



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL CASE NO. 42 OF 2013**

**MARGARET NDUNGE KIOKO.....PLAINTIFF**

**VERSUS**

**MANASE ANANDA CALLEB.....DEFENDANT**

**J U D G E M E N T**

1. By a plaint dated 6<sup>th</sup> March 2013, the plaintiff Margaret Ndunge Kioko sued Manase Ananda Caleb claiming ownership of all the parcel of land on plot C.R. No. 98701 subdivision 3665 Section III M.N and situated in Mtwapa. The plaintiff pleaded that around 4/3/1988, he agreed to buy the suit parcel from John Mukiri – deceased for a sum of Kshs.69,850. That on 24/5/1991, Mr. Mukiri transferred by way of agreement all his interest in the land to the plaintiff. The plaintiff pleaded that Mukiri had purchased the suit plot from Kobana Salim as evidenced by receipt numbers 1909, 1908, 080 2336.

2. The plaintiffs continued that she took possession of the plot and engaged a caretaker who operated a garage therein. That she also paid rates and therefore did not understand why the defendant decided to trespass on her land. It is her case that the defendant has acted in bad faith and might be intending to obtain her property through fraud. The particulars of fraud listed are;

**(i) Obtaining title deed without paying land rates.**

**(ii) Obtaining title deed without paying stamp duty.**

**(iii) Obtaining title without rates clearance certificate.**

**(iv) Using and or forging the plaintiff's deed plan No. 222406.**

3. The plaintiff's claim is for judgment to be entered against the defendant in her favour as follows;

**(a) A permanent injunction against the defendant stopping himself, his agents, employees and anybody from interfering with the plaintiff peaceful occupation.**

**(b) Vacant possession and in default eviction orders to issue.**

**(c) An order directing the Registrar of Titles, Mombasa do cancel the title deed issued to the defendant for parcel of land known CR. 98701 – sub division No. 3665 (Original Number 607/6 of Section III Mainland North as delineated on Land Survey Plan No. 229406 and replace it with the name of the plaintiff.**

**(d) Costs and interest at court rates.**

**(e) Any other relief that court deems fit to grant.**

4. The defence filed his statement on 8/4/2013 denying the plaintiff's claim. He pleaded that the plaintiff is a fictitious person who has no claim or interest on his property. The defendant denied that the plaintiff has ever had in her possession the original deed plan. The allegations of fraud were also denied and the plaintiff put to strict proof. The defendant pleaded that he lawfully acquired title to the suit property for valuable consideration. That the plaintiff's suit is defective and bad in law for non-joinder and the orders sought are in vain thus the same be dismissed with costs.

5. The plaintiff called four witnesses in support of her claim while the defendant called two. The plaintiff testified as **PW1**. She narrated that she bought the plot on 24/5/1991 from John Muchere Mukiri for a consideration of Kshs.69,850/= vide cheque No. 10776786 and presented the sale agreement which was marked for identification as P.I. That the agreement was witnessed by Hassan Swaleh Waithanje. The cheque was produced as **Pex 2** while receipts John Mukiri used to pay ground rents produced as **Pex 3**. **PW1** continued that Mukiri took her to the land owner called Kobana Salim and which owner executed a transfer dated 1/11/2003 in favour of the plaintiff. The witness produced the transfer as **Pex 4**.

6. It is her further evidence that she paid Kobana Kshs.100,000 in cash. Later a deed plan was prepared by Edward Kuguru (DW2) and she paid the surveyor Kshs.18,000/= on 1/11/2003 for the service. The receipt No. 366 was produced as **Pex 5** and deed plan No. 229406 inserting plot No. MN/III/3665 produced as MFI P6 following objection raised by the defence counsel. **PW1** added that she was in the process of securing a title as she paid approval fees of Kshs.270/= on 22/8/1991 as per the receipt produced as **Pex 7**. That she gave Elly Otieno (PW2) to use the plot as a garage until February 2013 – **Pex 8** when around 27<sup>th</sup> – 28<sup>th</sup> February 2013 she received a call that someone wanted to take her plot.

