



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 215 OF 2015

BOARD OF TRUSTEES OF MAENDELEO

YA WANAWAKE ORGANISATION.....PLAINTIFF

VERSUS

FLORENCE ACHISA SHIVACHI alias

FLORENCE GOME

ABIGAEI MAKOTSI MUSIMBI

ELIZABETH SIPETA MAKOKHA MUTENDE

MARTHA W. LUMBASI

ATANAS MANYALA KEYA.....DEFENDANTS

AND

GULF ENERGY LIMITED..... INTERESTED PARTY

JUDGEMENT

The plaintiff avers that on or about 7th September, 2013 the 1st, 2nd, 3rd and 4th defendants, who are not the registered trustees and Maendeleo Organization (MYWO), illegally and fraudulently held themselves out and purported to be the duly registered trustees of MYWO and purported to sell to the 5th defendant herein and parcel L.R. Kakamega Municipality/Block 1/557. As a result of the said illegal and fraudulent sale of the suit land herein by the 1st, 2nd, 3rd and 4th defendants the 5th defendant, the 5th defendant is the current registered proprietor of the suit property. It is the plaintiff's case that the 1st, 2nd, 3rd and 4th defendants acted in excess of their mandate and did not have the locus and or capacity to purport to sell the suit land to the 5th defendant or anyone else and the purported sale of the suit property on 7th September, 2013, was therefore illegal and fraudulent for the lack of the consent of the Registered Trustees of Maendeleo Ya Wanawake (MYWO) and the National Executive Council of MYWO, hence this suit. It is further the plaintiff's case that as a result of the said illegal and fraudulent sale the plaintiff's local branch and members have been deprived of the use and enjoyment of their land and premises which housed the county offices of MYWO and also housed other tenants. As a result of the said illegal sale of the plaintiff's land and premises the plaintiff's organization and the local branch have been rendered tenants on their own premises and have been threatened with eviction by the 5th defendant. The plaintiff's case against the defendants jointly and severally is for a declaration that the purported sale of the suit property herein on 7th September, 2013 by the 1st, 2nd, 3rd and 4th defendants to the 5th defendants herein was illegal and fraudulent and therefore illegal and null and void ab initio. The plaintiff prays for orders:-

1. A declaration that the purported land sale agreement entered between the 1st, 2nd, 3rd and 4th defendants and the 5th defendant on 7th September, 2013 in respect of the suit property No. L.R. Kakamega Municipality/Block 1/557, was fraudulent and therefore illegal and that the 5th defendant holds the suit property herein in trust for the plaintiff organization herein Maendeleo Ya Wanawake Organization (MYWO).
2. Cancellation of the 5th defendant as the registered proprietor of the suit property and restitution of the suit property herein to the Maendeleo Ya Wanawake Organization (MYWO).
3. Costs of this suit.

The 1st, 2nd, 3rd and 4th defendants aver that the outfit in which the plaintiff's allege to be elected leaders does not exist and they shall raise a preliminary objection on a point of law that their entire claim herein be ordered struck out with costs. They admit that Plot No. Kakamega/Municipality/Block 1/557 was originally the property of Kanu Maendeleo ya Wanawake Organization. They aver that at all material times, they were elected officials of Maendeleo ya Wanawake Organization Kakamega District during the period 2006 to 8th July, 2014 when they were voted out. They further state that they sold the suit plot to the 5th defendant on 7th September, 2013 pursuant to a resolution of the trustees of the organization for Ksh. 7.3 Million and thereafter they executed the transfer in favour of the purchaser which was duly registered. They aver that they lawfully sold the suit plot at a time when the same was under a repossession threat by the County Government of Kakamega following cumulative rates and land rent in the sum of Ksh. 23,558,793/= in the month of September, 2013. They aver that they requested for waiver of penalties and interest which was granted and brought down their liability of the County Government of Kakamega to Kshs. 3,255,051/= which they authorized to be paid by the 5th defendant to the County Government while they received Ksh. 4,044,949/= on the account of the organization. They further state that in selling the suit plot, they acted prudently and in the best interest of the organization at a time when the County Government of Kakamega had threatened both repossession and or a recovery suit for rates and land rents aforesaid and at a time when the organization had no funds whatsoever to redeem the suit plot.

