



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 101 of 2012

MELCHIZEDEK NDOLO NZYOKI

JAMES KELI MUINDE

NTHENYA WILLY KYELE

(Suing for and on behalf of and as the

Chairman, Secretary and Treasurer of

KILIKU SAVINGS SCHEME S.H.G).....PLAINTIFFS

VERSUS

GATATHA FARMERS CO-OP SOCIETY LTD.....1ST DEFENDANT

PETER KIBERA.....2ND DEFENDANT

JUDGMENT

Introduction:

1. In the Plaint dated 29th March, 2012, the Plaintiffs averred that they are the officials of Kiliku Savings Scheme Self Help Group (*the Scheme*); that at all material times, the Scheme was the owner of a farm registered as L.R. No. 1848/3 in Kilimambogo measuring 1263 acres (*the suit property*) and that the said land was allocated to the Scheme by the Government of Kenya to resettle squatters and landless people.
2. The Plaintiffs averred that the Scheme consists of 300 families who were landless and that it is the said families that own the suit property. According to the Plaintiffs, from the month of December, 2011, the Defendants encroached on the suit property and began constructing temporary structures. The Plaintiffs have prayed for a declaration that they are the ones owning and entitled to possession of the suit property.
3. In its Defence, the 1st Defendant averred that it is the registered proprietor of the suit property, to wit, L.R. No. 1848/3, situated at Kilimambogo and measuring 1263 acres or thereabouts having purchased the same for valuable consideration from the 2nd Defendant who was the registered proprietor of the said piece of land.
4. The 1st Defendant averred that the suit property is private property having been originally registered in the name of one Rachel Watt for a term of 999 years from 2nd August, 1918 pursuant to a Lease registered at the Government Lands Registry at Nairobi in Volume N45 Folio 250/6 File 14112.
5. According to the 1st Defendant, by virtue of an Indenture of Assignment (*transfer*) dated 8th day of June 2011, and registered at the Government Lands Registry at Nairobi on 11th July, 2011, the suit property was assigned (*transferred*) to the 1st Defendant for a consideration of Kshs. 201,880,000 by the 2nd Defendant who was then the registered proprietor of the land.
6. It was averred by the 1st Defendant that since the land was not Government Land, the same could not have been the subject of allocation to the Plaintiffs or the alleged Scheme as fraudulently and mischievously stated by the Plaintiffs.
7. In his Defence, the 2nd Defendant averred that on or about 19th September, 2003, he bought the suit land from Pan African Credit and Finance Limited (*then in Liquidation*) and that the later sold the property pursuant to its statutory power of sale and the Ruling of the court in

High Court Bankruptcy Cause No. 14 of 1988 dated 9th March, 1995.

8. The 2nd Defendant averred that vide an Indenture of Assignment dated 24th November, 2010, the suit land was duly transferred to him by the Deposit Protection Fund Board, being the liquidator of Pan African Credit and Finance Limited and that the said Pan African Credit and Finance Limited acquired interest in the suit land by way of a mortgage dated 28th September, 1984.

9. The 2nd Defendant averred that before buying the suit property, he conducted a search and established that the suit property was owned by the late Paul Ngei, with Pan African Credit and Finance Limited claiming interest on the land as a mortgagee.

10. The 2nd Defendant averred that after being registered as the proprietor of the suit property, he entered into a Sale Agreement with the 1st Defendant on 16th August, 2010 and sold a portion of the land measuring 943 acres and that he sold to the 1st Defendant the remaining portion of the suit property on 30th March, 2011.

11. According to the 2nd Defendant, vide an Indenture of Assignment dated 8th June, 2011, he transferred the suit property to the 2nd Defendant and that the Plaintiffs or their members have no reasonable cause of action as against him.

The Plaintiffs' case:

12. The Plaintiffs' Chairman, PW1, informed the court that him, together with other persons, started a Self Help Group known as Kiliku Savings Scheme S.H.G (*the Scheme*) to assist in settling its landless members. According to PW1, the Scheme was registered with the Ministry of Gender, Children and Social Development on 24th May, 2005 and that the Scheme consisted of 300 families.

13. It was the evidence of PW1 that on 10th September, 2007, the Plaintiffs' members were offered a chance to purchase 400 acres of Kyanzavi farm being L.R. No. 1848/3 Kilimambogo.

14. PW1 stated that on the advice of the Ministry of Lands, they obtained the sub-division plan of the suit property and had it surveyed. In addition, it was his evidence that they had an Environmental Impact Assessment Report prepared for the proposed sub-division.

15. PW1 informed the court that in mid-December, 2011, the Plaintiff learnt that the 1st and 2nd Defendants had encroached on the suit property and started putting up illegal structures. It was the evidence of PW1 that the suit land belongs to their forefathers; that their forefathers owned the land before colonialism and that the Defendants demolished the structures that they had on the land.