7. The witness stated that the person wanted to store building materials as he owned a neighbouring plot. That he built his house on the neighbouring plot and started interfering with the suit plot. The photos of the disputed construction were marked as MFI P9. That the search done on 25/6/2013 shows the land is in the name of Kobana Salim. **PW1** maintained the land is still his as no one has approached her to sell it. She urged the court to cancel any title issued to the defendant and grant her prayers as per the plaint.

8. In the cross-examination, **PW1** said she saw Kobana last on 1/11/2003 but she did not know when she died. That she lives in Germany and after receiving the call in February, 2013, she took time before coming to Kenya and she was not in Kenya on 6/3/2013. That she signed the transfer form by thumb printing as well as writing. **PW1** said she used the transfer form to get the deed plan at Kilifi lands office. That **Pex 3(a) & (b)** was payment made in respect of plot 607 and **Pex 3(c)** was payment by her in respect of plot No. 607/III/MN. MFI P1 is a transfer for plot 539 to 607 and **PW1** signed it as a witness. That John Mukiri did not show her any title deed.

9. In further cross-examination, **PW1** conceded that Kobana did not show her any deed plan after paying the Kshs.100,000/= as the deed plans were with Edward Kuguru. That **Pex 12** search is in respect of plot 3665/III/MN. That the plot occupied by the defendant does not have a title deed. That she does not know the process of getting a title after death of a deceased owner. In re-examination, **PW1** stated that the plot she bought was MN/III/3665 from original No. 607. That MFI-1 shows John was transferring to her the land as a buyer. That she also had an agreement where Kobana received the money. That she was not given search for plot 3665 because the original parcel had not been sub-divided. That the defendant never consulted her when he put up the fence round the suit plot.

10. Elly Otieno Ouma adopted her witness statement dated 19/7/2013 as his evidence. **PW2** said he operates a garage called Elma Mechanical services. That in the year 2010, he was running his garage on plot No. 3664/III/MN which adjoins plot No.3665. That she knew the plaintiff as the owner of plot No. 3665 and he approached her to allow him use it. That in 2011, the defendant started constructing the 1<sup>st</sup> floor of his building on plot 3666/III/MN and therefore requested **PW2** to allow him deposit his building materials on the suit plot. **PW2** stated that he was shocked when on 27/2/2013, the defendant's caretaker asked him to remove his property from plot No. 3665.

11. **PW2** continued that on 28/2/2013 the defendant's caretaker arrived very early in the morning and started digging the foundation. This forced him to inform the plaintiff. The plaintiff requested **PW2** to report the matter to the police station. That the police came and arrested the caretaker. This made the defendant to demand that he removes his motor vehicles.

12. In cross-examination, **PW2** confirmed he was running a garage on plot No. 3664 owned by Beatrice Kona. He did not know if Beatrice Kona shares a relationship with the plaintiff. That the signed agreement with the plaintiff to use her plot in 2010. **PW2** said he no longer operates on plot 3665 after being asked to move out. That, legally he does not know who owns plot 3665.

13. In re-examination, **PW2** stated that he started operating his garage on plot 3664 in the year 2009 and that same year, there was no construction on plot 3665. That he occupies suit plot in 3665 and they were neighbours with the caretaker of the defendant called Alex. That it is Alex who approached him to allow him deposit building materials on plot No. 3665. That the perimeter wall around 3665 was done on 27/2/2013. That the plaintiff never told him that she had sold the suit plot.

14. Mary Kioko Muthukya testified as **PW3**. She is the mother of the plaintiff. She stated that Hassan Swale helped them identify the plot in Mtwapa. That after viewing the plot, they called the owner John Mukiri, sat down and agreed on a price of Kshs.69,850/= which was paid through a bankers cheque. Later they met the owner of the land called Kobana Slim who confirmed the plot belongs to John. **PW3** said she is the one in custody of the plaintiff's documents. **PW3** added that the plaintiff has always been in possession before she was removed in 2013 by the defendant.

