



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 26 OF 2015**

**1. CHARO MANYULE MANGI**

**2. BAYA YAA MANGI.....PLAINTIFFS**

**VERSUS**

**1. TROPICAL TREASURE LIMITED**

**2. P.M. OMWENGA**

**3. THE LAND REGISTRAR MOMBASA.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By a Complaint dated 12<sup>th</sup> February 2015 and filed herein on 23<sup>rd</sup> February 2015, the two Plaintiffs Charo Munyule Mangi and Baya Yaa Mangi suing as Administrators of the Estate of the late Manyule Mangi Yaa, pray for:-

*a) A permanent injunction restraining the Defendants by themselves, their servants, employees and/or agents from dispossessing the Plaintiffs of the suit property, entering into, occupying, evicting the Plaintiffs agents, employees and/or servants, constructing, fencing, selling, disposing any interest of and/or undertaking any development or in any other way interfering with the property known as LR No. 28534 Kilifi CR No. 53828;*

*b) A declaration that the purported transfer of all that property known as LR No. 28534/Kilifi(to) the 1<sup>st</sup> Defendant is illegal, null and void and does not confer any proprietary interest upon the 1<sup>st</sup> Defendant and/or any other person;*

*c) A declaration that the purported transfer of all that parcel known as LR No. 28534/Kilifi executed by the 2<sup>nd</sup> Defendant is fraudulent, null and void;*

*d) An order directing the 3<sup>rd</sup> Defendant to rectify its register and to nullify the 1<sup>st</sup> Defendant's registration in respect to all that parcel known as LR No. 28534/Kilifi CR No. 53828; and*

*e) Costs of the suit and interest.*

2. Those prayers are premised on the Plaintiffs' contention that the suit property was prior to the filing of the suit registered in the name of the late Munyule Mangi Yaa. Sometime in the year 2001, the Plaintiffs agreed to sell and the 1<sup>st</sup> Defendant agreed to purchase the suit property measuring approximately 33.6 Ha(83 acres) at a consideration of Kshs 41,500,000/-.

3. In order to facilitate the sale, the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant executed a Sale Agreement dated 10<sup>th</sup> June 2011 before the 2<sup>nd</sup> Defendant Advocate on the understanding that the 2<sup>nd</sup> Defendant would provide assistance to the Plaintiffs family to enable them procure Letters of Administration for the Estate of the Deceased in whose name the property was still registered.

4. The Plaintiffs aver that the 2<sup>nd</sup> Defendant made them to sign a series of documents purporting to be those meant to facilitate the Succession. However in or about November 2011, the Plaintiffs were surprised to learn that they had by signing those documents transferred the property to the 1<sup>st</sup> Defendant.

5. The Plaintiffs further aver that the suit property has now been registered as a result, in the 1<sup>st</sup> Defendant's name yet the 1<sup>st</sup> Defendant has only paid a sum of Kshs 2,020,000/- and not the sum agreed in the Sale Agreement. Efforts to have the 1<sup>st</sup> Defendant to complete the payments have not yielded any fruit and hence this suit.

6. In their Joint Statement of Defence dated 30<sup>th</sup> March 2015 and filed herein on 31<sup>st</sup> March 2015, Tropical Treasure Ltd (the 1<sup>st</sup> Defendant) and PM Omwenga Advocate (the 2<sup>nd</sup> Defendant) both assert that the suit property was lawfully and procedurally purchased by the 1<sup>st</sup> Defendant from the Plaintiffs and all necessary documents were duly executed to that effect. The 1<sup>st</sup> Defendant further avers that there was a successful transfer of the property to its name and that it is now registered as the absolute owner thereof.

7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants further assert that contrary to the Plaintiffs assertions, all the completion documents were specifically explained to the Plaintiffs and all other beneficiaries of the Estate before execution, attestation and subsequent witnessing. They deny the Plaintiffs' allegations of fraud, collusion or illegality and urge that the suit be dismissed with costs.

8. The Land Registrar Mombasa (the 3<sup>rd</sup> Defendant) has equally through the Honourable the Attorney General's Office denied the Plaintiffs' Claim through a Statement of Defence dated 17<sup>th</sup> August 2015 and filed herein on 18<sup>th</sup> August 2015. In particular it is denied that there was any collusion or fraud perpetrated between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on one side and the 3<sup>rd</sup> Defendant on the other.

### **THE PLAINTIFFS' CASE**

9. On 25<sup>th</sup> July 2018 the parties agreed by consent to rely on the Statements, Affidavits and documents that had been filed by the parties as at that date. Accordingly, the 1<sup>st</sup> Plaintiff's Witness Statement dated 12<sup>th</sup> February 2015 and filed herein on 17<sup>th</sup> April 2015 was adopted as the Plaintiffs' evidence together with the List of Documents dated and filed on the same dates.

10. On the said Statement the two Plaintiffs Charo Munyule Mangi and Baya Yaa Mangi jointly assert that before the suit parcel was registered, the entire family agreed and appointed them to represent the family in the transaction. As at that time, the 1<sup>st</sup> Defendant through its Advocates approached them and they tentatively reached a settlement to dispose off the entire parcel of land at Kshs 41,500,000/-.

