



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 23 OF 2013

RASHID ABDULREHMAN KHATOR

ALI BWANA BWANAADI (As Administrators

of the Estate of Tima and Fatuma children

of **ALI BASHIR (Deceased)**.....**PLAINTIFFS**

VERSUS

IDHA MARIE AHMED

THE REGISTRAR, COAST

THE HON. ATTORNEY GENERAL.....**DEFENDANTS**

J U D G E M E N T

1. The Plaintiffs sued the 1st Defendant vide the Complaint dated 28th January 2013 seeking the following reliefs:

- a) A declaration that the 2/3 undivided share of Plot 1738 of section VI Mainland North is registered in the name of the Plaintiffs for the benefit of the heirs of the estates they represent and could thus not be sold or dealt with by any other person without the concurrence of the Plaintiffs.
- b) A declaration that the transfer of Plot 1738 of section VI Mainland North made and registered in favour of the 1st Defendant is null and void legally ineffectual and that the 1st Defendant is a trespasser upon plot 1738 of section VI Mainland North; and an order of ejectment of the 1st Defendant do issue.
- c) General and exemplary damages for trespass, dispossession of the plaintiffs and unlawful and unjust enrichment from the continued use of the suit property from July 1, 2012.
- d) An order for an account or inquiry as to income accruing to the 1st Defendant with directions that the 1st Defendant pays over to the plaintiffs a 2/3 pro-rata share of all income accruing from the continued use of the suit property from July 1, 2012.
- e) A permanent injunction barring the 1st Defendant by himself or through his agents, servants, employees and hirelings from entering or remaining on plot 1738 of section VI Mainland North and that he be ordered to restore the suit property to the state it was in at his own expense.
- f) The 2nd Defendant be directed to expunge from the register of plot section 1738 of section VI Mainland North any entry made in favour of the 1st Defendant and to cancel any parallel or illegal register showing that any part of the property is registered in the name of the 1st Defendant.
- g) Costs of the suit.

2. The Plaintiffs pleaded that in July 2012 the 1st Defendant entered upon the suit property and took possession thereof without any authority or sale agreement between him and the Plaintiffs as the administrators of the estate of the deceased registered owners of the property. That the 1st defendant then erected a fence around it and began using the suit plot as a parking yard for trucks from which he received an income.

The Plaintiffs claim that the 1st Defendant's dealings in the suit property amount to intermeddling with the estate of a deceased. The 2nd Defendant is sued in its capacity as the custodian of land records.

3. The 1st Defendant filed his Defence and Counterclaim on 3rd April 2013 in which he asserted that he purchased a portion of the suit property from one Rukiya Binti Soud and occupied it from late 1999. That the agreement was for $\frac{1}{6}$ share owned by Rukiya and the resultant transfer was lodged with the 2nd Defendant for registration. Further to the foregoing the 1st Defendant counterclaimed the portion he occupies by virtue of the doctrine of adverse possession.

4. The suit proceeded for hearing of oral evidence on diverse dates from 20th June 2015. **PW 1** testified that he is one of the administrators of the Estate of both Tima and Fatima from the year 2004. That Tima and Fatima (both deceased) held a $\frac{2}{3}$ share of the suit property while Mohamed bin Ali Bashir and Soud bin Ali Bashir each held $\frac{1}{6}$ share. **PW 1** continued that he was alerted by their caretaker on activities on the suit property sometime in 2012. **PW1** visited the site and found that the 1st Defendant had erected a perimeter fence around it and there were vehicles parked on the property as well as what looked like a garage.

5. **PW 1** decided to report the matter to Changamwe Police Station which resulted in the 1st Defendant being summoned to the Police Station. That the 1st Defendant claimed to have purchased the property and presented a sale agreement between himself and one Soud Rashid dated 24th November 1999. That Rukiya as an administrator of the Estate of Soud owned only $\frac{1}{6}$ share of the suit property. Further, Soud who is Rukiya's son was not an administrator of the suit property but only held a General Power of Attorney. The 1st Defendant also showed a gazette notice stating that the property had been transferred from Rukiya Soud to himself. It is **PW 1** evidence that his co-administrator, himself and the other beneficiaries were unaware of this transaction. That when Rukiya was confronted, she explained that she had refunded the money she received from the 1st Defendant.

6. **PW 1** asserted that both the sale agreement and 1st Defendant's title was fraudulent as it had different entries from those in his original title. That entry No. 7 of the original title was a registration of the Grant of Letters of Administration in Succession Cause No. 173 of 2004 while in the 1st Defendant's title it is a registration of the purported transfer of the property dated 25th January 2000 to the 1st Defendant for a consideration of Kshs. 300,000. The transfer is registered under section 65(h) of the Registration of Titles Act (*repealed*) vide Gazette Notice no. 676 of 11th February 2000.