15. In cross-examination, **PW3** stated Mama Kobana did not show her copy of her ID. That they met Kobana at her residence not the suit plot. **PW3** stated further that the plot was marked. That they used the transfer form Kobana signed to obtain a deed plan from the Kilifi survey office. That while they were processing a title, a problem arose because the defendant had started claiming the land. That from 2003, they were paying ground rent to Kilifi County Council. In re-examination, **PW3** confirmed they paid Kshs.100,000 to Kobana to enable them process the deed plan. That the arrears of ground rent were paid vide receipts produced as **Pex 3(a) – (d)**.

16. Swaleh Hassan Waithanje's statement was adopted without him appearing in court on account of his ill-health. **PW4** said she knew the plaintiff since 1975 because they schooled with her daughter at Mtopanga Primary School. **PW4** recorded that the plaintiff informed her in 1991 that she wanted to buy a plot. **PW4** knew one John Mukiri who had a plot in Mtwapa to sell. He brought the two together and a purchase price of Kshs.69,850/= was agreed for purchase of plot 3665/III/MN. **PW4** further recalled that on 1/11/2003, the plaintiff paid Kshs.100,000/= to Kobana Salim in order for her to effect the transfer of the plot to the plaintiff. That he was aware the plaintiff fenced off the plot and started conducting various businesses. **PW4** concluded he never heard that Kobana sold the same plot to the defendant. This marked the close of the plaintiff's case.

17. The defendant opened his defence with his evidence as **DW1** on 21/2/2018. Mr. Ananda said he lives in Bombolulu and adopted his witness statement filed on 8<sup>th</sup> April 2013 together with the documents numbers 1 – 10 contained in the list dated 8/5/2017. He stated that No. 1 on the list is the sale agreement dated 15/3/2005. The witness produced the documents except No. 7 and No. 10. **DW1** said that he has not been charged with fraud in respect of the title (**Dex 6**). That at the time of transfer to his name, there was no caveat or restriction registered on the title and the plaintiff was not in possession neither was PW2 (Elly Otieno) in possession. **DW1** stated further that he owns plot No. 3666. That PW2 could sometimes park his vehicles on the suit plot but with his permission.

18. It is the defendant's evidence that he fenced off the plot after getting the title on 1/2/2013 but has not developed it because of this case thus he has suffered loss. The witness added that he paid land rates and stamp duty and also obtained consent of Land Control Board to transfer. That the deed plan was issued to him by the Registrar of titles. He avers that the allegations by the plaintiff are misplaced and prayed the same be dismissed with costs.

19. In cross-examination, the defendant said in the agreement, the name of the vendor is indicated as Kobana Binti Salim. That consent was obtained on 2/11/2012 – 7 years from the date of sale and transfer signed on 22/11/2012. That the transfer was signed by Rehema Shee Ali although he has not produced any document to demonstrate she had capacity to do so. He confirmed that his manager was arrested while excavation was on-going. That the deed plan No.229406 was authored by E. M. Kuguru and signed by director of surveyors on 20/3/2000. The plaintiff said he has never met the plaintiff. That there is a correction of date on the deed plan.

20. Edward Marenye Kiguru gave evidence as **DW2**. He is a licensed surveyor and has been since 1973. He stated that he carried out sub-division on plot No. 607/III/MN into many plots and the suit plot No. 3665 was one of them. That he obtained deed plans for each plot. On 24/5/2013, the defendant wrote to him to confirm that he had issued deed plan No. 222406 to the plaintiff together with a receipt. He avers that he wrote back to confirm that he never released the said deed plan to the plaintiff nor issued her with a receipt. The deed plan and letter dated 9/7/2013 produced as **Dex 7** and **10**.

21. The witness was put to cross-examination by Mr. Mutugi learned counsel for the plaintiff. The Rehema was the daughter of Kobana Salim. That he was given instructions to do sub-division in the year 2000. **DW2** did not know when Kobana died. That the sub-division process commenced in the year 1997. That the signature on **Dex 7** is different from the deed plan of the plaintiff. That he has not made loss of deed plan to the police because it is intended for the registered owner. That he released the original deed plans to Rehema. **DW2** admitted he has a secretary in his office but the receipt shown to him did not come from him. **DW2** said he was not involved in processing of title deeds. This marked the close of the defence case.

