



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 25 OF 2013

JOSEPH NZARO T/A SMOKYLAND ENTERPRISES....PLAINTIFF

VERSUS

SALIM KAYAA

BAHATI SALIM

MTAWALI SALIM

KIPIGO SALIM.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Complaint dated and filed herein on 22nd February 2013, Joseph K Nzaro T/A Smokyland Enterprises prays for a permanent injunction to issue against the Defendants to restrain them from interfering in the use of LR No. 1705/79(CR 222). In addition, he prays for vacant possession of the said parcel of land and/or an order evicting the Defendants therefrom.

2. Those prayers are premised on the Plaintiff's contention that at all times material to this suit he was the registered proprietor of the said parcel of land having acquired the same pursuant to a Sale Agreement dated 10th March 2010. It is the Plaintiff's case that subsequent to the said purchase, he learnt that the suit property was the subject matter of a suit then pending before the Kilifi SPM's Court it being SPMCC No. 513 of 2009.

3. It is the Plaintiff's case that the said SPMCC No. 513 of 2009 was in relation to a burial dispute pitting the 1st Defendant herein against the vendor who sold the suit property to the Plaintiff. By the said suit, the Vendor sought to restrain the 1st Defendant from burying her deceased daughter Furaha Salim Kayaa on the land.

4. It is further the Plaintiff's case that the said suit has since been withdrawn and the 1st Defendant now threatens to bury the deceased on the said parcel of land in which the Plaintiff intends to develop a modern estate.

5. In their Statement of Defence and Counter claim, the four Defendants vehemently deny that the Plaintiff owns the aforesaid piece of land. On the contrary they aver that the 1st Defendant is their father and the legal owner of the said parcel of land.

6. By way of Counter Claim, the Defendants aver that they own the suit property by virtue of adverse possession having occupied the same for the last 50 years. Accordingly they pray that the Plaintiff's suit be dismissed and that Judgment be entered instead in their favour for:-

a) A permanent injunction restraining the Plaintiff from selling, leasing, sub-leasing, building, sub-dividing, cultivating or in any other manner interfering with the parcel of land being CR No. 22257 measuring approximately three acres and situated at Kiwandani, Kilifi.

b) An order compelling the Land Registrar to cancel the title deed in the name of the Plaintiff and transfer to the Defendants as trustees for the whole family.

c) An order that the deceased's body be buried on the aforesaid parcel of land as her right.

THE PLAINTIFF'S CASE

7. The Plaintiff called two witnesses in support of his case.

8. PW1-Joseph Katana Nzaro (the Plaintiff) testified that he is a Businessman engaged in real estate business. He trades in the name of Smokyland Enterprises. He told the Court that Plot No. 1705/79 belongs to him. The land measures five acres.

9. PW1 testified that he bought the land from the late Karisa Kazungu Tsuma at Kshs 5 Million. The vendor died some two years after selling the land to PW1. He further testified that by the time he filed this claim in Court, the Vendor was already dead. He had paid him using cheques.

10. PW1 further told the Court that when he bought the land, he saw a few structures. The Vendor then assured him that he was in the process of removing the structure. Later on PW1 came to learn that the Defendant had sued the squatters in a Kilifi Court seeking to evict them. The 1st Defendant intended to bury one of their relatives the late Furaha on the land. PW1 was enjoined in the suit.

11. Later on, the Vendor withdraw the case. That prompted the Plaintiff to file this suit. By then according to PW1, the suit property had been transferred in the Plaintiff's name.

12. PW1 further testified that before he bought the land, he did a search which revealed that the land was in the name of the Vendor. It had no encumbrances. PW1 denied that the land was fraudulently registered in his name. It was also not true that the land belonged to the whole family as the Defendants were not related to the deceased Vendor.

13. PW2-Castro Charo Kazungu testified that the Defendants were members of his family. He told the Court that his father Kazungu Karisa Tsuma told him once that he had sued Salim Kayaa and his sons at the Kilifi Law Courts because he wanted them evicted from the land.

14. PW2 further told the Court that one time, his father introduced him to one Joseph Katana Nzaro whom he was told was buying their parcel of land for Kshs 5,000,000/-. PW2 had no objection to the sale. The land was later transferred to the buyer.

THE DEFENCE CASE

15. The Defendants called one witness in support of their case.

16. DW1-Amos Kombe aka Bahati Salim is the 2nd Defendant herein. He told the Court that the 1st Defendant who was his father died in 2013. The 3rd and 4th Defendants are his younger siblings.

17. DW1 told the Court that they started living in Plot No. 1705/43 Kiwandani in 1964. The land belonged to a Whiteman called Lily White. DW1's father who was Lily's clerk was among the beneficiaries when Lily gave out the land as a gift to his workers. DW1 gave the papers to Kazungu Karisa Tsuma, a son of his fellow clerk Karisa Tsuma to process.

