



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CASE NO.192 OF 2017

PAUL MBATIA JASON MAINA

MARY WANJIRU MBATIA.....PLAINTIFFS

VERSUS

1. ELIZABETH NDUKI KIVUSYU

2. SHAMAKA N. LEONARD

3. HON. THE ATTORNEY GENERAL

4. THE KILIFI COUNTY LAND REGISTRAR.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Complaint dated 22nd August 2017 as filed herein on 11th September 2017 Paul Mbatia Jason Maina and Mary Wanjiru Mbatia pray for Judgment against the four Defendants jointly and severally for:-

(a) A declaration

i) That the transfer in favour of the 1st Defendant was obtained by fraud (and) hence be cancelled.

ii) That the Plaintiffs are the legal proprietors of all that piece or parcel of land known as Kilifi/Kijipwa/494.

(b) Costs of and incidental to this suit

(c) Interest on (b) at Court rates

(d) Any other relief that this Honourable Court may deem just to grant.

2. These prayers arise from the Plaintiffs' contention that they bought the said Plot No. Kilifi/Kijipwa/494 on 20th December 1995 at a consideration of Kshs 80,000/- from one Moses Mumbu Moinde and Eunice Loko Moinde. It is however their case that on or about 30th January 2016, they were informed by a

neighbour that a third party had broken into the fence they had placed around the property and were carrying out some constructions thereon.

3. The Plaintiffs assert that upon confirmation of what was going on, they reported the matter to the Police and the resultant investigations revealed that the suit premises had fraudulently been transferred to the 1st Defendant on 25th September 2015 in a transaction conducted at the 2nd Defendant Advocates offices. The Plaintiffs accuse the Land Registrar Kilifi (the 4th Defendant) of acting in a bad faith in registering the transfer.

4. But in a Statement of Defence dated 17th December 2018, Shimaka N. Leonard (the 2nd Defendant) denies in totality the allegations contained in the Plaint. The 2nd Defendant denies that he has trespassed on the suit premises and asserts that he is not the Land Registrar who ought to have issued a search to enable the Plaintiffs ascertain the status of the suit property.

5. The 2nd Defendant further denies that there was any fraudulent transfer of the suit property as stated by the Plaintiffs or at all and invites the Plaintiffs to strict proof. He avers that he did his duty as an Advocate upon receipt of instructions from the persons namely Paul Mbatia Jason Maina and Mary Wanjiku Mbatia whom he represented in the sale transaction. He further asserts that the sale was properly done and the suit property was successfully transferred to the purchaser Elizabeth Nduki Kivusyu.

6. On the other hand, the Honourable the Attorney General (the 3rd Defendant) in a Statement of Defence dated and filed herein on 19th October 2018 on his behalf and that of the Kilifi County Land Registrar (the 4th Defendant) similarly denies the allegations contained in the Plaint and invites the Plaintiffs to strict proof thereof. It is their case that all transactions that are alleged to have been done on the suit property were done in compliance with the law.

The Plaintiff's Case

7. PW1-Paul Mbatia Jason Maina is the 1st Plaintiff herein and a retired civil servant residing in Nairobi. He told the Court that together with his wife (the 2nd Plaintiff), they purchased the suit property measuring 0.4490 Ha from Moses Muumbu Moinde and Eunice Loko for a sum of Kshs 250,000/-. They fenced the property and used to visit it from time to time.

8. PW1 further testified that on 20th January 2016, he was informed by a neighbour that there was some development going on at the suit property. The Plaintiffs went to the land and confirmed that a third party had erected a structure thereon. They visited the Kilifi Land Registry but could not for some unexplained reason, obtain an official search for the suit property.

9. Subsequently, PW1 told the Court that they reported the matter to the CID offices at Kilifi. Upon investigations, it was revealed that the property had been fraudulently transferred to one Elizabeth Nduki Kivusyu (the 1st Defendant) purportedly by the Plaintiffs herein through the office of the 2nd Defendant Advocate. The said Advocate could not clearly explain who received the purchase price as PW1 and his wife had never sold the land.

10. On cross-examination, PW1 told the Court that he did not know the 2nd Defendant Advocate and that they only sued him because he purported to act for them in the transaction. He told the Court they still have the original title deed for the land and that the documents used by the Advocates to transfer the land were not genuine.

11. PW2- Mary Wanjiru Mbatia is the 2nd Plaintiff and the wife to PW1. She reiterated the testimony of PW1 and told the Court that they never sold their land.

