



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 118 OF 2014

1. SAID LALI SHEE A.K.A POTO
2. MARIAM LALI SHEE
3. AZIZ LALI SHEE
4. RUKIYA LALI SHEE.....PLAINTIFFS

VERSUS

MOHAMED YAHYA AHMED

HAZMI HAMID AHMED.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By their Complaint dated and filed herein on 24th June 2014 as amended on 13th November 2015, Said Lali Shee A.K.A Poto, Mariam Lali Shee, Aziz Lali Shee and Rukiya Lali Shee (the Plaintiffs) pray for Judgment against the two Defendants for: -

- a) A declaration that 15 acres part of Lamu/Hindi/Magogoni/526 belongs to the Plaintiffs;*
- b) That an order be issued that the 15 acres in occupation of the Plaintiffs be separated from Lamu/Hindi/Magogoni/526 and a Title Deed be issued in favour of the Plaintiffs;*
- c) An injunction against both Defendants restraining them from entering, trespassing and/or dealing in the suitland; and*
- d) Costs of the suit.*

2. These prayers arise from the Plaintiffs' contention that jointly as the sons and daughters of the late Lali Shee, they have been in possession of 15 acres comprised in the said Land Parcel No. Lamu/Hindi/Magogoni/526 which measures in total approximately 13.5 Ha. It is their case that following a search conducted recently at the Land Registry, they came to learn that the entire 13.5 Ha inclusive of the portion they occupy had been allocated to the 1st Defendant who has since subsequently transferred the same to the 2nd Defendant herein.

3. The Plaintiffs avers that the 1st Defendant has misused his influence as a leader in the area during the land adjudication process to fraudulently include the Plaintiffs' portion of land into his own and hence the allocation to himself of the said 13.5 Ha piece of land. They assert that the Defendants have no claim or interest in their 15-acre portion and hence the orders sought herein.

4. But in his Statement of Defence dated 30th September 2014 as filed herein on 1st October 2014, Mohamed Yahya Ahmed (the 1st Defendant) denies the assertions made by the Plaintiff. The 1st Defendant while admitting to have been the registered owner of the suit property prior to transferring the same to the 2nd Defendant avers that the Plaintiffs' parcel was only about three acres and that the same was mistakenly absorbed and included into his own piece of land during the land adjudication process.

5. The 1st Defendant avers that following the discovery of the mistake, he proceeded to compensate the 4th Plaintiff-Rukiya Lali Shee who had represented herself as the sole owner of the said parcel of land with an alternative Plot No. 528 measuring 6.6 Ha which was allocated to

her by the Land Allocation Committee.

6. The 1st Defendant accuses the Plaintiffs of filing the suit some 26 years after the event merely because they changed their mind in respect of the mutual undertaking in order to benefit a second time following the introduction in the area of the Lamu Port Project.

7. Hazmi Hamid Ahmed (the 2nd Defendant) is equally opposed to the grant of orders sought by the Plaintiffs. In his Statement of Defence and Counterclaim lodged herein on 6th June 2015, the 2nd Defendant avers that he is the registered proprietor of the suit property and that he is an innocent purchaser for value without notice of any defect in the title.

8. By way of his Counterclaim, the 2nd Defendant urges the Court to dismiss the Plaintiff's suit and to instead enter Judgment in his favour for:

a) A declaration that the 2nd Defendant is the legal and registered proprietor of the said Lamu/Hindi/Magogoni/526;

b) A permanent injunction to issue against the Plaintiffs whether directly or through their agents, servants or proxies from dealing in any manner whatsoever with the suit property; and

c) Costs and interests thereof.

The Plaintiffs' Case

9. At the trial herein, the Plaintiffs called two witnesses in support of their case.

10. PW1- Rukiya Lali Shee is the 4th Plaintiff and a resident of Magogoni Settlement Scheme, Lamu. She told the Court that together with her siblings who are the co-Plaintiffs herein, they have been in occupation of some 15 acres of land being part of what is now known as Lamu/Hindi/Magogoni/526 measuring 13.5 Ha after registration.

11. PW1 testified that through a search she conducted recently, she came to learn that the 1st Defendant had been allocated a total of 13.5 Ha which to her surprise included her family's 15 acres. She accused the 1st Defendant of using her influence as a leader in the Local Authority during the adjudication process to fraudulently include her family's 15 acres of land into his own.

12. On cross-examination, PW1 told the Court that the land was surveyed in 1993. She denied entering into any agreement for compensation with the Defendants. She further told the Court that she asked the Land Allocation Committee to be allocated land as an individual and not for her family. She further told the Court they had tried to resolve the dispute first at home and hence the length of time it took them to institute this suit.