16. In cross-examination, PW1 stated that they sought for assistance from the government to purchase the land from whoever was claiming to own the land; that the suit property belonged to the government and that he did not have in court the documents showing that they were allocated the land by the government.

17. According to PW1, the white colonialists acquired the suit land from their forefathers and that after independence, Paul Ngei purported to assist them to acquire the land. However, it was the evidence of PW1 that the late Paul Ngei instead acquired the land and had it registered in his name and that when he was unable to pay for the land, the land reverted back to the government.

18. PW1 told the court that the land was registered in the name of Paul Ngei; that Mr. Ngei was the registered owner of the land as at the time they filed this suit and that the Plaintiffs' Scheme has 75 registered members who all have families.

19. PW1 admitted that by the time the 2nd Defendant bought the land in the year 2003, their organization had not been registered and that the Ministry of Lands is in possession of documents showing that they own the land.

Defence case:

20. The 1st Defendant's Chairman, DW1, stated that by agreements in writing dated 16th August 2010 and 30th March 2011, the Company agreed to purchase a piece of land known as L.R. No. 1848/3 Kilimambogo measuring 1263 Acres or thereabouts from the registered owner, Mr. Peter Kibera (*the 2nd Defendant herein*).

21. According to DW1, the total purchase price for the whole piece of land was Kshs. 201,880,000 which was paid in accordance with the terms of the two sale agreements and that the said Mr. Peter Kibera was the owner of the piece of land as clearly shown by an Indenture of Assignment (*Transfer*) dated 24th November, 2010 which was registered at the Lands Office on 14th December, 2010.

22. It was the evidence of DW1 that by a further Indenture of Assignment (*Transfer*) dated 8th day of June, 2011, the suit property was transferred to the 1st Defendant and that the Assignment was registered at the Lands office on 11th July, 2011.

23. DW1 stated that upon payment of the purchase price, the 1st Defendant took possession of the suit land in accordance with the provisions of the Sale Agreement; that the 1st Defendant's agent ploughed the land and erected various structures thereon and that he does not know the Plaintiffs.

24. DW1 finally testified that the suit land is not public land; that the suit land has at all material times been private property owned by various persons since 1918 and that as such, the question of allocation of the land to landless people by the Government cannot arise.

25. The 2nd Defendant, DW2, informed the court that he entered into a Sale Agreement for the sale of the suit property with Pan African Credit and Finance which was under liquidation; that he conducted a search before purchasing the land and that the search revealed that the land was registered in favour of the late Paul Ngei.

26. According to DW2, further inquiry revealed that the late Paul Ngei obtained a mortgage on 28th September, 1984 using the suit property as security; that Paul Ngei was unable to service the loan and that Pan African Credit and Finance Ltd exercised its statutory power of sale and sold the suit property to him.

27. DW2 stated that after paying the purchase price of Kshs. 12,000,000, he obtained the consent of the Matungulu Land Control Board; that while the Indenture of Assignment was in the process of being registered, he entered into a Sale Agreement with the 1st Defendant for the sale of the land and that by an Indenture of 24th November, 2010, the suit property was transferred to him.

28. It was the evidence of DW1 that the suit property was transferred to the 1st Defendant vide the Indenture of Assignment dated 8th June, 2011 on 11th July, 2011 thus making the 1st Defendant the owner of the land. DW1 state that the Plaintiffs have never been in possession of the suit property.

Submissions:

29. The Plaintiffs' advocate submitted that the former registered owner of the suit property, one Paul Ngei, was irregularly registered as the proprietor of the said land having known that the land belonged to and was occupied by the Plaintiffs and other members.

30. The Plaintiff's advocate submitted that under Section 241 of the Companies Act, once a company has been placed under liquidation, all affairs of the said corporation are taken over by the liquidator; that the 2nd Defendant produced an agreement for sale which shows that the Vendor was Pan African Credit and Finance Limited and that the said agreement was illegal and did not have validity because the same was not executed by the liquidator of Pan African Credit and Finance Limited.

31. The Plaintiff's counsel submitted that the agreement entered into by the 2nd Defendant and Pan African Credit and Finance Ltd was null and void and therefore did not confer any interest of the suit property to the 2nd Defendant and that the Plaintiffs had proved their case on a balance of probabilities and are entitled to the orders sought in the Plaintiff.

32. The 2nd Defendant's advocate submitted that the suit property does not fall within the meaning of Article 62(a) of the Constitution as pertains to public land which states as follows:

“62(1) Public land is land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date.”

33. Counsel submitted that at all times, the suit property was privately owned by Paul Ngei who mortgaged it to Pan African Credit & Finance Limited for Kshs. 4,000,000; that Mr. Ngei bought the property from Agricultural Finance Corporation for a sum of Kshs. 550,000 and that no document pointing to the contrary was produced in evidence.