22. The parties filed their closing submissions. The plaintiff filed hers on 9<sup>th</sup> March 2020 and the defendant filed his on 19<sup>th</sup> February 2019. I have considered both and adopt the issues raised therein for my determination as follows;

(a) *Whether or not the plaintiff acquired ownership of the suit plot?*

(b) *Whether or not the defendant obtained his title through fraud?*

(c) *Whether or not the plaintiff has proved her case?*

(d) *What orders should the court issue?*

(e) *Who bears the costs of the suit?*

23. The plaintiff's claim is that she purchased the suit plot first hence there was no plot available to be sold to the defendant a second time. She put reliance on a copy of a sale agreement executed between John Mukiri and herself on 24/5/1991. At the time this agreement was made the number 3665 had not come into existence. This is confirmed by the date of the deed plan which was issued on 2000; Pex 3(a) – (c) which are receipts issued to John Mukiri that acknowledged payment for one plot No. T7 on 607 original No. 539/III/MN and also the evidence of DW2 when he said that the sub-division process commenced in 1997 and was completed in the year 2000.

24. The only two documents presented by the plaintiff which relates to the suit plot are; the transfer document dated 1/11/2003 which gave the C.R. No. as 98701 and the deed plan No. 229406. The plaintiff went further to state that she used the transfer document to obtain the deed plan from Kilifi Lands Registry. This confirmed DW2's evidence that he never issued the plaintiff with the deed plan. None of the plaintiff's witnesses mentioned dealing with DW2 or his role in their buying of the land. This begs answer as to why the plaintiff was claiming to have paid Kshs.18,000 to Edward Kiguru (DW2). Moreover it was not contested that DW2 was instructed to do the sub-divisions by Kobana Salim and not the plaintiff.

25. The plaintiff armed with a transfer document and deed plain stated that she began the process of acquiring title. Infact she stated that she paid rates and accused the defendant of obtaining his title without paying rates or stamp duty. Pex 6 is rates payment request dated 1/3/2013. It is stamped paid although the stamped part is ineligible. However, from the date of the document, the payment if at all could only have been made in the year 2013. It's therefore not clear to this court the steps the plaintiff took to secure the registration of the suit plot into her name.

26. Without a title to her name and since the evidence indicates that plot No. 3665 amongst the many plots from the sub-division of plot No. 607, the plaintiff ought to have demonstrated that the plot sold to her was indeed No.3665. In my opinion, this burden was not discharged. PW4 who introduced them to John Mukiri stated thus; "**On 24/5/1991, John Mukiri who had earlier purchased a plot on number 607/III/MN was paid Kshs.69,800/= in full.**" PW1 said that "**On 24/5/1991 John Mukiri from whom I purchased plot number 607/III/MN was paid Kshs.69,800 in full and an agreement executed.**" PW3 also stated that they met John sat down and agreed on the purchase price which he was paid in full.

27. None of these witnesses to the initial transaction explains how the land sold to them was identified on the ground. No mention is made of a sketch plan shown to them of the proposed sub-division. The plaintiff is relying on the evidence of PW2 to identify the plot she bought. This witness came onto the neighbouring plot No. 3664/III/MN in 2009 and started using the suit plot in 2010. This was after the sale had taken place about 20 years earlier. The evidence of PW2 would be of value if there was corroboration from the other witnesses which corroboration is lacking.