13. PW2- Mariam Lali Shee is a resident of Mombasa and a sister to PW1. She told the Court that together with her Co-Plaintiffs, they have been in occupation of a portion of land measuring 15 acres situated at Kiongoni Area within the Hindi/Magogoni Settlement Scheme. PW2 testified that the parcel of land was left to them by their father the late Lali Shee who used to carry out farming activities thereon even before the Settlement scheme was established.

14. PW2 further told the Court that their portion of land boarded the 1st Defendant's parcel. When the Scheme was established, her family parcel was fraudulently amalgamated with that owned by the 1st Defendant and one title deed that included the extent of land owned by PW2's family was issued to the 1st Defendant.

The Defence Case.

15. The two Defendants both testified at the trial herein in support of their respective cases.

16. DW1- Mohamed Yahya Ahmed is the 1st Defendant and a resident of Lamu. He told the Court that he was originally a squatter on the suit property. However, on 22nd February 1996 he was given a Letter of Offer for the land and was issued with a title deed therefor on 28th August 2006.

17. DW1 testified that on 1st September 2010, he sold the land to the 2nd Defendant and the property was transferred to the 2nd Defendant's name on 9th August 2011. DW1 told the Court that he was surprised when he was sued more than 15 years later for the same parcel of land. He told the Court the Plaintiffs were allocated Plot No. 528 and that they had stayed peacefully in their respective portions until when the LAPPSET Project commenced in the area.

18. On cross-examination, DW1 told the Court that he was residing in Mokowe town when the Hindi/Magogoni Settlement Scheme was established in 1988. He admitted that in his recorded Statement filed herein he had indicated that three acres of land belonging to the Plaintiffs had been mistakenly registered as part of his land. He however told the Court all the acreage shown on the title were his own.

19. DW1 further told the Court that the 4th Plaintiff was compensated with some ten acres of land and that she took the same on behalf of her family.

20. DW2- Hazmi Hamid Ahmed is the 2nd Defendant and a businessman in Mombasa. He told the Court he lawfully purchased the suit property measuring 13.5 Ha from the 1st Defendant vide an agreement executed on 1st September 2010. He was later on issued with a title deed for the land on 9th August 2011.

21. DW2 told the Court that sometime in 2015, the 1st Plaintiff started laying erroneous claims of ownership on the land after the LAPSET Corridor Project commenced. DW2 told the Court that he was aware that the 1st Plaintiff was compensated in the tune of Kshs 2,000,000/- in respect of some structures he claimed to have on the suit property.

22. On cross-examination, DW2 testified that he learnt that the suit property was being sold when he met the 1st Defendant in Mombasa in 2010. He did a search and established the 1st Defendant was the owner. He also visited the land and found some crops thereon. There were however no structures except a small one which he saw during the compensation when the Plaintiffs went to the suit property.

Analysis and Determination

23. I have perused and considered the pleadings filed herein by the parties, the oral testimonies of the witnesses and the evidence adduced at the trial. I have also perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

24. The Plaintiffs' case is that they are the beneficial owners of a portion of the suit property- Lamu/Hindi/Magogoni/526 measuring approximately 15 acres. It is their case that the said portion of land was first occupied and developed by their father the late Lali Shee long before the establishment of the Hindi/Magogoni Settlement Scheme. The Plaintiffs accuse the 1st Defendant of fraudulently amalgamating the portion of land into his own and thereby obtaining a title deed for the entire portion of land into his own name before later disposing of the same to the 2nd Defendant.

25. On his part, the 1st Defendant equally avers that he was in occupation of the suit property before the establishment of the Settlement Scheme. While denying the allegations of fraud against himself, he concedes that the Plaintiffs' father was his neighbor and that he occupied some three acres of the land neighbouring that of the 1st Defendant. It is however his case that during the process of land adjudication in the area which was done after the death of the Plaintiffs' father his three acres were mistakenly "absorbed" into the 1st Defendant's piece of land and that when the error was discovered, he assisted the 4th Plaintiff to acquire another parcel being Lamu/Hindi/Magogoni/528 in compensation.

26. It is the 1st Defendant's case that he later on sold the property to the 2nd Defendant who now asserts that he is an innocent purchaser for value without notice of the suit property which comprises of some 13.5 Ha in total.

