



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 33 OF 2018**

**THOMAS JERRY KHAMISI**

**EDWARD MWAMUYE MWADZOYA.....PLAINTIFFS**

**VERSUS**

**1. AUSTIN SADALA KHAMISI**

**2. CATHERINE WAITHIRA NDAMBIRI**

**3. AGNES NYALE MWANGEMI**

**4. JOSEPHINE MURINGO NDAMBIRI**

**5. MERCY ROSELINE NDAMBIRI.....DEFENDANTS**

**JUDGMENT**

1. By their Complaint dated 8<sup>th</sup> February 2018, Thomas Jerry Khamisi and Edward Mwamuye Mwadzoya (the Plaintiffs) pray for Judgment against the five (5) Defendants jointly and severally listed as follows:-

*a) The 1<sup>st</sup> Plaintiff prays that the Court declares as illegal and fraudulent the sub-divisions by the 1<sup>st</sup> Defendant namely land sub-division number MN/III/9105 (Original Number 7748/2) CR 65402, MN/III/9106 (Original Number 7748/2) CR 65403 and MN/III/9107 (Original Number CR No. 7748/2) CR 65404 and cancels the said sub-divisions and their subsequent sale and transfer and the register be restored to reflect Land Sub-division No. MN/III/7748 (Original Number 13331/12) CR No. 56340 as it was before the infringed sub-divisions.*

*b) The 1<sup>st</sup> Plaintiff prays that after the cancellation and restoration of the register as indicated in (a) above, there be a permanent injunction stopping the defendants either by themselves, their agents or any other persons acting under their names from selling, cultivating, leasing, transferring or in any way dealing with LR No. MN/III/7748 (Original Number 1331/12) CR No. 56340.*

*c) The 2<sup>nd</sup> Plaintiff prays for a refund of Kshs 365,000/- being a refund of the purchase price and further prays for compensation at prevailing market rates for the house he had constructed on the suit premises.*

*d) A declaration that the purported sale and transfer of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants was marred with fraud, (and) irregularities and hence null and void and the defendants be evicted from the suit land.*

*e) Costs of the suit.*

*f) General damages for trespass.*

2. Those prayers arise from the Plaintiffs' contention that vide an agreement dated 26<sup>th</sup> June 2015, the 1<sup>st</sup> Defendant agreed to sell to the 2<sup>nd</sup> Plaintiff all that parcel of land known as LR No. MN/III/7748 (CR No. 56340) situated at Mtwapa at a consideration of Kshs 400,000/-. Upon payment of Kshs 365,000/- on the date of the sale, the 2<sup>nd</sup> Plaintiff moved into the suit premises and commenced construction of a house thereon.