7. **PW 1** continued further that he got informed by the 2nd Defendant about two a parallel files existing pertaining to the suit property at the Lands Office. **PW 1** also pointed out that the transfer in favour of the 1st Defendant was for the entire suit property and not the $\frac{1}{6}$ share owned by Rukiya. **PW 1** prayed for the court to find that they are entitled to $\frac{5}{6}$ share of the suit property.

8. Two witnesses testified on behalf of the Defendants. The 1st Defendant testifying as **DW 1** stated that he initially rented out plot no. 1732 but was approached by one Soud who gave him the option to buy the suit property, Plot No. 1738. He believed that Soud had the authority to sell because his family had 11 other plots and he had a power of attorney as well as a copy of the title of the suit property. Soud informed him that there had been a forgery case that they won against the Plaintiff and the property was returned to them. **DW 1** stated that he bought the property and had it transferred to him by Rukiya.

9. **DW1** said that since the original title was misplaced the sellers applied for a provisional title. Thereafter, Soud gave him copies of the Kenya Gazette to that effect. That a Certificate of Postal Search also stipulated that Rukiya Binti Soud was the registered proprietor of the property as at 25th January 2000. The witness continued that entry No. 7 on the title showed that he was the registered owner of the property. That entry No. 4 is a court order from SRMCC No. 5571 of 1998 which cancelled entry No. 3 which was a transfer of $\frac{1}{3}$ share of the property to the Plaintiff.

10. **DW 1** stated that he was later informed by one Wandera that the suit property sold to him was also being claimed by third parties who said to have bought from the Plaintiffs. **DW1** mentioned the caveat dated 28th April 2000 lodged by Antony Wandera against his title claiming a purchaser's interest. That a further enquiry at the Lands Office revealed that there were parallel records for the suit property.

11. **DW 1** then decided to pursue a refund of his money since there were too many disputes concerning the property, including a family dispute that the sellers never settled and this culminated in the agreement dated 8th June 2000. **DW 1** was to transfer the property back to Rukiya once he received his refund in full but he only received part-payment of Kshs. 150,000. **DW1** said there are developments on the suit property comprised of a Swahili house occupied by the Wanderas and temporary commercial structures occupied by **DW 1's** tenants. **DW 1** opposed the Plaintiff's claim and faulted them for not enjoining the parties who sold the property to him. However, on cross-examination **DW 1** stated that he would rather receive his full refund as opposed to the property.

12. Samuel Kariuki who is the Land Registrar at the Mombasa Lands Office testified as **DW 2**. He produced the deed file record for the suit property plot No. 1738/VI/MN CR No. 10866. He stated that on receipt of the summons to attend Court he perused their records and found existing two title registers. That the first register had entries up to No. 9 while the second register had endorsements up to No. 10 from a reconstructed register. He testified further that from the records, problems began from entry No. 7 which was a transfer to the 1st Defendant done without presentation of the original title. That the register was reconstructed from 2005 with entries 1 – 6 were a copy from the original title. In accordance with the Registration of Titles Act (*repealed*), the registrar can dispense with the production of the original title where the original cannot be traced and a gazette notice is duly issued.

13. **DW 2** noted however that the reconstruction of the file was done without affidavits sworn by the then registered owners, Tima and Fatima. The only affidavit was that of Rukia Binti Soud dated 28th January 2001. Further, the search showing Rukiya Binti Soud as the registered owner of the entire property as at 25th January 2000 was factually wrong because at the time the gazette notice No. 676 of 11th

February 2000 was issued, she only held $\frac{1}{6}$ share of the property. The search was issued before registration of the transfer to the 1st Defendant as entry No. 7. **DW 2** emphasized that entry No. 7 did not represent the correct position of ownership because it does not mention the share transferred nor does it have a memorandum.

14. Moreover, gazette notices No. 676 on registration of the transfer dispensing production of the original title and No. 826 on issuance of a provisional title both of 18th February 2000 were issued after registration of the transfer in favour of the 1st Defendant. The provisional certificate was not issued due to the existence of an encumbrance on the title. **DW 2** also opined that the original title was availed in 2005 when entry No. 7 on transmission of the suit property to the Plaintiffs was made and could not tell whether the discrepancies between the two registers were ever resolved because there was no correspondence on the files to that effect. This marked the close of the defendants' case.

