



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC SUIT NO.176 OF 2013**

**MADHUKAR DILSUKHRAI VIBHAKAR.....PLAINTIFF**

**VERSUS**

**JIM OGOYI OPEE.....DEFENDANT**

**ODHIAMBO HANNINGTON PHARES.....DEFENDANT**

**DAVID K. KANDIE.....DEFENDANT**

**GEOFFREY GICHURU GATU.....DEFENDANT**

**KIPROTICH KORIR.....DEFENDANT**

**THE REGISTRAR OF TITLES MOMBASA.....DEFENDANT**

**JUDGMENT**

**PLAINTIFF'S CASE**

1. By a Plaint filed on 14<sup>th</sup> August, 2013 the Plaintiff avers that he is the registered owner of land parcel MOMBASA L.R NO. MN/1/3806 CR NO. 21632 the suit property which was initially registered in the 1950's as Sub Division Number 1114/1/MN by the colony protectorate of Kenya under survey Plan Number 60409 drawn by the then Director of Survey in favour of Nyali Limited.

2. The Plaintiff pleaded that the suit property was then transferred to one DILSUKHRAI VANDRAWANDAS VIBHAKAR (now deceased) on or about the 31<sup>st</sup> December, 1971 who was the Plaintiff's father.

3. The Plaintiff's claim as against the Defendant is for orders as follows;-

a) A permanent Injunction restraining the Defendants by themselves, their servants, employees and /or agents from dispossessing the Plaintiff of the suit property, entering into, occupying, evicting the Plaintiff's agents, employees and/or servants, constructing, fencing, selling, leasing, disposing any interest of and/or undertaking any development or in any other way interfering with the property and/or the Plaintiff's quiet possession and enjoyment of the suit property known as MOMBASA L.R NO. MN/1/3806

b) A declaration that the first and second Defendants' purported title to wit CR. NO. 30693 AND CR. NO. 60075/1345 is illegal, null and void and does not confer any proprietary interest upon the Defendants or any other person.

c) An order directing the sixth Defendant to rectify its register and to nullify the first, second, third, fourth and fifth Defendants registration in respect to CR. NO. 30693 and CR. NO. 60075/1

d) An order for vacant possession against the first, second, third, fourth and fifth Defendants by themselves, employees, agents and/or servants.

e) Costs of this suit and interest.

**DEFENDANT'S CASE**

4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants responded to the Plaint by way of a statement of Defence filed on 3<sup>rd</sup> October 2013. The Defendants denied the Plaintiff's claim and responded that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are regularly, lawfully and legally holding ownership and are in actual possession of a Plot Known as MN/1/1114 (C.R NO. 6675/1) having purchased it for value without notice upon due diligence having been done.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also denied that Plot Known as MN/1/1114 (C.R NO. 6675/1) was procured by way of fraud and/or collusion and by illegality; that the title deed was acquired by way of paying value/consideration without any due notice. The said Defendants further denied that their Title Deed is illegal and void thus prayed that the Plaintiff's suit as against them be dismissed with costs.

6. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants filed a memorandum of Appearance on 29<sup>th</sup> October, 2013 but did not file their any defence to the suit.

7. The 6<sup>th</sup> Defendant also responded to the Plaint by way of a defence filed on 26<sup>th</sup> March, 2014. The 6<sup>th</sup> Defendant countered the averments by the Plaintiff and in particular denied the allegations of fraud leveled against the 6<sup>th</sup> Defendant pleading that the same is misconceived, displaced and untrue. The 6<sup>th</sup> Defendant further stated that the reliefs sought by the Plaintiff are neither available nor merited and prayed for the Plaintiff's suit to be dismissed.

#### **Hearing:**

8. The matter came up for hearing on 30<sup>th</sup> May, 2018. **PW 1 BATHOLOMEWO MWANYUNGU** testified that he is a Land Surveyor with a private practice since 2006 and based in Mombasa. He stated that he carried out a survey on the land ref. no. MN/1/3806 which title was a result of consolidation of land ref. No. MN/1/1114 and MN/1/1117 on plan FR 72/92. He produced a report dated 5<sup>th</sup> December, 2013 and confirmed to have a full version of the map which he produced in court as well. PW1 confirmed to the Court that he had a copy of the deed plan for plot No. 60409 issued in 1955.

9. PW1 continued that before consolidation, it was the property of the Plaintiff. That the title CR 30693 & LR 1114 with deed plan number 60409 issued in 1996 (titles of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants) is similar and appears the same deed plan was used twice for the three titles, i.e that the title issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in 1997 is similar to the ones issued to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants and refers to the same property claimed by the plaintiff on the ground. On cross-examination by the State Counsel, PW1 confirmed that he received the deed plan from the Director of Surveyors.