3. Thereafter, the 2<sup>nd</sup> Defendant stopped the construction claiming to be the owner of the suit property. On carrying out investigations, the 2<sup>nd</sup> Plaintiff came to learn that the suit property originally belonged to the 1<sup>st</sup> Plaintiff's father and that the 1<sup>st</sup> Defendant had fraudulently sub-divided the same and sold it to the 2<sup>nd</sup> Defendant who in turn transferred his portion to the 3<sup>rd</sup> Defendant.
4. It is the Plaintiff's case that a search at the Lands Registry later revealed that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were the registered owners of the two portions of land sub-divided fraudulently as aforesaid by the 1<sup>st</sup> Defendant. Despite notice to sue, the Defendants have refused to relinquish their claim to the suit property and hence this suit.
5. In their Joint Statement of Defence dated 9<sup>th</sup> April 2018, the Defendants deny that the 1<sup>st</sup> Plaintiff has the capacity to sue on behalf of the estate of the late Charles Juma Khamis and urge the Court to strike out the suit.
6. The 1<sup>st</sup> Defendant in particular denies having sold Plot No. MN/III/7748 (Original Number 1331/12) CR No. 56340 to the 2<sup>nd</sup> Plaintiff and further denies having received a sum of Kshs 365,000/- or any part thereof from the Plaintiffs. They admit that at all times the property sub-division No. 9106/III/MN was registered in the name of the 2<sup>nd</sup> Defendant and that he subsequently transferred the same to the 3<sup>rd</sup> Defendant.
7. At the trial herein, the Plaintiffs called two witnesses in support of their case. The Defendants however did not participate in the trial and so did not call any evidence.
8. PW1-Edward Mwamuye Mwadzoya is the 2<sup>nd</sup> Plaintiff herein. He testified that he bought land from the 1<sup>st</sup> Defendant vide a Sale Agreement dated 26<sup>th</sup> June 2015. Before buying the land, he was taken where the land is situated and was shown the boundaries thereof by an agent known as Karisa. He subsequently met the 1<sup>st</sup> Defendant who confirmed that he was the owner of the land having inherited the same.
9. PW1 told the Court that the 1<sup>st</sup> Defendant was yet to process the title for the property. The same was accordingly sold to him for Kshs 400,000/- on condition he would process his own title. He paid a deposit of Kshs 365,000/- but when he started constructing a house thereon, the 2<sup>nd</sup> Defendant went to the land claiming it belonged to her. The 2<sup>nd</sup> Defendant who had a title to the land told PW1 that the land had earlier been sold to her by the 1<sup>st</sup> Defendant.
10. When PW1 confronted the 1<sup>st</sup> Defendant, he told him that he (the 1<sup>st</sup> Defendant) had bought the land from his brother Joseph Matano Hamisi. Joseph and his brothers however denied selling the land. It is then that PW1 realised he had been conned and decided to come to Court.
11. PW2-Thomas Jerry Khamisi is the 1<sup>st</sup> Plaintiff herein. He testified that the suit property belonged to Joseph, Charles and Fredrick Khamisi who are his brothers. The brothers had inherited the land from their father and it was to be sub-divided into three portions. PW2 told the Court he got to know the land was sold when he saw PW1 constructing a house thereon. The 1<sup>st</sup> Defendant who sold the land is also PW2's brother but he had no permission to sell the same.
12. PW2 testified that he did with his brother Fred write a letter to the Land Registry seeking to stop any dealings with the land but they later came to realize that it had been sold to three other different people. PW2 told the Court that his brothers Fredrick and Charles died while Joseph now lives abroad.
13. I have perused and considered the pleadings filed herein, the oral testimony of the two Plaintiffs witnesses as well as the evidence adduced at the trial. I have equally perused and considered the submissions filed herein by the Learned Advocates for the Plaintiffs.
14. The 1<sup>st</sup> Plaintiff brings this suit as the Legal Representative of his brother the late Charles Juma Khamis. He produced at the trial herein a Limited Grant of Letters of Administration issued to him on 23<sup>rd</sup> January 2018 in **Malindi Chief Magistrates Court Probate and Administration Cause No. 3 of 2018** for the purposes of commencing and prosecuting this suit.
15. According to the 1<sup>st</sup> Plaintiff, his brother who passed away on 22<sup>nd</sup> July 1988 was one of the three registered proprietors of all that parcel of land known as LR No. MN/III/7748 (Original No. 1331/12) CR No. 56340 measuring approximately 0.1403 Ha and situated at Mtwapa within Kilifi County. The other two proprietors Fredrick Haraka Khamis and Joseph Matano Khamis are also brothers to the 1<sup>st</sup> Plaintiff. Testifying before this Court as PW2, the 1<sup>st</sup> Plaintiff told this Court that his brother Fredrick also passed away on 3<sup>rd</sup> March 2016 while Joseph now lives abroad.
16. In support of their case PW2 produced a Certificate of Title No. 56340 in the names of his three brothers (Pexh. 1) as well as a Rates Clearance Certificate issued to them by the County Government of Kilifi dated 21<sup>st</sup> October 2014 (Pex 4). He told the Court that he first came to learn that the property belonging to his brothers had been alienated when he saw the 2<sup>nd</sup> Plaintiff constructing a house thereon.
17. PW2 told the Court that at the time, his brothers Fredrick was still alive and they both wrote to the Registrar of Titles Mombasa alerting his office that the land was not for sale. When they visited the Registry, they came to learn that the land had been secretly and fraudulently sub-divided, sold and was transferred to the 2<sup>nd</sup> to 5<sup>th</sup> Defendants herein.
18. The 2<sup>nd</sup> Plaintiff (PW1) confirmed that the 1<sup>st</sup> Defendant who is also a brother to the 1<sup>st</sup> Plaintiff approached him through an agent indicating that there was a parcel of land on sale. PW1 went and viewed the land and decided to purchase the same. On 26<sup>th</sup> June 2015,