15. Parties filed their final submissions and lists of authorities. The Plaintiffs' were filed on 25th January 2019. The Plaintiffs' Counsel submitted that Rukiya Binti Soud having been pre-deceased by her co-administrators could not pass a good without first complying with Section 75A as read with section 81A of the Law of Succession Act. Further, the sale itself was suspect having fallen short of several legal requirements. For instance, no certificate of payment of rates was produced; the original transfer document was not shown to the Court; the consideration stipulated in the transfer and sale agreement were different, being Kshs.300,000 and Kshs.650,000 respectively and the transfer was not signed by all owners of the suit property as required by Section 34 of the Registration of Titles Act Cap 281 (*repealed*).

16. The Plaintiffs submitted further that the Agreement for refund between the said Rukia and the 1st Defendant amounted to a rescission of the sale agreement between them thereby extinguishing any perceived rights the 1st Defendant had with respect to the suit property. On the 1st Defendant's Counterclaim for adverse possession, the Plaintiffs contended that the same lacked merit because he led no evidence demonstrating that he had been in open uninterrupted possession of the suit property for over 12 years.

17. The 1st Defendant's submissions were filed on 1st April 2019 and it is submitted that the sale agreement was sound in accordance with Section 3(3) of the Law of Contract Act as it was signed by someone authorised by the vendor being her Attorney. The 1st Defendant asserted that the gazette notices were issued before the transfer was registered. On the issue of the transfer and sale agreement bearing different figures, he contended that the Collector of Stamp Duty's recourse was to place a caveat on the title until unpaid duty is paid. It did not vitiate the transfer already registered in favour of the 1st Defendant.

18. The 1st Defendant also took issue with the fact that Rukiya Binti Soud was not sued nor was any relief sought against her yet the substratum of the Plaintiffs' claim was on her involvement in the sale. He asserted that he was an adverse possessor as he was put in possession of $\frac{1}{6}$ portion of the suit property as per clause 4 of the sale agreement dated 24th November 1999. Time began running from that date and hit the requisite 12 year mark on 23rd November 2011.

19. Both the Plaintiffs and 1st Defendant submitted extensively on entry No. 4 concerning the Court Order in CMCC No. 5571 of 1998 which caused $\frac{1}{6}$ share of the Estate of Mohamed bin Ali Bashir to revert back to the Estate after proceedings on forgery. The entry was a transfer of the $\frac{1}{6}$ to Mr and Mrs Abdulrehman Khator. That the Court found in Rukiya Binti Soud's favour. The Plaintiffs were of the view that the orders were a nullity as the lower court lacked jurisdiction while the 1st Defendant argued that this Court was not the appropriate forum to determine that matter. It should have been appealed or reviewed for the parties involved to present their cases.

20. The 2nd and 3rd Defendants' submissions were filed on 24th April 2019. State Counsel condensed his issues into two, namely whether registration of the transfer instrument in favour of the 1st Defendant was procedural and what is the way forward regarding the two registers. The first issue was answered in the affirmative. Counsel submitted that the registrar stated that the transfer was presented on 26th February 2000 and a Gazette Notice issued on 11th February 2000. The date in question, 26th February 2000 was the date on which the instrument was presented. The exercise was in accordance with section 26(2) of the Registration of Titles Act as the date to be used was the date obtained from the presentation book. On parallel registers Counsel was of the opinion that rectification after the court ascertains the rights of the parties was the way forward.

21. In light of the above summaries, I frame the following questions for determination:

- i) Whether or not the 1st Defendant acquired the whole suit property by virtue of adverse possession as he has counter-claimed.
- ii) Whether or not the registration of the 1st defendant as owner of the entire suit property was regular & lawful
- iii) Whether the plaintiffs are entitled to the orders sought in the plaint.
- iv) Who bears the costs of the suit

22. The 1st Defendant in his counter-claim pleaded that he has been in occupation of the whole property for a period in excess of 12 years therefore has acquired it by way of adverse possession. For a claim of adverse possession to succeed, the occupation must be without the consent of the land owner for a period of twelve years. In the case before me, the 1st defendant stated that he entered the suit land on 24th November 1999 pursuant to a sale agreement executed between him and a Mr Soud. His occupation was thus by consent of the "land owner." The 1st defendant did not lead evidence on when the consent of this land owner was terminated.

23. If we take time to start running from date of agreement as the date of occupation, consent could only be deemed as terminated on the lapse of the sixth year, in this case on 23rd November 2006 which leaves only 6 years to the date the suit was filed. Secondly the 1st Defendant in his oral testimony stated that when he realised present suit was the family dispute was not being quickly resolved, he opted to

seek his refund. The first instalment towards refund was made on 8th June 2000 with the balance agreed to be paid on 8th August 2000. This would have given the 1st defendant leeway of time to run. However, the 1st Defendant had acquired registration of the title in his name by February 2000.