34. It was submitted by counsel that the Ministry of Lands had no capacity at all to allocate the suit land to the Plaintiffs and that any purported allocation was a nullity as the suit property did not fall under the mandate of the Ministry. Counsel relied on the Court of Appeal decision in the case of *Nelson Kazungu Chai & Others vs. Pwani University College [2017] eKLR* which cited with approval the decision in *Said Bin Seif vs. Sheriff Mohammed Shatry [1940] (1) KLR 9* where the court reinstated that:

“...an action taken by the Commissioner of Lands without legal authority is a nullity and such an action, however technically correct is null and void and is of no effect whatsoever under legitimate expectation, estoppel or otherwise.”

35. Counsel submitted that the letters produced by the Plaintiffs only indicated a promise from the Ministry of allocating the suit property to the Plaintiffs; that the said promise concerned land that was not within the Minister's mandate and that at no point after Paul Ngei's acquisition of the suit land did the Plaintiff or the Government own land parcel No. L.R No. 1848/3 (*the suit property*).

36. It was submitted by the 2nd Defendant's advocate that Section 26 of the Land Registration Act 2012 provides that a 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.

37. Counsel submitted that a title can only be defeated on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme. It was submitted that nothing along those lines have been pleaded nor proved before this court by the Plaintiffs.

38. Counsel relied on the Court of Appeal decision in *Mike Maina Kamau vs. Attorney General [2017] eKLR* which reinstated the position of Section 23(1) as was held in *Dr. Joseph Arap Ngok vs. Justice Moiwo Ole Keiwua & 5 Others, Civil Application No. Nairobi 60 of 1997*, where the Court held that:

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only

be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

39. Counsel submitted that the suit property was lawfully transferred to the 2nd Defendant by the Deposit Protection Fund who were acting as liquidation agents for Pan African and Credit Bank.

40. Counsel submitted that the Plaintiffs failed to show any viable instrument they can leverage on to elevate their right over the suit property; that the Plaintiffs failed to show any instance of fraud occasioned by the 1st Defendant in the manner in which the suit property was transferred and that the 2nd Defendant's right over the suit property at the first instance cannot be defeated.

Analysis and findings:

41. This dispute arises from the sale of that parcel of land known and identified as L.R No.1848/3 Kilimambogo (*the suit land*) to the 1st Defendants. The Plaintiffs have sought for the following orders:-

(a) A declaration that the Plaintiffs are the owners and entitled to possession of the suit property;

(b) A permanent injunction prohibiting and or restraining the Defendants whether by themselves, their servants and or agents from entering, selling, alienating transferring, disposing of, carrying on any or any further constructions or in any manner otherwise howsoever from interfering with L.R No.1848/3 Kilimambogo;

(c) An order that any buildings, structures erected on the suit property to be demolished and the 1st and 2nd Defendants be evicted and interest on costs.

42. In opposing the claim, the 2nd Defendant filed his Witness Statement in which he stated that he bought the suit property on 19th September 2003 from Pan African Credit and Finance Limited (*then in liquidation*) and that the latter sold the suit property pursuant to a statutory power of sale and the Ruling of the High Court in Bankruptcy Cause No.14 of 1988 made on 9th March 1995. The 2nd Defendant then transferred the suit property to the 1st Defendant for value.

43. According to the testimony of PW1, on 10th September, 2007, the Plaintiffs' members were offered a chance to purchase 400 acres of L.R. No. 1848/3 Kilimambogo, and that on the advice of the Ministry of Lands, they obtained the sub-division plan of the suit property and had it surveyed.

44. PW1 informed the court that in mid-December, 2011, the Plaintiffs learnt that the 1st and 2nd Defendants had encroached on the suit property and started putting up illegal structures. It was the evidence of PW1 that the suit land belongs to their forefathers; that their forefathers owned the land before colonialism and that the Defendants demolished the structures that they had on the land.

45. PW1 produced several documents in evidence to prove the Plaintiffs' case, which included: the certificate of registration of Kiliku Savings Scheme S.H.G issued by the Ministry on 1st November, 2011; the Certificate of Local Registration of the same organisation dated 24th May, 2005 and the Plaintiffs' letter dated 29th October, 2009.

46. In the letter dated 29th October, 2009, the Plaintiffs made the following request to the Commissioner of Lands:

“This is to request you to settle this landless Kenyans who have been so since colonial time when the white man displaced our great grandparents who had settled on this land. When the white man left Kenya, this land was assigned to Kakuza Fibrelands Limited on 24th November, 1996, who later sold to Mr. Paul Joseph Ngei. This action made our parents to remain landless on their own home land and so are we.”