12. On cross-examination, PW2 testified that they do not know the Advocate who purported to represent

them in the sale transaction. While the transfer document purported it was the two of them who sold the land, the photos thereon were not that of her husband and herself. She admitted that the transfer form was executed by the 2nd Defendant and G.N Gakuo Advocate. She testified that they did not sue the said Gakuo as it is the 2nd Defendant who was shown to have represented them in the sale transaction.

Analysis and Determination

13. I have perused and considered the pleadings filed herein, the oral testimonies of the Plaintiffs and the evidence adduced at the trial herein. I have similarly perused and considered the written submissions filed herein by Mr. J.K. Mwarandu Learned Advocate for the Plaintiffs.

14. Despite service of summons, the 1st Defendant neither entered appearance nor filed a defence to the Plaintiff's claim. The 3rd and 4th Defendants however entered appearance and filed a defence but did not participate at the trial herein. On their part, the 2nd Defendant participated in the trial through his Advocates on record but did not call any oral evidence in support of his defence.

15. From the material placed before me, it was not disputed that the parcel of land known as Kilifi/Kijipwa/494 measuring 0.4490 Ha (the suit property) was on 20th December 1995 transferred to the Plaintiffs herein by Moses Muumbu Muinde and Eunice Loko Muinde for a consideration of Kshs 80,000/-. Following the consent of the Land Control Board obtained on 18th December 1995, the suit property was registered and a Title Deed was issued in the joint names of the Plaintiffs on 21st December 1995.

16. The Plaintiffs told the Court that they then took possession of the land and fenced it. As they reside in Nairobi, they would visit the land from time to time. However, sometime in January 2016, their neighbour in Kijipwa called and asked them if they had sold the land. The neighbour went on to tell them that some people had entered the land and had begun erecting structures thereon.

17. The Plaintiffs told the Court that their worst fears were confirmed when they travelled from Nairobi to the suit property a few days later only to find a two-roomed house, a pit latrine and an incomplete borehole being constructed thereon. They then visited the 4th Defendant's Registry and did a search. The 4th Defendant however for some inexplicable reason could not give them the results for the search.

18. The couple then visited their lawyers on record who advised them to report the matter to the Directorate of Criminal Investigations (DCI), Kilifi. They did as advised and upon investigations, they realised that their parcel of land had been transferred in unclear circumstances, purportedly by themselves, to the 1st Defendant herein. It was the Plaintiffs case that they neither sold their land nor received any purchase price from the 1st Defendant herein.

19. As it were, the 1st Defendant to whom the land is said to have been sold neither entered appearance nor filed a defence in these proceedings. From a copy of the Title Deed produced by the Plaintiffs' herein, the suit property was registered in her name on 25th September 2015 in a transaction which the DCI investigations revealed were facilitated by Messrs Marende Birir Shimaka & Company Advocates.

20. From a perusal of the Land Transfer Forms submitted to the 4th Defendant's Registry, it was purported that the two Plaintiffs herein had in consideration of Kshs Three Hundred Thousand (but which in words is shown therein as Kshs 2,500,000/-) transferred the suit property to the 1st Defendant herein on 24th September 2015. The receipt of the money was witnessed by Mr. Leonard N. Shimaka Advocate (the 2nd Defendant herein) who certified therein that "the above-named Paul Mbatia Jason Maina and Mary Wanjiru Mbatia appeared before him on the 24th day of September 2015 and being identified by their ID and Pin, acknowledged the signatures thereon as their own-and freely and voluntarily executed the transfer."

21. From the correspondence availed herein, it was evident that the 1st Defendant when made aware of the DCI investigations stopped any developments on the suit property and sought a refund from the Advocates who purported to represent the purchasers herein.

22. Arising from the foregoing, it was evident to me that the Plaintiffs herein had not sold their land to the 1st Defendant. The said 1st Defendant is aware of the fraudulent transactions that led to the Title Deed for the suit property being registered in her name and hence her lack of interest in representing herself in these proceedings.

23. In the premises I am persuaded that the Plaintiffs have proved their case beyond a balance of probabilities against the Defendants jointly and or severally. Judgment is accordingly hereby entered for the Plaintiff as prayed in the Plaint.

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

Dated, signed and delivered at Malindi this 10th day of July, 2020.

J.O. OLOLA

JUDGE