28. Before I consider the plaintiff's evidence as having missing links, I proceed to determine if she has proved the fraud she alleged against the defendant. It is trite law that allegations of fraud must be specifically pleaded and strictly proved. This position has been set in precedence for instance in the case of *Ratilal Patel Vs Lalji Makanji (1957) EAR 314 – 317* that; ***“There is one observation which we must make – the burden of proof – standard of proof required – allegations of fraud must be strictly proved. Although that standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than a balance of probabilities is required.” This was followed in Umila W/o Mahindra Shah Vs Barclays Bank International Ltd & Ano (1979) KLR pg 67 (per Law JA); “A high standard of proof is required to establish such a finding appropriate to the gravity of the offence concerned.”***

29. One of the particulars of fraud alleged was obtaining a title without paying stamp duty. The defendant produced a paying in deposit slip dated 3/12/2012 which shows that stamp duty of Kshs.20,040 was paid in respect of the transfer of 3665/MN/III. The plaintiff pleaded further that the defendant obtained title without paying land rates and rates clearance certificate. In respect of rates payable to the municipality, the defendant did not present proof of payment of such. The plaintiff had to show however how none payment of rates or failing to obtain a rates clearance certificate is a fraud by itself.

30. The core of this dispute however revolve around the question on whether or not the defendant forged the plaintiff's deed plan No. 222406 to get the title. The parties did not know each other before the commencement of the proceedings. PW3 who is the plaintiff's mother said she was in possession of the plaintiff's documents and she also did not know the defendant. So where did the defendant get the plaintiff's deed plan to forge it?

31. In her submission, it is stated that the plaintiff collected the original deed plan from Edward Kuguru who had done the survey and she made a payment of Kshs.18,000 where she was issued with receipt No. 366. If indeed it is true that the plaintiff picked her deed plain from the surveyor (which the surveyor has denied) then the person in whose possession the deed plains were would be the one to explain how the defendant obtained a similar version of the plaintiff's deed plan. It would therefore be proper to join the said surveyor (DW2) or the Director of Surveys as a party to these proceedings for the plaintiff's claim of forgery to have legs to stand. I so hold because there is no basis of accusing a stranger of forging your document without laying a basis of how the stranger may have accessed the document or suing persons in whose possession the document is.

32. The plaintiff averred that the defendant's deed plan is a forgery because she is the one who was issued with deed plan No. 229406 dated 20/3/2000. DW2 stated that after he prepared the deed plans, they are forwarded to the Director of Surveys to sign therefore his signature does not appear on either of the two deed plans. This raises the question on who had capacity to determine the authentic deed plan. No evidence was led to this end. Instead the plaintiff submitted that as at 2005 when the defendant purchased the suit land (as per Dex 1), the registered owner was long dead and the property was not available to the beneficiaries to sell. No evidence was led to state when Kobana Salim died. PW1 and PW3 said they do not know when Kobana died.

33. Secondly Rehema Shee Ali was not joined to this Case thus submitting that she knew the property had been sold or that she lacked capacity to execute a transfer in favour of the defendant is asking the Court to condemn her unheard. The documents signed by Rehema Shee Ali were served on the plaintiff before she closed her case. She did not endeavour to amend the plaint to join the said person. The plaintiff attempts to lead evidence through submissions must thus be disregarded as it goes against the rules of natural justice. The plaintiff submitted that the defendant's deed plan did not have a number. However, the copy produced in court has a number given as 229406. The plaintiff ought to have clarified what number she wanted the deed plan to bear.

34. Was the defendant aware of the plaintiff's interest on the land? PW2 did not state that he showed the defendant the agreement he signed between him and the plaintiff. In any event by 2009 when PW2 started using the neighbouring plot, the defendant had already executed a sale agreement for purchase of the land.

35. In light of the foregoing analysis, this court comes to the following conclusions;

- (i) The plaintiff has not demonstrated that she identified the plot she was buying before paying for it.**
- (ii) The plaintiff has failed to create a nexus between the plot she bought and the suit plot.**
- (iii) The plaintiff failed to prove that the defendant acquired the suit title through fraud.**
- (iv) The plaintiff's suit is fatally defective for on-joinder of parties.**

36. Consequently, the plaintiff has failed to prove her case on the standards required in law. The same is dismissed with costs to the defendant.

**Judgement dated & signed at Busia this 16<sup>th</sup> Day of September 2020**

**A. OMOLLO**

**JUDGE**

**And delivered electronically via email to the parties' advocates this 21<sup>st</sup> Day of September 2020 due to Covid-19 pandemic.**

**A. OMOLLO**

**JUDGE**