47. From the documents produced in court, there is no indication that the Commissioner of Lands allocated the Plaintiffs the suit land. Indeed, as admitted by the Plaintiffs in their letter dated 29th October, 2009, the suit property was already registered in favour of the late Ngei as at the time they were making the request to be allocated the same land.

48. The documents that were produced by the Defence shows that vide the Mortgage dated 28th September, 1984 between Pan African Credit and Finance Limited and Paul Ngei, Mr. Ngei charged the suit property, having purchased the land from Agricultural Finance Corporation. The Defendant also produced in evidence the official search showing that the land was registered in favour of Mr. Ngei as at 23rd April, 2009.

49. The undisputed evidence shows that the suit property was in fact owned by the late Paul Ngei who bought it from Agricultural Finance Corporation; Paul Ngei mortgaged the suit property to Pan African Credit & Finance Limited for a sum of Kshs. 4,000,000.00 and the suit property was then transferred to the 2nd Defendant pursuant to the bank's statutory power of sale and High Court Ruling in Bankruptcy Cause No. 14 of 1988 made on 9th March 1995.

50. The evidence by the Defendants shows that the 2nd Defendant purchased the suit property from Pan African Credit and Finance Ltd vide

a Sale Agreement for a consideration of Kshs. 12,000,000.00 for which an Indenture of Assignment was registered under his name on 14th December, 2010.

51. A search conducted at the lands registry on 4th January, 2011 confirmed that the 2nd Defendant subsequently became the registered proprietor of the suit property as at that date.

52. Whilst the Indenture of Assignment was in the process of being registered, and the 2nd Defendant having completed all his obligations under the Sale Agreement, he entered into another agreement with the 1st Defendant herein on 16th August, 2010 for the sale of 943 acres of the suit property for the sum of Kshs. 150,880,000.00.

53. Subsequently, vide an Indenture of Assignment dated 24th November, 2010, the suit property was transferred to the 2nd Defendant who was registered on 14th December, 2010 at the Lands Registry.

54. As the proprietor, the 2nd Defendant entered into another Sale Agreement with the 1st Defendant on 30th March, 2011 for the sale of the remaining 300 acres of the suit property for the sum of Kshs. 60,880,000.00. The 1st Defendant was then registered as the proprietor of the land vide an Indenture of Assignment dated 8th June, 2011 registered on 11th July, 2011.

55. The title held by the 1st Defendant is protected by the provision of Section 23(1) of the Registered Titles Act (*repealed*) which provides as follows:

“23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

56. The Court of Appeal in *Mike Maina Kamau vs. Attorney General [2017] eKLR* restated the position of Section 23(1) of the Act as was held in *Dr. Joseph Arap Ngok vs. Justice Moiwo Ole Keiwua & 5 Others, Civil Application No. NAI 60 of 1997*, where the Court held that:-

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.

57. Further, the court in *Samuel Murimi Karanja & 2 others vs. Republic HCCC Criminal Application No. 412 of 2003* cited with approval the case of *Norbixin Kenya Ltd vs. Attorney General [2014] eKLR*, where the court observed as follows:

“The issue of land ownership is volatile. It is for this reason that holders of valid titles to land must be protected by the law, the government and this court... Once the court is face with a claim of a valid title issued by the government it has no obligation to inquire into the reasons or manner in which the title was obtained, unless there is a clear evidence of fraud against the holder of the title. Courts must shy away from usurping the authority of the grantor or right to question title deeds... Except in clear cases of fraud or where title was not issued in accordance with the governing Act. This strict observance of property rights of a title holder is necessary to ensure certainty in transactions regarding land.”

58. As correctly submitted by the 2nd Defendant’s advocate, the suit property does not fall within the meaning of Article 62(a) of the Constitution as pertains public land. At all times, the suit property was privately owned by Paul Ngei who bought it from Agricultural Finance Corporation. The suit property was therefore not available for allocation to the Plaintiffs.

59. That being the case, the Ministry of Lands had no capacity at all to allocate the suit land to the Plaintiffs. This is the position that the Court of Appeal took in the case of *Nelson Kazungu Chai & Others vs. Pwani university College [2017] eKLR* which cited with approval the decision in *Said Bin Seif vs. Sheriff Mohammed Shatry [1940] (1) KLR 9* where the court reinstated that:-

“...an action taken by the Commissioner of Lands without legal authority is a nullity and such an action, however technically correct is null and void and is of no effect whatsoever under legitimate expectation, estoppel or otherwise.”

60. During the hearing, the Plaintiff’s witnesses were unable to provide a certificate of title or an equivalent to ascertain ownership of the suit property. The Plaintiffs also failed to prove to this court that the suit property was available for allocation by the government, or that indeed they were ever allocated the land.

61. For those reasons, I find that the Plaintiffs did not prove their case on a balance of probabilities. That being so, the Plaintiffs’ suit is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF SEPTEMBER, 2020

O.A. ANGOTE

JUDGE