



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 79 OF 2018

COAST NEUROLOGY CENTER LIMITED..... PLAINTIFF

VERSUS

1. MOHAMED KASIM BAKARI

2. THE LAND REGISTRAR KWALE COUNTY

3. THE DISTRICT SURVEYOR KWALE COUNTY

4. THE ATTORNEY GENERAL..... DEFENDANTS

JUDGMENT

1. The plaintiff instituted this suit by way of a plaint dated 5th April, 2018 seeking the following orders:

- a. Compensation for loss of its land at current unencumbered open market value which stands at Kshs.12,000,000/= at the time of filing this suit.**
- b. Costs of clearing land in the sum of Kshs.86,840/=**
- c. General damages for breach of trust/fiduciary duty by the 2nd and 3rd defendants.**
- d. Aggravated and exemplary damages.**
- e. Costs and interest from the date of filing this case.**

2. In the plaint it is pleaded that sometimes in 2015 the plaintiff wanted to invest in land and particularly sugarcane farming to supply to Kwale International Sugar Company Limited. The plaintiff pleaded that it was led by a land-broker to Mohamed Kasim Bakari, the 1st defendant herein who at the time claimed to own a parcel of land at Kwale. That the 1st defendant at the time owned a parcel of land known as KWALE/BUMBANI 'A'/188 measuring 33.5 hectares. It is stated that since the 1st defendant did not want to sell the entire land, the same was subdivided into two parcels, to wit, KWALE/BUMBANI "A"/932 and KWALE/BUMBANI "A"/933. The plaintiff states that it bought parcel KWALE/BUMBANI "A"/932 measuring approximately 32.38 hectares.

3. It is further pleaded that to help them in the process, the plaintiff engaged a lawyer who conducted due diligence by way of a search which confirmed that the property was registered in the name of the 1st defendant. That the plaintiff entered into a sale agreement for the said land at a price of Kshs.6,400,000/= which the plaintiff stated was fully paid and the land was transferred to it upon payment of the registration fees and stamp duty. That the transfer was done and an original title deed handed over to the plaintiff. The plaintiff states that it started the process of clearing part of the land and put up a temporary structure and in the process incurred expenses in the region of Kshs.86, 840.

4. The plaintiff states that thereafter, it engaged the Kwale International Sugar Company Limited who started the process of clearing the entire land in preparation for planting season. That when the Kwale International Sugar Company Limited conducted their verification of the title documents for purposes of signing of the production agreement, they reported to the plaintiff that they could not obtain a search as the records at the lands registry had been interfered with. That when the plaintiff also visited the Land Registry at Kwale, it found that indeed the records had been altered. It is stated that the plaintiff's land had been subdivided into 11 portions without its knowledge and/or consent and the ownership thereof changed. That as a result, the Kwale International Sugar Company Limited cancelled the farming deal that was in the process. The plaintiff states that it is also no longer interested in the land subject matter herein because the reason for acquiring it no longer

exists. The plaintiff states that its enquiry at the lands office at Kwale fell on deaf ears as the Land Registrar could not explain how the records were changed after transfer to the plaintiff had already been registered. The plaintiff blames the defendants for what it terms a fraudulent, illegal dealing with the land records and a breach of trust and fiduciary duty particularly against the 2nd and 3rd defendants, and has listed particulars of fraud and illegalities and breach of trust/fiduciary duty against them. These include altering the plaintiff's land records in KWALE/BUMBANI "A"/932 irregularly without following the law; casually erasing the proprietorship of the plaintiff in the said land without following due process, dislodging the ownership of the said land from the plaintiff without compensation, dealing with the plaintiff's land detrimentally without its consent, facilitating dubious and questionable land transactions in total disregard to the sanctity of the title, interfering with the plaintiff's survey records and dealing with them without consent and/or permission, acting in an unprofessional manner and causing a subdivision on the plaintiff's land when the plaintiff had not authorized the same and in the process changing ownership of the said land against the law. The plaintiff states that the 1st defendant was also an accomplice and co-conspirator in the entire scheme to defraud the plaintiff of his property and money. The plaintiff avers that it has suffered loss and damage.

5. The defendants were duly served with summons to enter appearance but failed to do so. Upon request by the plaintiff, interlocutory judgment was entered against the 1st defendant in default of appearance on 23rd May, 2019. At the hearing, only the plaintiff attended court. Even though the Honourable Attorney General on behalf of the 2nd, 3rd and 4th defendants was duly served with a hearing notice, he never attended court.

