



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 127 OF 2015

JOSEPH MUCHEMI WANYEKI.....PLAINTIFF

-VERSUS-

PREMJI BHIMJI KERAI

KANJI NARAN BJUDIYA.....DEFENDANTS

JUDGEMENT

1. The plaintiff herein Mr Joseph Muchemi Wanyeki brought this suit against the two defendants vide his plaint dated 9th June 2015 later amended on 6.10.16. He sought the following reliefs:

(a) A declaration that the plaintiff is the rightful and/or lawful owner of that parcel of land known as Plot Number 1865/Section 1/Mainland North (“the suit property”) and he is entitled to exclusive and unimpeded right of possession and occupation of the suit property.

(b) A declaration that the defendants’ title Plot Number 1865/Section 1/Mainland North is invalid, null and void.

(c) Cancellation and/or revocation of the title to Plot Number 1865/Section 1.Mainland North issued in the name of the defendants and an order directing the Land Registrar, Mombasa to cancel any memorial or entry in the register which is in the name of the defendants and restore and/or register the plaintiff as the owner thereof of the suit property.

(d) A declaration that the defendants whether by themselves, their servants, agents or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly, trespassers on the same.

(e) A permanent injunction restraining the defendants whether by themselves, their servants, agents, employees or through anyone deriving title through them or otherwise howsoever from selling, transferring, charging, leasing, depositing building materials, erecting further structures and/or in any other manner whatsoever dealing or interfering with the suit property.

(f) A mandatory injunction compelling the defendants to demolish and remove the perimeter wall and the structures erected on the suit property failing which the plaintiff be authorized to demolish and remove the said perimeter wall and structures at the defendants’ expense.

(g) Vacant possession of the suit property.

(h) General damages for trespass.

(i) Costs of this suit and interest at such rate and for such period of time as this honourable Court may deem fit to grant.

(j) Any such other or further relief as this honourable Court may deem appropriate.

2. The plaintiff pleaded that in the year 2012, the defendants wrongfully entered his land plot No 1865/1/MN and erected a perimeter wall and other structures on it. That by virtue of the said acts of the trespass, the defendants have misused, damaged the property and denied the plaintiff to use and enjoy it.

3. The plaintiff also filed documents in support of his case as per the list dated 9th June 2015. He annexed copies of the following:

(1) Title of deed

(2) Certificate of search dated 7th October 2014

(3) Letter dated 27th September 2013

(4) Photographs taken on 9th October 2014

4. The defendants denied the plaintiff's claim vide their defence dated 21st August 2015. The defendants denied depriving the plaintiff of his property and denied that the plaintiff is the registered owner. The defendants pleaded that they are in occupation which they have since developed and accused the plaintiff of coming to Court with unclean hands.

5. In support of their defence, the defendants filed two sets of documents containing the following documents inter alia;

1. Sale agreement dated 2nd December 2011.

2. Transfer registered 26th March 2012.

3. Copy of title No grant No 15757.

4. Copy of search dated 28th November 2012.

5. Copy of search dated 17th November 2011.

6. Letter of the Director of Prosecution dated 31st May 2013.

7. Letter to the Chief Building Inspector dated 29th May 2013.

8. Notification of approval of the application for development approval dated 6th December 2012.

9. Notice under Local Government Building by laws dated 10th May 2013.

6. At the close of the pleadings, parties called oral evidence. The plaintiff testified as a sole witness on 18th September 2017. He produced a copy of his ID Card No 1867383 as Pex 1. PW 1 stated that he lives in Loresho, Nairobi and he is a CPA trading as Wanyeki & Co Associates. He continued that the

defendants entered his land MSA/MN/1/1865 without his permission. He produced a letter of allotment issued to him on 20th February 1980 as Pex 2 and Original title deed also issued in December 1980 as Pex 3.