The 5th defendant states that he lawfully purchased the suit plot on 7th September, 2013 from the 1st, 2nd, 3rd and 4th defendants and dully paid the agreed consideration to them as per the terms of the sale agreement of that date and subsequently the title thereof was transferred to him after following due process. The 5th defendant states that before he purchased the suit plot he exercised due diligence. The 5th defendant states that he purchased the suit land on a willing buyer willing seller basis and having paid the purchase price as per the sale agreement, the issue of application of the proceeds of the sale is strictly an internal affair between the plaintiff and the rest of the defendants to his exclusion.

The interested party avers that at all material times to this suit relevant to the interested party, the 5th defendant, Atanas Manyala Keya, was the registered proprietor of all the property bearing title No. Kakamega/Municipality/Block 1/557 The interested party and the 5th defendant herein entered into a lease agreement over the suit property as the lessee and lessor respectively. As a result, the interested party conducted due diligence at the Lands Registry located in Kakamega and established that the 5th defendant was the registered proprietor of the leasehold interest in the suit property for a term of 99 years from 1st June, 1991. Consequently, the interested party and 5th defendant herein executed a lease dated 12th August, 2015, for a term of 25 years, and the same was presented for registration on 19th August, 2015. The lease instrument was executed by the interested party on 6th July, 2015 before the institution of the present proceedings. Further, the suit property was charged in favour of the interested party as the charge, and the 5th defendant as the charger, securing the principal amount of Ksh. 7,200,000/=. The Charge instrument was similarly registered at the Lands Registry on the 19th August, 2015. Subsequently the interested party conducted an official search at the Lands Registry located in Kakamega and established that the interest held by the interested party, being the Lease and Charge, had been noted and registered as an encumbrance to the suit property. On the confidence of the registered interest, the interested party sought to develop the suit property and has contracted multiple parties to construct a service station and consumer store. At all material times the interested party herein was unaware of any adverse action instituted against the 5th defendant challenging the ownership of the suit property.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... and the title of that proprietor shall not be subject to challenge except –

- a. *On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. *Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – 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.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is not in dispute that the registered owner of land parcel No. L.R. Kakamega Municipality/Block 1/557 is the 5th defendant. The issue for determination is whether or not he acquired the title legally and procedurally. It is the plaintiff's case that on or about 7th September, 2013

the 1st, 2nd, 3rd and 4th defendants, who are not the registered trustees and Maendeleo Organization (MYWO), illegally and fraudulently held themselves out and purported to be the duly registered trustees of MYWO and purported to sell to the 5th defendant herein land parcel L.R. Kakamega Municipality/Block 1/557. As a result of the said illegal and fraudulent sale of the suit land herein by the 1st, 2nd, 3rd and 4th defendants to the 5th defendant, the 5th defendant is the current registered proprietor of the suit property. The 1st, 2nd, 3rd and 4th defendants admit that they were not the Trustees at the material time and that they held a delegates meeting which resolved to sell the suit land after consulting with the head office in Nairobi which gave approval. They further state that in selling the suit plot, they acted prudently and in the best interest of the organization at a time when the County Government of Kakamega had threatened both repossession and or a recovery suit for land rates and rents. The 5th defendant testified that he lawfully purchased the suit plot on 7th September, 2013 from the 1st, 2nd, 3rd and 4th defendants and dully paid the agreed consideration to them as per the terms of the sale agreement of that date and subsequently the title was transferred to him after following due process. The 5th defendant states that before he purchased the suit plot he exercised due diligence. The interested party testified that they entered into a lease agreement with the 5th defendant herein over the suit property as the lessee and lessor respectively. They executed a lease dated 12th August, 2015, for a term of 25 years, and the same was presented for registration on 19th August, 2015. Later, the suit property was charged in favour of the interested party as the chargee, and the 5th defendant as the charger, securing the principal amount of Ksh. 7,200,000/= . The Charge instrument was similarly registered at the Lands Registry on the 19th August, 2015. That before entering into the lease agreement they exercised due diligence.