6. PW1 was Dr. Eric James Maina, the majority shareholder and Managing Director of the plaintiff company. He adopted his witness statement filed on 9th April 2018 as his evidence-in-chief and which mainly reiterates the averments in the plaint. He produced a copy of Title Number KWALE/BUMBANI 'A'/932, copies of searches, sale agreement dated 1st September, 2015, various cheques/acknowledgements/receipts, completion documents, letter dated 29/3/16 from Kemosi Mogaka Co-advocates, Land clearing expenses, survey records, RIM maps, mutation forms, email communication with Kwale International Sugar Company Limited, demand letters and valuation report as p.exhibits 1-11.

7. PW2 was Sheila Maina, a co-director of the plaintiff company and wife to PW1. She adopted her witness statement filed on 9th April, 2018 as her evidence-in-chief. Her evidence is a replica of that of PW1.

8. With the above evidence, the plaintiff closed its case. The plaintiff filed its submission on 5th February, 2020. The plaintiff submitted that under Section 13 (7) of the Environment and Land Court Act, this court has power to award damages as well as compensation plus costs. The plaintiff urged the court to be guided by the case of **Mike Maina Kamau –v- The Attorney General (2017) eKLR** where the court was faced with a similar case where there was a breach of trust by the state by failing to guarantee security of title from its own institutions. The plaintiff urged the court to award it a sum of Kshs.50 million as general damages. This is primarily because the suit land was meant to be contracted to Kwale International Sugar Company Limited as out-growers for purposes of growing cane and selling it to the company for profit.

9. The plaintiff submitted that it had legitimate expectations to do business with Kwale International Sugar Company Limited that were thwarted when the suit property was taken away from it by actions of the defendants. That the court has to uphold the sanctity of title and the tenets of the constitution. It was submitted that the manner in which the plaintiff's land was taken without any compensation and with no explanation by the defendants despite service smacks of impunity and breach of trust and rule of law. The plaintiff submitted that it is therefore entitled to aggravated and exemplary damages and proposed an award of Kshs.10 million. The plaintiff further submitted that costs follow the event, and urged the court to award it costs. The plaintiff further relied on the case of the **National Land Commissions –v- The estate of Sisiwa Arap Malakwen & the AG (2017)eKLR** where the court made an award of Kshs.2,950,000/= for violations on title to land by government officers as in this case. The plaintiff urged the court to award it the following as compensation: -

a. Cost of land – Kshs12,000,000/=

b. Cost of clearing the land – Kshs.86,840/=

c. General damages – Kshs.50,000,000/=

d. Aggravated and exemplary damages – Kshs.10,000,000/=

e. Costs of the suit

10. I have considered the pleadings, evidence and submissions. The plaintiff produced sale agreement dated 1st September, 2015 showing that the plaintiff purchased a subdivision of plot KWALE/BUMBANI 'A'/188 from Mohamed Kasim Bakari, the 1st Defendant herein. It is the plaintiff's evidence that following the subdivision, the 1st defendant transferred one of the subdivisions, PARCEL NO. KWALE/BUMBANI 'A'/932 measuring 32.38 hectares for a consideration of Kshs.6,400,000/=. The plaintiff has also produced evidence of payment of the full purchase price made to the 1st defendant. Thereafter, the suit property known as KWALE/BUMBANI 'A'/932 was registered in name of Coast Neurology Center Limited, the plaintiff herein and a title deed issued to it on 5th October, 2015. There is no doubt that the plaintiff acquired the said property pursuant to carrying out due diligence as shown by the certificate of official searches produced. It is also evident that the plaintiff paid the registration fees and stamp duty. The plaintiff also produced petty cash vouchers amounting to Kshs. 86, 840/= for clearing part of the land and putting up a temporary structure. From the email communication produced, it is apparent that the plaintiff engaged the Kwale International Sugar Company Limited who started the process of clearing the land in preparation for planting. The plaintiff's evidence is that the intended planting failed to materialize because the Kwale International Sugar Company Limited cancelled the farming deal because the records of the suit land at the Kwale Land Registry had been altered.