7. PW 1 stated further that he learnt of the defendants' trespass in late 2012 – early 2013 after finding a stone wall built around the plot. He took photographs of the premises which photos he produced as Pex 4 (a) – (c). He continued that he lodged a complaint with the Registrar of titles and the O.C.S vide his letter dated 27th September 2013 (Pex 5). That it is on investigations he carried out that he got to know of the defendants' use of the suit land. He denied selling the land to the defendants or receiving any money as purchase price. The witness denied signing the transfer form. He states that the signature & pass photo appearing on the transfer form does not belong to him.

8. It is PW 1's further evidence he has never surrendered his title deed to the lands office. He claims to have suffered loss of Kshs 30,000 per year from 2012 to date as he has not been able to access the plot to develop it. The plaintiff asked the Court to cancel the forged title and also award him damages together with costs of the suit.

9. The defendants gave their testimony a year later on 18th September 2018. Kanyi Naran Bhudiya testified as DW 1. He adopted his witness statement dated 21st August 2015 as his evidence. He added that they bought the land from the plaintiff for Kshs 5.2 Million. That the transaction was done at their advocate's office Mr. K. M. Karimbhai. That he executed all the paper forms and was later issued with a title deed – Dex 1. Subsequently they processed architectural drawings for approval. The approval was given on 6.12.2012. He produced the drawings as Dex 2 & approval letter as Dex 3. DW 1 stated that they have paid all the rates in respect of the suit property. That the Joseph who has sued them is different from the one they paid the purchase price. That the payment was made in instalments as per document No 13 in their list. He produced this schedule of payment as Dex 6. DW 1 maintained that the land is theirs.

10. In cross – examination, DW 1 stated that they were shown the plot by someone. That the agreement was drawn at Karimbhai's office on 1.12.2011 but it does not bear the stamp of Kharimbhai or O. H Momanyi & Co. advocate. That he paid for the land for about one year. He did not know where in Nairobi the person they dealt with lives. He confirmed that the ID given to them does not belong to the plaintiff herein. He maintained that the suit land belongs to them. He also confirmed that they have put a boundary wall around it.

11. DW 2 Kurban Mulla Karimbhai gave evidence on 31st October 2018. He said that he is an advocate from 1960's currently semi – active in practice. He confirmed preparing a transfer between Joseph Muchemi & the defendants. DW 2 said he handled the transaction for the parties. That the transfer dates ought to be 2.12.2011 with transfer taking place the following year. He also stated that he signed the sale agreement although his rubber stamp is missing which could be as a result of the parties walking out of his office in a hurry. That he identified the Joseph using his original ID card which he made a copy. He was surprised that there were two people sharing the same name. He produced copies of the transfers, searches and sale agreement as D ex 7 – 9 and the letter of Consent as Dex 10.

12. In cross – examination, DW 2 said the agreement was brought by the parties and they signed in his presence. That he prepared a transfer on the same day because Joseph was going away. That he submitted the transfer on 29.3.2012 for registration. DW 2 did not know how payment of the purchase price was made as it was done between the parties. DW 2 did not know Joseph Muchemi personally before the transaction. In re – examination, DW 2 said his role was to prepare the transfer and register it. This marked the close of the defence case.

13. Parties filed written submissions which I have read. I note that the submissions as filed reiterate the evidence adduced hence I do not need to repeat them since I already gave summary of the same. From the evidence presented, the plaintiff and the defendants are each holding original title deed for the suit parcel 1865/1/MN. The plaintiff is claiming the land as the original allottee while the defendants are

claiming the land having bought from a person bearing a similar name as the plaintiff.

14. The defendants have admitted that the person who brought this suit is not the person who sold to them the land. The plaintiff has equally confirmed that the signature and photographs appearing in the transfer form and sale agreement is not his. However it is ID card number and name which has been entered in both documents.

15. For this Court's determination is; which of the two Joseph Muchemi Wanyoike bore a genuine title capable of passing on to the defendants. The plaintiff stated that he was allotted the plot in 1980. It is his case that the title transferred to the defendants was a forgery. The law of evidence imposes on any party who alleges fraud to specifically prove it. In this case since it is not in dispute that the plaintiff is not the person who sold the suit land to the defendants, the burden is thus upon him (plaintiff) to demonstrate that the Joseph Muchemi Wanyeki who purported to sell his land was a fraud. Further it was incumbent upon the plaintiff to prove that the title documents in his possession were genuine and those in possession of the other Joseph (and now defendants) were fake. Has he discharge this burden?