24. Given the refund agreement was silent on the issue of possession and taking into consideration that the suit title was already in the name of the 1st Defendant, I am unable to conclude that time could run as against the plaintiffs and the 1st Defendant himself presented a search which he showed him the land was registered in the name of Rukiya Binti Soud at the time he purchased it. It is a settled principle of law that time runs in favour of an adverse possessor where the land is registered in the name other than that of a claimant. The facts set out in the case of **Peter Mbiri Michuki Vs Samuel Mugo Michuki (2014) eKLR** is distinguishable to the extent that the suit had been brought against the Vendor unlike here where parties had no contract between them.

25. The second question is the registration of the 1st Defendant as owner of the whole plot was lawful. In the document of title presented at page 48 of the 1st Defendant's documents, it set out shares of the different parties as follows:

- *Tima, Fatuma & Children of Ali Bin Bashir* 2/3rd

- *Mohamed Bin Ali Bashir* 1/6th

- *Soud Bin Ali Bashir* 1/6th

26. The 1st Defendant was well aware that he was purchasing the 1/6th share owned by Rukiya Binti Soud. In cross exam, he admitted that there was no entry made on the title regarding the share of Tima & Fatuma or that of the estate of Mohamed Bin Ali Bashir. During re-examination, the 1st Defendant stated that he was not involved in the dispute between Rukia & the Plaintiffs. He also stated that because of the dispute, he would rather keep his money rather than the land.

27. In light of the evidence adduced by the Plaintiffs as regards shareholding of the suit land which is not been disputed by the 1st Defendant; it was erroneous on the part of the 2nd Defendant to register the whole parcel in the names of the 1st defendant without supporting documents (share transfer) of the other co-owners. According to the 2nd Defendant's evidence, the current owners are as below;

- Mohamed Ali Bashir 1/6

- 1st Defendant (Idha) 1/6

- Plaintiffs (as Adm of estate of Tima & Fatuma) 2/3

28. The Plaintiffs in their submissions urged the court to enter judgement as prayed in the plaint. However in their evidence and oral submissions, the Plaintiffs urged the Court to find that the cancellation & expunging of the sale of 1/6 undivided share of Soud Bin Ali Bashir by Rukia Binti Soud to Mr & Mrs Abdulrehman Khator was done by a court without jurisdiction thus a nullity. This was not one of the prayers sought in the plaint. Secondly, neither Rukiya Binti Soud nor Mr & Mrs Khator were parties to this suit. In asking the court to cancel the entry for want of jurisdiction of the court that made the order is both contrary to the rules of natural justice (condemning a party without a hearing) as well as this court granting orders not prayed for.

29. In conclusion, I find the Plaintiffs' case proved to the extent that the 1st defendant was irregularly registered as the owner of the entire suit land. Consequently, I enter judgement for the Plaintiffs as follows:

a) A declaration and is hereby made that the 2/3 undivided share of Plot 1738 of section VI Mainland North be registered in the name of the Plaintiffs for the benefit of the heirs of the estates they represent and could thus not be sold or dealt with by any other person without the concurrence of the Plaintiffs.

b) A declaration is given that the transfer of Plot 1738 of section VI Mainland North made and registered in favour of the 1st Defendant is null, void and legally ineffectual and that the 1st Defendant is a trespasser upon a portion measuring 2/3rd of the plot 1738 of section VI Mainland North; and an order of eviction of the 1st Defendant from this portion do issue.

c) An order for an account or inquiry as to income accruing to the 1st Defendant with directions that the 1st Defendant pays over to the plaintiffs a 2/3 pro-rata share of all income accruing from the continued use of the suit property from July 1, 2012 until surrender of vacant possession.

d) A permanent injunction barring the 1st Defendant by himself or through his agents, servants, employees and hirelings from entering or remaining on the 2/3rd portion of plot 1738 of section VI Mainland North and that he does restore the said portion to the state it was in at his own expense.

e) The 2nd Defendant be directed to expunge from the register of plot section 1738 of section VI Mainland North any entry made in favour of the 1st Defendant as sole owner and to cancel any parallel register. The 1st Defendant is however entitled to be registered as the owner of 1/6th share of the land subject to terms of their refund agreement being concluded as between

the 1st Defendant and Rukiya binti Soud

f) Costs of the suit awarded to the Plaintiffs.

Dated and signed at BUSIA this 22nd day of October, 2019.

A. OMOLLO

JUDGE

Delivered at MOMBASA this 28th Day of October, 2019

C. YANO

JUDGE