the 2<sup>nd</sup> Defendant admits that she bought the suit property from the 1<sup>st</sup> Defendant whom she describes as the true owner thereof. She further asserts that having so bought the property, she had the right to lease, alienate or even sell the same to third parties such as the 3<sup>rd</sup> Defendant herein. The 3<sup>rd</sup> Defendant neither entered appearance nor filed a defence to the Plaintiff's claim.

24. I have carefully studied the two Title Deeds and the other documents produced by both the Plaintiff and the 1<sup>st</sup> Defendant. Both titles indicate that the parcel of land concerned were registered on 8<sup>th</sup> September, 1980. However while the Plaintiff's Parcel refers to the land as Kilifi/Roka/46, measuring 12.4 acres, the 1<sup>st</sup> Defendant has two Titles for parcels Numbers Kilifi/Roka/430 measuring 12.42 acres and another for Kilifi/Roka/46 measuring 12.4 acres.

25. In the Proprietorship Section of the two parcels for Block 46 the Plaintiff's parcel of land has Entry No. 1 showing that on the said 8<sup>th</sup> September 1980, the Plaintiff was entered in the Register as Proprietor of the land while Entry No. 2 shows that the Plaintiff was issued with a Title Deed on 21<sup>st</sup> December 2006. On the other hand, the 1<sup>st</sup> Defendant's Title Deed has no Entry No. 1. Instead, it starts at Entry No. 2 which shows that on 29<sup>th</sup> August 2006, the 1<sup>st</sup> Defendant's name was entered in the Register as the Proprietor. Entry No. 3 shows that a Title Deed was issued to him on the very same day of registration.

26. The other title produced by the 1<sup>st</sup> Defendant for Kilifi/Roka/430 has similar Entries No. 2 and 3 in the Proprietorship Section indicating that the 1<sup>st</sup> Defendant was registered as the owner on 29<sup>th</sup> August 2006 and was issued with a Title Deed on the same day.

27. According to the Defendant, both titles referred to one and the same piece of land. During his cross-examination herein he told the Court that he bought the piece of land from one Ndenje Chigutu who was the original allottee thereof. According to him, the said Ndenje Chigutu sold him Plot No. 46 'A' but it was later changed to Plot No. 430. He did not however explain when, how and by whom the Plot numbers were changed.

28. A careful perusal of the documents produced by the 1<sup>st</sup> Defendant reveals that the 1<sup>st</sup> Defendant interests were in Plot No. 46 Tezo/Roka Settlement Scheme and not the Plot described as Kilifi/Roka. While some changes were subsequently made to the numberings, it was clear to me that the title registered in the Plaintiff's name could not possibly be the same one the 1<sup>st</sup> Defendant was claiming.

29. In this respect, the Plaintiff produced a letter dated 28<sup>th</sup> November 2016 from the Land Adjudication and Settlement Officer Kilifi addressed to the District Land Registrar Kilifi. The said Letter reads in part as follows:-

**"Verification of Plot No. 46 & 431 Tezo/Roka Settlement Scheme**

***Records as per the accountability list, Plot No. 46 was allocated to Gatonye Muriu while Plot No. 431 first name was Ndeje Chigutu but was cancelled and the name of Oliver Mtengo Kalama appears.***

***At first Tezo/Roka had started from the old ferry to Matsangoni hence you could get plot numbers with As, Bs and Cs. But these numbers no longer exists following the creation of Mtondia Settlement Scheme, Tezo/Roka Settlement Scheme, Ngerenyi Settlement Scheme and Matsangoni Settlement Scheme and as such new numbers were issued.***

***In view of the above, Ndeje Chigutu had two plots (46 'A' and 47 'A') which their new numbers were 46'A' as 431 while 47'A' as 430.***

***It is evident that Ndeje Chigutu opted to give Oliver Mtengo Kalama Plot No. 431...."***

30. A Certificate of Official Search for the said Parcel No. Kilifi/Roka/431 attached to the Plaintiff's documents reveals that the said parcel also measuring 12.42 acres was indeed registered in the name of the said Ndeje Chigutu on 29<sup>th</sup> August 2006, the same day the 1<sup>st</sup> Defendant claims to have been registered as the proprietor of the suit property.

31. As it were, the 1<sup>st</sup> Defendant could not have been legitimately registered as the owner of the suit property on that date. I say so because according to the 1<sup>st</sup> Defendant's own List of Documents, that parcel of land was as at that date still encumbered by a Charge to the Settlement Fund Trustees. The Discharge of Charge produced by the 1<sup>st</sup> Defendant shows that the title was not discharged until 10<sup>th</sup> October 2011.

32. Asked about the documents during his cross-examination, the 1<sup>st</sup> Defendant answered that he got his title before he went to the Fund for transfer. It was not clear to me how an allottee of a parcel of land could be registered as the owner thereof before the parcel is transferred by the Settlement Fund Trustees.

33. At any rate, the Plaintiff has demonstrated that the suit property was registered in his name in the year 1980. He testified that he took possession and has since been in possession of the land. That is demonstrated by the fact that he was able to lease the land to the said Jawanga Enterprises to excavate building stones before the Defendants laid claim thereon.

34. The 1<sup>st</sup> Defendant did not satisfactorily explain how he was able to be registered as the owner of the suit property on 29<sup>th</sup> August 2006 when the Plaintiff's registration as the proprietor thereof on 8<sup>th</sup> September 1980 had not been cancelled. The Plaintiff's registration vested him with absolute ownership of the land and those rights could not be defeated unless it was proven that the said registration had been procured contrary to the law. The Defendants therefore had no colour of right over the suit property.

35. It was the Plaintiff's testimony that the excavation of stones from his parcel of land has been on-going by the 3<sup>rd</sup> Defendant to whom the land was leased by the 2<sup>nd</sup> Defendant in purported exercise of his proprietorship thereof. He urged the Court to grant him mesne profits in the sum of Kshs 50,000,000/- for the damage done to the property.

36. In support of this claim the Plaintiff produced a Valuation Report by Basemark Valuers Ltd dated 10<sup>th</sup> January 2018. I have looked at the Report. It states that it was arrived at by comparison of recent sales of land for the area. It also states but without any substantiation that one quarry stone is valued at Kshs 28/- and that the Valuers estimated that "the number of quarry stones in the four acres portion of the land could be between 1,700,000 to 1,800,000.

37. As it were, the Report does not attach any document from which the price of the quarry stone was derived and how the Valuers estimated the number of quarry stones in the excavated portion of land. It was not however disputed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are excavating building stones from the suit property. Taking into consideration all the circumstances herein, I am of the view that an award of Kshs 15,000,000/- would suffice as compensation for the damage done to the property.

38. In the premises, I am satisfied that the Plaintiff has proved his claim against the Defendants to the required standard. Judgment is accordingly entered for the Plaintiff against the Defendant as prayed in the Plaint with mesne profits of Kshs 15,000,000/- as aforesaid.

39. The Plaintiff shall also have interest on the mesne profits and costs of both the suit and the 1<sup>st</sup> Defendant's Counterclaim which hereby stands dismissed.

**Dated, signed and delivered at Malindi this 29<sup>th</sup> day of April, 2020.**

**J.O. OLOLA**

**JUDGE**