PW1 and the 1<sup>st</sup> Defendant entered into a Sale Agreement in which PW1 agreed to buy the land for Kshs 400,000/-. The 1<sup>st</sup> Defendant told PW1 that he was yet to procure title and PW1 agreed that he would pursue the issuance of title after the purchase.

19. PW1 further testified that he took immediate possession of the property after he paid a deposit of Kshs 365,000/- to the Plaintiff on the date of the transaction. He then started building a house but when it reached the roof, the 2<sup>nd</sup> Defendant disrupted the construction and caused his arrest on the basis that she had a title to and was the lawful owner of the suit property. The 2<sup>nd</sup> Plaintiff was subsequently arraigned at the Shanzu Law Courts in **Criminal Case No. 1423 of 2015** where he was charged with the offence of Forcible Detainer contrary to Section 91 as read with Section 36 of the Penal Code.

20. PW1 told the Court that it was at that point that he learnt that the property he bought from the 1<sup>st</sup> Defendant had already been transferred by the same 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant on 12<sup>th</sup> May 2015. The 2<sup>nd</sup> Defendant later withdrew the charges after she sold and transferred the land complete with PW1's half- built house to the 3<sup>rd</sup> Defendant.

21. I have considered the Plaintiffs' uncontroverted evidence and it is clear to me that the 1<sup>st</sup> Defendant wrongfully and illegally subdivided and sold portions of the suit property when he had no capacity to do so as he was not the registered owner thereof. It is also clear to me that he received a sum of Kshs 365,000/- from the 2<sup>nd</sup> Plaintiff on the purport that he had capacity to sell the land. The land did not belong to him and he had no such capacity.

22. The 2<sup>nd</sup> Plaintiff told the Court that at the time he was stopped from building a house on the suit property by the 2<sup>nd</sup> Defendant, he was almost through with the building as only the roof was pending construction. From a Valuation Report he filed herein as prepared by Amazon Valuers (Pexh 9), the value of the house as at April 2017 was in the sum of Kshs 650,000/-.

23. It was however clear from the Valuation Report that the said value included the roofing and other fittings which had not been put in by the 2<sup>nd</sup> Plaintiff. Arising from the foregoing and from my own analysis of the Report and the photographs shown of the house under construction, I would estimate its value at Kshs 450,000/-.

24. In the premises, this Court is satisfied that the Plaintiffs have proved their case to the required standard. Judgment is accordingly entered for the Plaintiffs as prayed in the Plaint.

25. In light of Prayer No. C of the Plaint, it is hereby directed that the 1<sup>st</sup> Defendant refunds the sum of Kshs 365,000/- to the 2<sup>nd</sup> Plaintiff. In addition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are hereby ordered to compensate the 2<sup>nd</sup> Plaintiff in the sum of Kshs 450,000/- being the value of the developments he had carried out in the property as at April 2017 together with interests at Court Rates.

26. The Plaintiffs shall also have the costs of this suit.

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

**J.O. OLOLA**

**JUDGE**