I have carefully perused the Constitution of Maendeleo ya Wanawake Organization produced as PEx1 and Article 22(5) states that;

“The Board of Trustees shall be a body corporate may sue and be sued in their capacity as Trustees of MYWO.”

Article 6 goes on to say that;

“...the Trustees shall have power to sell, purchase and transfer any immovable properties of MYWO and cause monies belonging to MYWO to be vested in or used for exchanged for the purchase of such bonds, mortgages, shares and other forms of investments as deemed to fit the approval of the National Executive Council.”

It is clear therefore that it is only the Trustees who had authority to dispose of immovable property belonging to the plaintiff. PEx2 is the list of Trustees of the plaintiff at the material time, namely;

1. Mrs. Jane MUmbi Kiano
2. Hon Dr. Phoebe Asiyo
3. Mrs. Joan Mujomba
4. Prof. Julia Ojiambo
5. Dr. Joseph Barage Wanjui
6. Mrs. Monica wamaitha Kabeburi

On the issue of lack of authority and or capacity when entering into agreements the court in the case of In re Estate of Francis Kimani Muchiri (Deceased) (2018) eKLR stated that;

“The short of it is that the transaction between the applicant and the protestor over LR NOs 22718/ 5 and 6 was dead in water as at the date it was entered into. It was a sterile arrangement between two intermeddlers, persons who had absolutely no authority to deal with the said assets. They acted in contravention of the law. Their transaction was a nullity. It was of no binding effect to either of them, and it could not possibly be enforced by or against either of them.”

None of the 1st to 4th defendants were Trustees of MYWO at the material time. Be that as it may, I have also peruse the sale agreement between the 1st, 2nd, 3rd and 4th defendants and the 5th Defendant dated 7th September 2013 and produced as DEx1 and the same indicates that it is between MYWO through its registered trustees and the 1st, 2nd, 3rd and 4th defendants when ahead and signed as the vendors yet they were only the officials namely; chairlady, secretary, treasurer and the 4th defendant had no title. I find this was fraudulent as they passed themselves out as trustees which they were not. Secondly they had no authority to enter into a sale agreement on behalf of the plaintiff as they did. The 1st, 2nd, 3rd and 4th defendants never produced this person whom they called from the headquarters in Nairobi who gave them verbal authority to sell the suit plot. They even failed to account what they did with the balance of the money after paying the alleged land rent and rates. The 5th Defendant proceeded to enter into a lease agreement with the interested party even after this suit was filed. I find that the actions by all the defendants were dishonest. It appears to me that the defendants may have been acting in collusion.

The defendants submitted that the plaintiff being a body corporate has failed to produce a copy of its certificate of incorporation or a copy of certified annual returns as required by the Trustees Act. They also did not file a resolution to institute the suit. I find that the fact that the 1st, 2nd, 3rd and 4th defendants were not the Trustees of MYWO at the material time was not disputed. The 1st, 2nd, 3rd and 4th defendants simply had no authority or capacity to enter into the sale agreement with the 5th defendant. I find that the purported sale was illegal and fraudulent and therefore illegal and null and void ab initio. The interested party ought to have exercised due diligence and may pursue their recourse from the 5th defendant. This court has taken judicial notice that MYWO was registered in 1952 with national membership and has a Board of

Trustees. It is a non - profit voluntary women's organization with a mission to improve the quality of life of rural communities. This court is also guided by Article 159 (2) d of the Kenyan Constitution which states that;

“justice shall be administered without undue regard to procedural technicalities;”

For these reasons I find that the plaintiff has proved its case on a balance of probabilities and I grant the following orders;

1. A declaration that the purported land sale agreement entered between the 1st, 2nd, 3rd and 4th defendants and the 5th defendant on 7th September, 2013 in respect of the suit property No. L.R. Kakamega Municipality/Block 1/557, was fraudulent and therefore illegal.
2. Cancellation of the 5th defendant as the registered proprietor of the suit property and restitution of the suit property herein to the Maendeleo Ya Wanawake Organization (MYWO).
3. Costs of the suit to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 15TH DECEMBER 2020.

N.A. MATHEKA

JUDGE