27. From the material placed before me, it is clear that the suit property was transferred to the 2nd Defendant on 9th August 2011 and that he was indeed issued with a Title Deed in his name on that very day. It was also apparent that that transfer arose from a Sale Agreement executed between the two Defendants on 1st September 2010 in which the 2nd Defendant purchased the said property from the 1st Defendant at a consideration of Kshs 5,500,000/-.

28. It was difficult to fault the 2nd Defendant's assertion that he was an innocent purchaser for value without notice. I say so because prior to the transfer to himself, the 1st Defendant was the registered proprietor of the suit property. That registration of the 1st Defendant was not recent but had been obtained way back on 28th August 2006, some five (5) years before the 2nd Defendant purchased the same.

29. The 1st Defendant on his part, traces his ownership of the suit property to a Letter of Offer dated 29th February 1996 addressed to himself from the Director of Land Adjudication and Settlement which letter states, in part, as follows: -

"SETTLEMENT PLOT-LETTER OF OFFER

I am pleased to inform you that your application for a Settlement Plot has been successful.

The Government through the Settlement Fund Trustees and with the advice of the District Settlement Plot Selection Committee has offered you Plot No. 526 of approximately ten acres at HINDI MAGOGONI Settlement Scheme in Lamu District.

In pursuant thereto, please note that you are required to report to the District Land Adjudication and Settlement Officer LAMU DISTRICT so that you are shown the plot boundaries and be issued with a letter confirming this before documentation....."

30. From the evidence placed before me, it was not clear how the ten acres offered by Director of Land Adjudication and Settlement almost tripled to the 13.5 Ha indicated on the title deed. This Court was however keen to note that such errors were not restricted only to the 1st Defendant's case. On the same date that the 1st Defendant was issued with the Letter of offer, a similar letter, word for word, was issued to the 4th Plaintiff Rukiya Lali Shee (PW1) in regard to Plot No. 528 Lamu/Hindi/Magogoni/528. While the said letter offered PW1 ten acres of land, PW1 told this Court in her testimony herein that her parcel of land is 16 acres.

31. It was also interesting to note that while the Plaintiffs assert that their father occupied 15 acres of land prior to the establishment of the Settlement Scheme, there was no independent evidence of the existence or ownership of the land before or after the establishment of the scheme save for the admission on the part of the 1st Defendant that the Plaintiffs' father owned a portion of the land measuring about three acres.

32. From the Plaintiffs own documents, it is apparent that their father passed away on 18th July 1986. That would be some ten years before the Scheme was established. The Plaintiffs have not provided any evidence of their existence on the ground when the land was being allocated in the Scheme nor any evidence of their allocation of the alleged 15 acres of the land in the Scheme.

33. While PW1 told the Court that they only realized recently that their parcel of land had been amalgamated into that of the 1st Defendant, it was obvious to me that nothing could be further from the truth. PW1 was aware as far as back as January 1996 that people were being allocated land in the Scheme. It was her own evidence that based on that knowledge, she applied as an individual and was allocated Title No. Lamu/Hindi/Magogoni/528 measuring 16 acres. She did not tell the Court why no application was made in her father's name or in the names of her siblings.

34. That can only lend credence to the claim by the 1st Defendant that at the time of the allocation, she represented herself as the sole heir of the late Lali Shee and that she was compensated with Parcel No. 528 for and on behalf of her family. It further lends credence to the claim that the Plaintiffs only remembered to bring this claim on the realization that people were being compensated for the Lamu-Port- South Sudan- Ethiopia-Transport(LAPPSET) Corridor. Indeed, while the 1st Plaintiff may have been compensated by the Lappset Project, I did not see the documents relied on for such compensation and in any case the mere fact of compensation could not on its own confer title of the suit property upon the Plaintiffs.

35. As it were the Plaintiffs have neither sued the Director of Land Adjudication and Settlement nor the Land Registrar who issued the title deed to the 1st Defendant in August 2006. While they were aware of the allocations in the Scheme as far back as 1996, they did nothing until some 18 years later when they brought this suit. Under Section 7 of the Limitation of Actions Act, the suit to recover the land was clearly time-barred and could not be filed as was done without the leave of the Court.

36. In the premises, I think I have said enough to show that I did not find any merit in the Plaintiffs' claim herein. That being the case I have no hesitation in dismissing the same with costs. I did however find the Defendants' case credible and I hereby enter Judgment for the 2nd Defendant as prayed in his Defence and Counterclaim.

37. The Defendants shall have the costs of both the Plaintiffs suit and of the Counterclaim.

Dated, signed and delivered at Malindi this 15th day of October, 2020.

J.O. OLOLA

JUDGE