18. DW1 testified that Kazungu instead registered all the land in his name secretly. He then started selling the land. He sold two acres to one Selestina Safari Shehe in 2002. Later on Kazungu sued DW1's family at Kilifi Court. He wanted DW1 and his family evicted. While the matter was pending in Court, Kazungu again sold the land to the Plaintiff herein. He later withdrew the case, before the Plaintiff filed the current one.

19. DW1 further testified that Kazungu died after selling the land to the Plaintiff and was buried in Sokoke, far away from the disputed parcel. It is DW1's case that they had their homes on the land at the time the Plaintiff bought the same from Kazungu. There were also graves in which they had buried their relatives.

ANALYSIS AND DETERMINATION

20. I have considered the pleadings filed herein, the testimony and the evidence adduced before me by both parties. I have equally perused and considered the written submissions as filed herein by the Learned Advocates for the parties.

21. The Plaintiff's claim on the suit property is premised on his position that on or about 8th March 2010, he purchased the suit property from one Kazungu Karisa Tsuma at a consideration of Kshs 5,000,000/=. He produced the Sale Agreement between himself and the said Kazungu as Pexh 2 at the trial herein.

22. From the material placed before me, the said Vendor had prior to the Sale Agreement filed Kilifi PMCC No. 513 of 2009 seeking eviction of the Defendants herein from the suitland. That suit was however withdrawn pursuant to a Notice of Withdrawal of suit filed by the Vendor and dated 10th February 2013.

23. Prior to its termination, the Plaintiff herein had filed a Statement of Defence and Counterclaim therein as the 2nd Interested Party dated 17th October 2011 in which he similarly sought to have the Defendants herein evicted from the suit property. It was the Plaintiff's case in the said Kilifi case, just as herein that he bought the suit free from any encumbrances and that he was unaware of the said Kilifi case prior to the registration and transfer of the land in his favour.

24. Paragraphs 7 to 9 of the Sale Agreement between the Plaintiff herein and the said Kazungu Karisa Tsuma read as follows:

7. The vendor hereby guarantees the purchaser that the property is free from any or claims from third parties and further

undertakes to take full responsibility for any such claims and indemnify the purchaser against any claims that may arise against the Purchaser's title to the said property.

8. The Purchaser shall take immediate possession of the property upon completion of the agreement and shall be at liberty to fence and carry out developments of his choice.

9. The Vendor undertakes to give vacant possession of the property by on or before the 1st December 2011 and shall demolish the temporary and permanent structures thereon at his own cost.

25. As it turned out, there were indeed third parties who were not only on the suit property but had built structures thereon. According to the Defendants, they had started occupying the suit property way back in 1964 when the land belonged to a Whiteman by the name Lily White. It was their case that the said Kazungu Karisa Tsuma who purportedly sold the land to the Plaintiff herein had procured the registration of the land in his name by fraud.

26. In support of their case, they produced a bundle of photos (Dexh 7) showing various houses and graves on the suit property. While it is difficult to confirm how long the Defendants had been on the suitland, the Plaintiff himself testified at the trial herein that he had seen what he described as "a few structures" on the land at the time he bought the same. He was to learn later that the Vendor had sued, again in his own words "the squatters who were on the land" seeking their eviction.

27. Evidently, the Plaintiff herein obtained title to the property during the pendency of the said Kilifi PMCC No. 513 of 2009. While the Plaintiff in the said suit withdrew his claim vide the notice of withdrawal dated 18th February 2013 and filed in Court on 21st February 2009, it was not clear if the Plaintiff herein withdrew his counterclaim. Whatever the case it is evident that the Plaintiff herein filed the present suit just one day after the said Kilifi PMCC No. 513 of 2009 was withdrawn with the sole aim of perpetuating the same interests that the Plaintiff in the withdrawn suit sought to achieve.

28. In my humble view the purported sale of the suit property during the pendency of that suit was riddled with bad faith. It is difficult to believe the Plaintiff herein given his conduct and that of the Vendor, that he was unaware of the case filed in the Lower court.

29. Being the purchaser of the suit property, the Plaintiff had the option of claiming against the Vendor as per paragraphs 7 to 9 of the Sale Agreement aforesaid. Instead, the Vendor withdrew the suit on a Notice filed in Court on 21st February 2009, a day before the Plaintiff herein filed the present suit. As it were, it is the Vendor who had promised to demolish the temporary and permanent structures on the suit property.

30. In the circumstances of this case, and in view of the evident dispute between the Defendants herein and the said Kazungu Tsuma in regard to the suit property, I think the Plaintiff herein was, as it were, the author of his own misfortune. Having admitted that there were structures on the suit property, he ought to have done due diligence to establish the proper position in regard to the land before he engaged in any agreement of sale. Otherwise, it would appear to me that he bought the land knowing only too well that it was occupied.

31. In the circumstances of this case, I did not find any merit in the Plaintiff's claim. The Plaintiff's case is accordingly dismissed and Judgment entered in favour of the Defendants as prayed in the Counterclaim.

32. The Defendants will also have the costs of this suit.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE