



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MALINDI

CIVIL APPEAL NO. 5 OF 2012

(Being an appeal from the Judgment and Decree of Hon. D.W.Nyambu, Senior Principal Magistrate, delivered on 29th February 2012 in Malindi SPMCC No.7 of 2002)

MOHAMED ABDALLA FARUKU.....APPELLANT

=VERSUS=

FRIDAUS ABDALLA BAKARI.....RESPONDENT

J U D G M E N T

Introduction

1. The Appellant herein was the Plaintiff in the lower court while the Respondent was the Defendant.
2. According to the Plaint filed in the lower court, the Appellant sought for a permanent injunction restraining the Respondent from further interference with portion number 546/347 (the suit property) and for vacant possession. The learned Magistrate heard the matter and on 29th February 2012 dismissed the Plaintiff's suit.
3. The Appellant filed his Memorandum of Appeal on 28th March 2012 on the following grounds.

(a) That the learned Magistrate erred in law and fact in holding that the Defendant was the lawful owner of the suit property.

(b) That the learned Magistrate erred in law and fact in holding that the Agreement of Sale made between Kassim Ahmed Mbarak and Joseph Kashuru Mumbo on behalf of Harambee Maweni Community on 9th December 1987 was lawful and had passed title in the suit property to Kassim Ahmed Mbarak.

(c) That the Magistrate erred in law and fact in holding that the Agreement for sale made between the Plaintiff and Harambee Maweni Community on 4th August 1994 did not pass any title in the suit property to the Plaintiff.

(d) That the Magistrate erred in law and fact in holding that the Plaintiff had failed to prove his case against the Defendant on a balance of probabilities.

4. The parties agreed to dispose of the Appeal by way of written submissions.

The Appellant's case:

5. The Appellant's advocate submitted that from the evidence adduced by the parties, the suit property was a subdivision of portion number 546 Malindi. That portion was at all material time owned by a self help group known as Harambee Maweni Committee (hereinafter the Committee).
6. It is the Appellant's case that he bought the suit property from Harambee Maweni Committee on 4th August 1994. The Appellant's Advocate submitted that according to the evidence of PW2, the Secretary of the Harambee Maweni Committee, the Committee did not recognise Joseph Kashuru Mumbo, DW3, as the Chairman of the Committee.
7. The trial court, it was submitted, did not analyse the evidence of PW2 before holding that the Respondent was the lawful owner of the suit property.
8. It is the Appellant's case that DW3 did not produce any evidence showing that he was appointed the caretaker chairman by members of the Committee after the initial Committee was dissolved.
9. The Appellant's advocate finally submitted that contrary to the findings of the Magistrate, the Plaintiff had not only produced the list of officials of the Committee but had also called an official of the group, PW2, to testify to that effect; that the trial Magistrate erroneously disregarded the said list of officials of the Committee on the basis that its author was not disclosed and that the Magistrate did not analyse the testimony of PW2.
10. The Appellant's counsel finally submitted that from the evidence adduced, there was no basis for the trial court to have concluded that the Defendant was the lawful owner of the suit property.

The Respondent's case:

11. The Respondent's advocate submitted that the Respondent bought the suit property from Mohamed Salim Said on 12th May 2001. The said Mohamed Salim Said had purchased the suit property from Kassim Ahmed Mbaruk who had in turn purchased it from Harambee Maweni Committee on 9th December 1987.
12. It is the Respondent's case that the Committee could not have sold the plot twice and if it did, then Kassim Mbaruk was the first in time to purchase it. The Respondent's advocate finally submitted that the hand written list of the Committee members was not authenticated and its author was not disclosed. Consequently, it was submitted, the trial Magistrate did not err in holding that the sale of the suit property to the Appellant was unlawful.

Analysis and findings

13. The only issue for determination by this Court is whether the learned Magistrate erred in law and fact in holding that the Committee had no right to sale the suit to the Plaintiff in 1994 having sold the same property to Kassim Mbaruk in 1987.
14. This being a first appeal, I am required to evaluate and re assess the evidence that was tendered in the trial court to determine whether the trial court erred in law and fact as alleged by the Appellant.
15. According to the evidence of the Plaintiff (the Appellant herein), he bought the suit property from Harambee Maweni Committee on 4th August 1994 for Kshs.170,000. PW1 produced the sale agreement as Plaintiff exhibit number 1.
16. In cross examination, PW1 stated that the agreement in respect to the suit property was signed by the Committee's chairman. PW1 stated that he was not aware that the same property had been sold in 1987 to Kassim Ahmed Mubarak by the same Committee as alleged by the Defendant.
17. PW2 informed the trial court that Harambee Maweni Committee was established in 1984 with him as the secretary. The chairman was one Suleiman Swaleh alias Mudalisi with Mjahid Lali as its vice-chairman. A certificate of registration was produced by the witness as Plaintiff exhibit number 2. The witness also produced as exhibit number 3 the list of the members of the Committee as at 23rd July 1984.
18. According to PW2, the Plaintiff bought the suit property from the Committee in 1994. The then chairman Mjahid Lali signed the agreement on behalf of the Committee. PW2 informed the trial court that Mjahid Lali took over the chairmanship of the Committee in 1991 after the chairman died. It was his evidence that once one buys a plot, he is issued with a clearance certificate, which in this particular case, was given to the Plaintiff. The clearance certificate was produced as

- Plaintiff's exhibit number 6.
19. PW2 denied that Joseph Kashuru was the Committee's caretaker chairman. According to PW2, the said Joseph Kashuru was the Chief of the area and not the chairman of the Committee. PW2 informed the court that the Committee maintains the names of the people who purchase land from it and according to their records, the Defendant was not one of the purchasers. He denied that Ahmed Kasim Mubarak was the first one to purchase the suit property.
 20. PW2 insisted that the chairman of the Committee was one Mjahid Suo Lali and not Mr. Kashuru whom the Committee sued in a different case for the sale of its plots although the Committee lost the suit.
 21. The Respondent, DW1, informed the court that he purchased the plot from Mohamed Salim for Kshs.150,000. According to DW1, he knew the suit property belonged to Mohamed Salim who had purchased it from Kassim Ahmed Mbarak. Kassim Ahmed Mbarak was the first owner of the suit having purchased it from the Committee in 1987. DW1 produce the Agreement between Kassim Ahmed Mbarak and the Committee dated 9th December 1987 as Defence exhibit number 1.
 22. The Agreement of sale between Kassim Ahmed Mbarak and the Committee was signed by "Chief Joseph Kashuru" on behalf of the Committee. The purchase price was Kshs.15,000/=.
 23. DW1 also produced as defence exhibit number 2 the agreement that was entered into between Kassim Ahmed Mbarak and Mohamed Salim dated 13th June, 2000. The Defendant also produced as Defence exhibit number 4 the agreement between himself and Mohamed.
 24. In cross examination, DW1 stated that although he was aware that clearance certificates are usually issued by the Committee for the sold plots, he was not issued with one in respect to the suit property.
 25. DW2, Mohamed Ahmed Mbarak, confirmed that his later brother Mohamed Salim sold the suit property to the Defendant. The witness further confirmed that Mr. Kashuru, who was the chief of Malindi location, signed the agreement as the chairman of the Committee.
 26. According to the witness, Mr. Mwizangu (who was the Assistant Chief), is the one who used to collect money from the purchasers of land which he would then hand over to Mr. Kashuru, the Chief. It was the testimony of the witness that Chief Kashuru never showed him any documents to prove that he was the Chairman of the Committee.
 27. Joseph Kashuru Mumbo, DW3, informed the court that he was a former Chief of Malindi town. He stated that he had worked with the Committee as a caretaker chairman. The Committee purchased plot number 546 at Maweni which was sub-divided and sold to the squatters. According to DW3, he was appointed a caretaker chairman after the Committee was dissolved.
 28. DW3 informed the court that he is the one, on behalf of the Committee, who had sold the suit property to Kassim Ahmed Mbarak. The witness did not have the records of the people that had purchased the plots owned by the Committee during his tenure as the caretaker chairman.
 29. In cross examination, DW3 testified that it is the members of the Committee who appointed him as the caretaker chairman after the Committee was dissolved by the District Commissioner. The witness further stated that all the proceeds of the plots were channeled through a salesman, Mr. Mohamed Mwanzau. DW3 confirmed that the office bearers of the Committee at the time he sold the suit property to be Mr. Kassim Were, Richard Baya, PW2, Mdaris and Abdalla.
 30. In his brief judgment, the learned Magistrate held that the Committee having sold the suit property to Kassim Mbarak in 1987 had no right to sale the same plot to the Plaintiff and consequently found that the Defendant was the lawful purchaser of the suit property.
 31. The learned Magistrate further held that whether DW3, Chief Joseph Kashuru Mumbo, was a genuine Committee member or not was not proved by the Plaintiff. The learned Magistrate disregarded the handwritten list of Committee members which was produced as Plaintiff's exhibit number 3 because its author was not disclosed.
 32. Plaintiff exhibit number 3 is a form entitled "Self Help Group- form for local registration". The said form has been filled with the names of ten members of Harambee Maweni Committee. The said form also stipulates the objectives of the committee which includes "buying plots for putting up rental houses for members. The bank account numbers of the committee are also indicated on the form.
 33. The said form is dated 23rd July 1984. It is signed by the District Community Development Officer, Kilifi who also indicated that the Group/Committee was awarded a registration certificate