10. **PW 2 NIRA VIBHAKAR** testified on behalf of his father who he said is the owner of the suit land. He said that he had a copy of the title deed for plot no. 1114 which was acquired in 1971 and they later acquired a neighbouring plot no.1117. That the two titles were surrendered for consolidation in 1991 to become plot Number 3806 issued in my grandfather's name that passed away in 1995. The suit title was transferred to his father by assent in 1998 thereafter PW2's father sub leased it to his brother.

11. **PW2** continued to state to the Court that they lived in the suit property until 2002 when they moved to England and that the property was being managed by Texas Alarms. It is his evidence that in 2010 it came to their attention that some other titles were issued in respect to the suit land using the old numbers which prompted them to lodge a complaint with the Commissioner of Lands. That the Commissioner of Lands carried out investigations whose results confirmed the Plaintiff as the legal owner.

12. On cross-examination **PW 2** confirmed that when they discovered the fraud in 2011, they wrote a letter to the Commissioner of Lands and copied it to the Senior Registrar of Titles, Mombasa. That there was no response from the titles office Mombasa and that no land officer was charged with fraud. That the instructions to investigate the matter came from the Commissioner of Lands. He further stated that they were evicted as at 2013 and that he is assuming that 1<sup>st</sup> to 5<sup>th</sup> Defendants are in possession.

13. **PW 3 SAMUEL KARIUKI MWANGI** testified and said he works with the Ministry of Lands as the Registrar of Titles. He stated that the H-Book is the title registration book and it contains how the numbers are issued to plots in a serial manner while indicating the date of issuance and the deed plan number. He confirmed that he had a title number CR. NO. 30693 in favour of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. That from the H-book, the number was available from October 1997 for portion number 10674 Malindi. That the copy of the title shows that it was registered in October 2009. That the title number was not corresponding with the H-Book whose copy he produced in evidence.

14. In respect of CR 60075, **PW3** said it was first registered to Juba Petroleum before it was transferred to the 1<sup>st</sup> & 2<sup>nd</sup> defendants. The deed plan number given is 60409 and title issued on 30<sup>th</sup> July 2013. That from the H-Book, this title was registered to a plot number 12415 in MN/II from a subdivision issued to Jotham Mwangi. A certified copy of the extract was produced as an exhibit. **PW3** stated further that CR no. 21632 for plot no. 3806/MN/I was registered as a new grant to the plaintiff on 9<sup>th</sup> July 1991. That the CR Nos 30693 &60075 refer to the same plot number and deed plan number, which is an anomaly. That the documents presented by the plaintiff showed the historical formation of the current number.

15. On cross examination he stated that he did not have records of the titles for the 1<sup>st</sup> to 5<sup>th</sup> Defendants and only saw copies of the same when they were served with the Court documents. He also said that he did not have a problem rectifying their records to be in favour of the Plaintiff and that they did not rectify earlier as the Defendants were claiming to have titles for the suit land. This marked the close of the plaintiff's case.

#### **Submissions**

16. The Plaintiff filed their submissions on 31<sup>st</sup> October, 2018 with none of the Defendants doing so.

## Analysis and Determination

17. I have considered the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants statement of Defence as well as Submissions on record. The court is called upon to establish whether the Plaintiff's claim was proper in law and legally before this court. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Defence and in it sought to have the Plaintiffs case dismissed on grounds that they bought the suit property at a consideration having done due diligence on the same. No evidence was adduced by the Defendants to support this averment despite having been duly served with hearing notices.

18. In the case of **Motex Knitwear Ltd vs Gopitex Knitwear Ltd, NBI HCCC No. 834 of 2002; Justice Lesiit citing the case of Autar Singh Bahra & ano vs Raju Govindji, HCCC no. 548 of 1998** stated thus:

*“Although the defendant has denied liability, in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”*

Again in the case of Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of **2001** the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

19. There was no material adduced by the 1<sup>st</sup> to 5<sup>th</sup> Defendants to contest the case by the Plaintiff on particulars of fraud which was particularly pleaded, particularized and specifically proved to the satisfaction of the court (see the evidence of PW 3).

20. The next issue for the court to address would be on whether the court has power to cancel the two titles borne by the Defendants' titles having established particulars of fraud during the acquisition of the Defendants titles. The law relating to cancellation of titles is to be found in **Section 80 of the Land Registration Act**. The material provisions of the said section provide, *inter alia*, that;

**“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”**

21. The court having found that the Plaintiff has proved his case on balance of probabilities thus deserves the grants of all the prayers in the Plaintiff and the law allows for rectification of the register in instances such as presented in this case; I accordingly allow the plaintiff's claim as presented in his plaint.

**Judgment Dated, Signed and Delivered in Mombasa this 14<sup>th</sup>**

**March 2019**

**A. OMOLLO**

**JUDGE**

In the presence of: Mr Sitonik h/b for Ms Mango for the Plaintiff

N/A for the defendants