11. In this case, the plaintiff has given convincing evidence to prove that it lawfully acquired the suit property by following the required procedures and obtaining the relevant completion documents. The property was not available for cancellation without compensation and

without the permission of the registered owner. The plaintiff herein is still in possession of the original title deed for the suit property. It was incumbent upon the defendants to discharge the evidentiary burden of showing the lawful reason for cancellation of the plaintiff's proprietorship in the suit property. The plaintiff's evidence on record remains uncontroverted. As the holder of uncanceled title deed, then as provided by Section 26 (1) of the Land Registration Act, the plaintiff was deemed to be the absolute and indefeasible proprietor of the said parcel of land. Section 26 (1) of the Land Registration Act provides:

“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 the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

12. The plaintiff has in its evidence explained how it acquired title to the property. The defendants were supposed to show whether the title to the plaintiff may have been fraudulently obtained. The defendants have not shown that there was fraud or misrepresentation on the part of the plaintiff or that the same was acquired illegally, unprocedurally or through a corrupt scheme. The defendants did not adduce any evidence to show any fraud or illegality, which could then be said to attach to the plaintiff. In conclusion therefore there is no evidence to show that the plaintiff was fraudulent in the acquisition of the title to the suit property. The plaintiff herein acquired the suit property after it was transferred to it by the 1st defendant. The title deed herein was issued by the Land Registrar, Kwale the 2nd defendant herein. There was no explanation offered by the defendants for the cancellation of the plaintiff's name from the register. It is therefore my finding that the plaintiff had an absolute and indefeasible title which had not been lawfully cancelled. The defendants' action was therefore illegal, null and void.

13. Having found that the plaintiff had an absolute and indefeasible title which had not been cancelled, then it is entitled to protection of the Constitution and the law. The court has a duty to uphold the sanctity of title and the tenets of the constitution as provided under Article 40 of the constitution. The court finds and holds that the plaintiff's right to property was breached by the actions of the defendants, and the plaintiff therefore is entitled to compensation.

14. The documentary evidence produced by the plaintiff has not been controverted by the defendants. Under Section 13 (7) of the Environment and Land Court Act, the court has jurisdiction as follows:

“In exercise of its jurisdiction under this Act, the court shall have power to make any order or grant any relief as the court deems fit and just including: -

a) Interim or permanent preservation orders including injunction.

b) Prerogative orders

c) Award damages

d) Compensation

e) Specific performance

f) Restitution

g) Declarations, or

h) Costs”

It is therefore clear that the court has power to award damages as well as compensation under Section 13 (7) (c) & (d) plus costs.

15. I considered the valuation report produced by the plaintiff. The current value of the unencumbered freehold interest in the suit property was given as kshs.12,000,000/=. The same was not challenged by the defendants. The court will therefore accept the figure of Kshs.12,000,000/= as compensation for loss of the plaintiff's land based on the current market value. The plaintiff has also claimed the sum of Kshs.86,840/= being expenses for clearing the land and has produced supporting documents such as payment vouchers and receipts. The same have not been challenged by the defendants and the court will accept the same.

16. The plaintiff has also pleaded for general damages for pain and suffering due to breach of trust/fiduciary duty by the 2nd and 3rd defendants. The plaintiff has proposed a figure of Kshs.50 million. The plaintiff relied on the case of **Mike Maina Kamau –v- Attorney General (supra)**. I note however, that the value of the suit property in that case was given as Kshs.651,588,204/=:, which is much higher than the value of the suit property herein. It is therefore my finding and holding that the submitted sum of Kshs.50 million is on the higher side. I do find that the plaintiff has established that it had the right to the property and that its right of user to plant cane for profit was deprived. I do find that general damages of Kshs.3,000,000/= is adequate.

17. The plaintiff has also pleaded aggravated and exemplary damages and has submitted that a sum of Kshs.10,000,000/= is adequate. The

rationale given is that the plaintiff had legitimate expectations to do business with Kwale International Sugar Company Limited that were thwarted when the suit property was taken away from it by the actions of the defendants. Although the same has not been challenged by the defendants, the court finds that the proposed figure is excessive. The court will therefore award the sum of Kshs.2,000,000/= as aggravated and exemplary damages. Because costs follow the event, costs of the suit to be borne by the defendants jointly and severally.

18. Having now carefully considered the available evidence, the court finds that the plaintiff has proved its case on a balance of probabilities. Consequently, the court enters judgment for the plaintiff against the defendants jointly and severally in the following terms: -

a. Costs of the land – Kshs.12,000,000/=.

b. Costs of clearing the land – Kshs86, 840/=.

c. General damages – Kshs. 3,000,000/=.

d. Aggravated and exemplary damages – Kshs.2, 000,000/=.

e. Costs of the suit plus interest from the date of this judgment until payment in full at court rates.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 14TH day of July 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

1ST JUDGE