11. The Plaintiffs state that the said Advocate M/s A.A Said & Company Advocates then undertook to champion on their behalf the full process of ensuring that they obtain Letters of Administration before proceeding to execute any transfer document in relation to the suit property. They however agreed to enter a Sale Agreement dated 10<sup>th</sup> June 2010 before the Letters were obtained.

12. The Plaintiffs aver that they proceeded to obtain Letters of Administration in Mombasa Succession Cause No. 132 of 2010 and that at all times during the process thereof, the 1<sup>st</sup> Defendant's Advocates prepared documents and caused them to be sent to the family at their home in Mariakani for execution. In that process, the 1<sup>st</sup> Defendant also sent to them transfer document and requested copies of their identity cards purporting the same to be for the purpose of fast-tracking the process of obtaining the Letters of Administration.

13. The Plaintiffs further aver that the 1<sup>st</sup> Defendant has since only paid to them a sum of Kshs 2,020,000/-. They however exonerate the 2<sup>nd</sup> Defendant and deny that they have ever met P.M Omwenga Advocate for any purpose in relation to the transaction.

### **THE DEFENDANTS' CASE**

14. In accordance with the consent recorded by the parties on 25<sup>th</sup> July 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants agreed to adopt and rely on the Replying Affidavit of Abdulsamad Abeid Said, a Director of the 1<sup>st</sup> Defendant sworn on 18<sup>th</sup> March 2015 and filed herein on 23<sup>rd</sup> April 2015 in response to the Plaintiffs Notice of Motion dated 12<sup>th</sup> February 2015 which sought orders of injunction.

15. In the said Replying Affidavit, the 1<sup>st</sup> Defendant avers that it lawfully and procedurally purchased the suit property from the Plaintiffs after they executed all necessary documents. The 1<sup>st</sup> Defendant asserts that it is now the registered owner of the suit property and denies that they were so registered as a result of any fraud, collusion, coercion, misrepresentation or illegality on their part.

16. The 1<sup>st</sup> Defendant further asserts that their Advocates conducted all the requisite due diligence prior to the purchase of the property and that they prepared and facilitated all necessary documents and transactions including the receipt of a total of Kshs 2,020,000/- from themselves for onward transmission to the Plaintiffs.

17. The 3<sup>rd</sup> Defendant did not call any evidence.

### **ANALYSIS AND DETERMINATION**

18. I have perused and considered the pleadings filed herein, the statements and evidence relied upon by all the parties as well as the submissions and authorities filed herein by the Learned Counsels for the parties.

19. The two Plaintiffs are the Administrators of the Estate of Munyule Mangi Yaa. Before he passed away on 6<sup>th</sup> August 2004, the late Munyule Mangi Yaa was the registered proprietor of the suit property, at that time, an unsurveyed parcel of land situated at Mitangoni Area of Mariakani and measuring 33.6 Ha or thereabouts.

20. Some six years after Manyule's death, his family decided to dispose off the said property by way of sale to the 1<sup>st</sup> Defendant herein. To spearhead the transaction the large family appointed the two Plaintiffs herein to represent them and to carry out all transactions that were required.

21. As a result on or about 10<sup>th</sup> June 2010, the two Plaintiffs executed a Sale Agreement with the 1<sup>st</sup> Defendant wherein they agreed to sell the suit property to the 1<sup>st</sup> Defendant at a consideration of Kshs 41,500,000/-.

22. It is now the Plaintiffs case that contrary to the said Agreement and despite the fact that the 1<sup>st</sup> Defendant only paid a sum of Kshs 2,020,000/-, the 1<sup>st</sup> Defendant has since caused itself to be registered as the proprietor of the suit property and has refused and/or neglected to pay the balance of the purchase price.

23. The Plaintiffs further assert that such registration was procured fraudulently after the 1<sup>st</sup> Defendant's Advocates misled the Plaintiffs' family members into executing transfer documents for the property on the pretext that execution thereof would help expedite the process of obtaining Letters of Administration and hence the sale transaction.

24. The 1<sup>st</sup> Defendant does not deny that the suit property is now registered in its name. It however denies any evidence of wrong-doing and asserts that it duly acquired the suit property after the Plaintiffs and the other beneficiaries of the Estate of Manyule Mangi Yaa executed the necessary documents to facilitate the same.

25. I have perused and considered the evidence placed before me. Clauses 1 and 2 of the terms of the Agreement of Sale dated 10<sup>th</sup> June 2010 provided as follows:-

***“1. The Vendor hereby agrees to sell and the Purchaser hereby agrees to purchase the said property at the price of Kshs 41,500,000/- which sum shall be paid to the Vendor in full and without any deductions (subject to advances if any paid out prior to completion as per the terms of this Agreement) on a acquisition of the Certificate of Title to the property from the Commissioner of Lands and the Transfer of the property in favour of the Purchaser and or nominee respectively.***

***2. The possession of the said property will be given to the Purchaser immediately upon payment of the purchase price amount hereinbefore described to the Vendor.***

26. Granted that the Sale Agreement was drafted by the Purchaser's Advocates, a clear reading of those provisions would reveal that the full purchase price was to be paid upon acquisition of the Certificate of Title at which point in time the Purchaser was to be put in possession.

27. I did not therefore agree with the Plaintiffs contention that they never agreed to transfer the suit property to the 1<sup>st</sup> Defendant before the completion of the payment of the agreed purchase price. While there is every possibility that the Plaintiffs did not understand fully the consequences of those two Clauses that is exactly what they committed to when they executed the Agreement.

28. As it were, and despite being represented by their Advocates during the transaction, the 1<sup>st</sup> Defendant appears to me to have been suffering from the same misapprehension of the terms of the Agreement of Sale. According to the 1<sup>st</sup> Defendant the acquisition of the said title document was a demonstration that it was a bona fide purchaser, in good faith, for value.

29. Unfortunately for the 1<sup>st</sup> Defendant, I was unable to see the value they were referring to. My reading of Clauses 1 and 2 of the Agreement did not give me the impression that the mere fact that title had issued in the 1<sup>st</sup> Defendant's name, it automatically meant that the 1<sup>st</sup> Defendant had paid the purchase price and was therefore entitled to possession of the land.

30. I have read and re-read the Replying Affidavit. There is no single paragraph in which the 1<sup>st</sup> Defendant depones to have paid the sum of Kshs 41,500,000/- which was the agreed Purchase Price. At Paragraph 9 of the Replying Affidavit all that the 1<sup>st</sup> Defendant states is that it paid the sum of Kshs 2,020,000/- through its Advocates to the Plaintiff “as part payment towards the agreed purchase price of the suit property herein.” There is no indication in the 21-paragraph-Affidavit when the balance of the purchase price was paid.

31. That part payment is what the Plaintiffs acknowledged to have been paid to them and nothing would have been easier if the balance had been paid for the 1<sup>st</sup> Defendant to state so and demonstrate the fact of that payment. I did not think that in a situation like this where the Plaintiffs accuse the 1<sup>st</sup> Defendant of failing to make the agreed payment that it would suffice for the 1<sup>st</sup> Defendant to make the generalized statements of the nature it has made in the Replying Affidavit to demonstrate that it had made the payments.

32. At paragraph 13 of the Replying Affidavit, the 1<sup>st</sup> Defendant denies receiving any demand for payment or completion from the Plaintiffs before this suit was filed. Yet at paragraph 14 thereof, it confirms that it is indeed in actual possession of the suit property. As we have seen, Clause 2 of the Agreement only allowed it to take possession upon payment of the Purchase Price.

33. While the Transfer of the suit Property was done on 11<sup>th</sup> November 2011, at pages 163 to 166 of the annexures to the Replying Affidavit are Letters from the 1<sup>st</sup> Defendants Advocates dated 26<sup>th</sup> November 2013 and 12<sup>th</sup> March 2014 acknowledging that the balance of the purchase price was yet to be paid on the basis that the 1<sup>st</sup> Defendant was trying to get the National Land Commission to remove some squatters who had invaded the land before they could release the balance.

34. One curious annexure is to be found at page 144 of the Replying Affidavit. In the said Annexure is a document headed “Statement of

Account.” It goes ahead to list the services rendered to the Plaintiffs by the 1<sup>st</sup> Defendant’s Advocates in the sum of Kshs 4,709,500/-. That Advocate is none other than Mr. Abdulswamad Abeid Said, the deponent of the Replying Affidavit. A perusal of the Instrument of Transfer listed at pages 124 to 131 of the Affidavit reveals that the said Abdulswamad Abeid Said and one Esha Abdalla Ibrahim are the very Directors of the 1<sup>st</sup> Defendant herein.

35. That the 1<sup>st</sup> Defendant’s Director is the same Advocate who drafted the Sale Agreement that the parties relied on tells a great deal about the lopsided nature of the Sale Agreement. It is not then surprising that the Agreement required the Plaintiffs to transfer their property before payment was made. Nor is it surprising that the Advocate would sit in his office and charge whatever amount he deemed appropriate to justify the fact the Purchase Price had been paid.

36. In the circumstances of this case, I am persuaded that the Plaintiffs case not only had merit but that the same has been proved on a balance of probabilities against the 1<sup>st</sup> Defendant.

37. However even though in their pleadings the Plaintiffs had alleged that the 2<sup>nd</sup> Defendant had colluded with the others in the said transactions, they did state in their Statement in Court that they had no issue with him.

38. And given that the Plaintiffs executed the documents leading to the transfer, I did not find any basis to sustain the suit against the 3<sup>rd</sup> Defendant.

39. In the circumstances, the Plaintiff’s suit is hereby allowed as against the 1<sup>st</sup> Defendant with costs.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of October, 2019.**

**J.O. OLOLA**

**JUDGE**