



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 119 OF 2013

P.N MASHRU LIMITED.....PLAINTIFF

VERSUS

MUMBAI KAJIWE.....1ST DEFENDANT

BEPIA KAJIWE.....2ND DEFENDANT

MKAUMA SAHA.....3RD DEFENDANT

JUDGMENT

(Suit by plaintiff seeking to have the defendants restrained from the disputed land; plaintiff having purchased the land and having title to it; defendants claiming that the seller sold their family land and that the land was owned by their late father who was a brother to the seller; no evidence that the land was ever owned by the defendant's late father; nothing to show that the land was fraudulently sold; judgment entered for the plaintiff; counterclaim of the defendants dismissed)

1. This suit was commenced through a plaint which was filed on 9 June 2013. In the plaint, the plaintiff averred to be the owner of the land parcel Mgumo Patsa/Mazeras/1454 having purchased it from one Said Washe Guro in the year 2009. It has complained of interference and trespass from the defendants and has sought the following orders in the suit.

(a) A declaration that the defendants are trespassing on the piece of land known as Mgumo Patsa/Mazeras/1454 and vacate forthwith.

(b) A permanent injunction restraining the defendants whether by themselves or through their servants, employees and/or agents from entering upon, interfering with and/or having any dealings of adverse nature with the piece of land known as Mgumo Patsa/Mazeras/1454.

(c) Costs of the suit.

(d) Such other or further orders as this Honourable Court may deem just and fit in the circumstances.

2. The defendants filed a joint statement of defence. They pleaded inter alia that the land parcel Mgumo Patsa/Mazeras/1454 (hereinafter referred to as "the suit land") belonged to their late father, Tsuma Washe Kajiwe (deceased) who died on 28 October 1993 and it is claimed that he was buried on the same land. They pleaded that Said Washe Guro, is their uncle and younger brother to their late father, and that he had no right to inherit any part of the property of the deceased. They contended that it was wrong for Said Washe Guro (hereinafter referred to as Mr. Guro) to subdivide the suit land and sell it to the plaintiff. It is claimed that any title obtained by Mr. Guro was obtained through fraud, inter alia, without there being a valid transfer from the deceased or his family members, and forging documents purporting the same to have been executed by the original owner. They also pleaded fraud on the part of the plaintiff, inter alia by purchasing land without the consent and permission of the family of the deceased. They also filed a counterclaim vide which they sought a declaration that the transfer of the suit land to the plaintiff was wrongful, illegal, and fraudulent and the same should be cancelled, and title registered in the names of the defendants.

3. PW-1 was Abeid Said Jumaan, the General Manager of the plaintiff company. He relied on his witness statement and a witness statement filed by Said Wahe Guro who he said is now deceased. Principally, he stated that the suit land was purchased by the plaintiff through a sale agreement dated 3 July 2009. A transfer was registered on 16 February 2010 and title issued to the plaintiff on the same day. Soon after the purchase, the defendants trespassed into the land and confronted a contractor engaged by the plaintiff to develop the property. The statement by Said Washe Guro is to the effect that he owned the land parcel Mgumo Patsa/Mazeras/545 (Plot No. 545), jointly with the County

Council of Kilifi and Tinga Tsimba Benyae, and that he sold his share to the plaintiff. PW-1 also produced various documents including the official search before the sale and the sale agreement. He testified that the land was initially the Plot No. 545 and that the plaintiff purchased 3 acres of the share of Mr. Guro. The original land was then subdivided and what they ended up purchasing was identified as the Plot No. 1454 (the suit land). The same was transferred to the plaintiff and the plaintiff got title. He stated that the plaintiff has now developed the suit land with 42 flats which it uses to house the plaintiff's workers after successfully seeking an injunction against the defendants. He testified that when the suit land was purchased, it was vacant, and they did not evict anyone. He stated that it was when the plaintiff was developing a wall around the suit land that the defendants started interfering with it.

4. The defendants did not testify and did not call a witness, only that the parties agreed that the defendants could have their documents produced by consent without calling their makers. They are as follows :-

- (i) Death Certificate of the late Tsuma Washe;
- (ii) A copy of a letter dated 11 October 1982;
- (iii) A copy of a letter dated 23 April 2011;
- (iv) A copy of a letter dated 28 June 2011;
- (v) A copy of an order in High Court P& A No. 154 of 2011;
- (vi) A copy of a letter dated 25 February 2013
- (vii) Some minutes of a family meeting held on 29 November 2014.