16. In his witness statement dated 9th June 2015 and filed in Court on the same day, he refers to the visit he made to the suit property in the year 2012 and how he was denied access by the defendants' servants. During his oral testimony, the plaintiff stated that upon discovering the trespass by the defendants he wrote the letter dated 27th September 2013 addressed to the Registrar of Titles and copied to the OCPD Nyali Police Station. Subsequently he filed this case. The rest of the evidence relates to the documents of title in his possession which he produced and also particulars of loss he suffered as a result of the acts of trespass.

17. On the face of the two titles presented in evidence they are looking alike i.e. issued to the same person on the same date and the name & signature of the Commissioner of Lands is the same. It also bears same revenue stamp dates. In the case of **R. G Patel V. Lalji Makanji (1957) E.A 314** case of **Denis Noel Mukhulo Ochwada & Another vs Elizabeth M. Njoroge & Another (2018) eKLR**. The Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be heavy as to require beyond reasonable doubt, something more than a mere balance of probabilities is required.”

That same position was taken in the case of **Denis Noel Mukhulo Ochwada & Another vs Elizabeth M. Njoroge & Another (2018) eKLR**.

18. That the plaintiff in his effort to prove fraud stated that the agreement of sale relied on by the plaintiffs did not bear the stamp of an advocate. This evidence was rebutted to by the evidence Mr Karimbhai advocate who testified as DW 2. He confirmed that he witnessed the agreement and that the same may not have been stamped due to the parties leaving this office in a hurry. Mr Khakrimbai stated that the two parties signed the sale agreement in his presence

19. The advocate further confirmed presenting the signed documents to the lands office for transfer and registration in the defendant's name. That the same were registered and a certificate of title issued to his clients. In order for the plaintiff to have satisfied this Court that the documents presented by the defendants were a forgery, he ought to have called the Registrar of Titles Mombasa to identify which of the two titles was genuine. He failed to do so to the detriment of his case. I say so because section 108 of the Evidence Act Cap 80 imposes a duty on a party who wishes to rely on certain facts to establish the existence of those facts. The plaintiff did not yield the **“forged”** documents for examination by the relevant experts.

20. The plaintiff submitted that the burden of proof shifted on the defendants because the defendants pleaded that it is the plaintiff who had sold them the suit land. I hold a different view and instead state that the statement of defence as relates to the sale does not take away the substance of this dispute which is whether there was fraud or not. The defendant on receipt of the plaint was right to assume at the first

instance that the person who sold them the land is the one who brought the suit.

21. Can the defendant be held responsible for the fraud if any? The defendant presented a search they conducted which show the property at the time of purchase was in the name of Joseph Muchemi Wanyeki. They appeared before an advocate who witnessed their signatures. The said Joseph also had an original title deed. Consequently not having known the plaintiff before, it would be asking much more than due diligence on the part of the defendants of them to know at the time of their transaction that there was a forgery on that title.

22. The defendants questioned why the plaintiff did not pay rates to the municipality from 1980 to date. In their evidence, they presented rates payments receipt upto date. In my opinion, I find the defendants have satisfied the principle of innocent purchaser for value without notice as per **Black's Law Dictionary 8th Edition** as:

“one who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable considerable for property without notice of prior adverse claims.”

23. I am also not satisfied that the plaintiff proved the allegations of fraud as pleaded in paragraph 5A of his amended plaint. It follows that the plaintiff having failed to effectively challenge the title documents of the defendants as provided under section 26 of the Land Registration Act is not entitled to damages for trespass. In the end I come to the conclusion that the plaintiff’s case is dismissed for lack of proof with an order for each party to meet their respective costs of the suit.

Dated, signed & delivered at Mombasa this 9th April 2019

A. OMOLLO

JUDGE