- number KFI/LR/36/84. The Certificate of Registration of the Committee that was issued by the Ministry of Culture and Social Services on 23rd July 1984 was produced as Plaintiff's exhibit number 2. The registration number of the committee is KFI/LR/36/84 which is the same number shown in Plaintiff's exhibit number 3, the form.
34. It is therefore obvious that the Plaintiff's exhibit number 3 is the standard form that must be filled by the members of a group before a certificate of registration can be issued. The said document shows the officials of the group as at the time of registration and was duly signed by the District Community Development Officer, Kilifi on the same day the Certificate of Registration was issued to the Group.
 35. It is therefore not true, as was held by the learned Magistrate, that the author of the list of the members of the Committee indicated in the Plaintiff exhibit number 3 was not disclosed. Plaintiff exhibit number 3 was duly received by the Ministry of Culture and Social Services and it shows the officials and the objectives of the Committee as at 23rd July 1984.
 36. One of the officials indicated in Plaintiff's exhibit number 3 is Richard Baya, PW2. PW2 stated that he has always been the secretary of the Committee since inception. The witness further stated that DW3 has never been an official of the Committee and he could therefore not have had the locus standi to enter into any agreement on behalf of the Committee in 1987 as alleged.
 37. Although DW3 stated that he was appointed as the caretaker chairman of the Committee after the Committee was dissolved, there was no evidence of his appointment. There was also no evidence that the said Committee was ever dissolved so as to allow the appointment of DW3 as a caretaker chairman.
 38. No evidence was called by the Respondent in the lower court to show that DW3, as the area Chief or the caretaker chairman of the Committee passed the purchase price that he had collected through the then Assistant Chief to the Committee or banked the money in the Committee's account. This are the issues that the learned Magistrate failed to interrogate and yet they were pertinent in ascertaining if indeed DW3 was acting on behalf of the Committee in 1987 when he sold the suit property to Mr. Kassim or not.
 39. In any event, even if the District Commissioner had dissolved the Committee as claimed, which position was not proved, it is untenable that the area Chief could enter into binding contracts on behalf of the Committee considering that he was firstly, a civil servant and secondly the list of the members of the Committee was never changed to show the appointment.
 40. Consequently, I am of the view that the then Chief of Malindi town, DW3, could not have entered into any valid agreement with Mr. Kassim Ahmed Mbarak on behalf of Harambee Maweni Committee on 9th December 1987. That explains why the said Kassim Ahmed Mbarak or the Respondent was not issued with a clearance certificate by the Committee. The clearance certificate, as shown in Plaintiff's exhibit number 6, is supposed to be signed by the District Officer, the Committee Chairman and Treasurer.
 41. The learned Magistrate therefore erred in holding that the Appellant purchased a plot that had already been sold to someone else. The only valid agreement in respect to the suit property is the one dated 4th August 1994 that was entered into between the Appellant and the Committee.
 42. I say so because PW2 who has been an official of the Committee since its inception confirmed that the agreement between the Committee and the Plaintiff was signed by Mr. Mjahid Suo Lali who was the Chairman of the Committee after the demise of Salim Suleiman Swaleh alias Mudalisi in 1991. Mr. Mjahid Suo Lali was Mr. Salim Suleiman's vice-chairman.
 43. I have perused Plaintiff's exhibit 3 and it clearly shows that indeed Mr. Lali S. Masud was one of the founder members, in fact, the vice chairman of the Committee on 23rd July 1984. The evidence of PW2 is therefore consistent with the documents that were filed by the Committee with the Ministry of Culture and Social Services at the time of registering the Committee. The name of DW 3 was never entered into the records of the Committee as one of its officials.
 44. After the sale of the suit property, the Plaintiff was duly issued with a clearance certificate number 8309 by the Committee. Consequently, and for the reasons I have given, I find and hold that the learned Magistrate erred in holding that the Plaintiff had failed to prove his case against the Defendant on a balance of probabilities. The Plaintiff proved its case on a balance of probabilities after showing that the only valid agreement in respect to the suit property is the agreement dated 4th August, 1994.

45. For the reasons I have given above, I allow the Appellant's Appeal and set aside the Judgment and Decree in Malindi SPMCC No. 7 of 2002. Having allowed the Appeal, I shall, which I hereby do, enter Judgment in favour of the Appellant as prayed for in Malindi SPMCC No. 7 of 2002. The Respondent shall pay to the Appellant the costs of the Appeal and the costs in the lower court.

Dated and Delivered in Malindi this **14th** Day of **February**, 2014

O. A. Angote

Judge