5. I have assessed the above documents. The certificate of death only shows that one Tsuma Washe, the father of the defendants, died on 28 October 1993. The letter dated 23 April 2011 appears to be from the Ministry of Agriculture proposing how some land owned by one Kajiwe W. Tsuma can be utilised. The said letter does not give the identity of the land and one cannot tell what land this is, or what its relation with the suit land is. The letter dated 23 April 2011 is a letter from the Assistant Chief of Mazeras. It is addressed "to whom it may concern" and attaches a list of names said to be beneficiaries of the estate of the late Tsuma Washe. The letter also claims that properties belonging to the deceased were left in the hands of his brothers who have decided to inherit the same without the permission of the children and surviving spouses of the deceased. No specific property is mentioned in the said letter. The letter dated 28 June 2011 is from M/s Ong'era Adembesa & Company Advocates addressed to Mr. Guro. In the letter the said law firm avers that it is acting for the family of the late Tsuma Washe Kajiwe and that the deceased left behind various properties including the suit land. The letter claims that Mr. Guro took over the said properties and fraudulently transferred them to himself and sold some of them without the permission of the family of the deceased. The letter threatens legal action after 10 days. I am not aware of any legal action that followed that letter and the said letter cannot be said to be proving any fraud. The copy of order said to be from the suit High Court P & A No. 154 of 2011, is nothing more than a grant of letters of administration for the estate of Tsuma Washe issued to Saumu Fauzia Tsuma, his daughter. There is no list of properties displayed in the said grant. The letter dated 25 February 2013 is again from the Assistant Chief of Mazeras- M/Patsa. It is actually a sort of agreement where Mr. Guro was asking for a small piece of land from the family of the late Tsuma Washe, to bury his late wife. The specific land being asked for is not particularized. The last document is minutes of a meeting held on 29 November 2014 to deliberate on a dispute between Mr. Guro and the family of the late Tsuma Washe and his estate. The meeting was informed that Mr. Guro grabbed the properties of the late Tsuma Washe, fraudulently registered them in his name, and sold the same. Among the properties listed for deliberation are the suit land and another, Mgumo Patsa/Mazeras.1453, said to have been sold by Mr. Guro to Transpares (K) Limited. I can see that the meeting acknowledged that the suit land is under dispute in this case. Nevertheless, the meeting resolved that Mr. Guro vacates and hands over vacant possession of the piece of land (not specified which) to the family of the late Tsuma Washe within 6 months failure to which the administrators of the estate of the deceased can sue him in court. That meeting could not have had jurisdiction to deliberate on or make decisions on a dispute pending before this court.

6. I have assessed the above documentary evidence tabled by the defendants. I am afraid that they in no way demonstrate that the suit land was ever owned by the deceased. Other than mere oral claims, there is no tangible evidence of the ownership of the suit land by the late Tsuma Washe as claimed by the defendants. From the evidence before me, the suit land was hived off the Plot No. 545, which was owned by Mr. Guro, the County Council of Kilifi and a Mr. Benyae. Nowhere is the name of Tsuma Washe in the title document. If indeed the family of Tsuma Washe thought that the suit land belonged to the estate of the deceased, nothing stopped them from filing suit to claim it. No suit was ever filed, but most importantly, as I have said, there is nothing that shows that the late Tsuma Washe ever owned the suit land. I have nothing before me that supports the claim that Mr. Guro fraudulently acquired title to the suit land and that he had no property to sell to the plaintiff. From what I can see, title was properly in the name of Mr. Guro and he transferred his interest to the plaintiff. I have nothing before me that proves that this transfer was done fraudulently. The counterclaim of the defendants must therefore fail and the same is dismissed.

7. Given my above findings, it is my position that the plaintiff acquired good title to the suit land. It is thus the plaintiff who is entitled to exclusive use and occupation of the suit land. Having not proved any right over the suit land, the defendants must keep off the land and must not interfere with the plaintiff's use and occupation of it. The plaintiff's suit must succeed and the defendants' counterclaim fails. The defendants will bear the costs of both suit and counterclaim.

8. I now make the following final orders :-

- (i) That the defendants have not demonstrated any right over the land parcel Mazeras/Mgumo Patsa/1454.*
- (ii) That the counterclaim of the defendants for the land parcel Mazeras/Mgumo Patsa/1454 is hereby dismissed.*

(iii) That the defendants are hereby permanently restrained whether by themselves or through their servants, employees and/or agents from entering upon, interfering with and/or having any dealings of adverse nature with the piece of land known as Mgumo Patsa/Mazeras/1454.

(iv) That the defendants will shoulder the costs of the main suit and of the counterclaim

9. Judgment accordingly.

DATED AND DELIVERED THIS 15TH DAY OF JUNE 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA