



REPUBLIC OF KENYA

KENYA LAW
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO.1042 OF 2013

JAMES OSOGO.....1ST PLAINTIFF

GIDEON CHRIS MAINA.....2ND PLAINTIFF

(suing as the registered trustee of Kenya Youth Hostels Association)

MUSA MUKANGWA.....3RD PLAINTIFF

FRANCIS MUTHINI.....4TH PLAINTIFF

GIDEON CHRIS MAINA.....5TH PLAINTIFF

(Suing as the Chairman, Secretary and Treasurer respectively of Kenya Youth Hostels Association)

=VERSUS=

MUTAVI ITUNDUA MASEKI.....1ST DEFENDANT

LIVINGSTONE SIMEL SANE.....2ND DEFENDANT

TIMOTHY VITALIS OKWORO.....3RD DEFENDANT

SUPERIORFONE COMMUNICATIONS LIMITED.....4TH DEFENDANT

REGISTRAR OF DOCUMENTS.....5TH DEFENDANT

TIMOTHY ISAAC BRYANT.....6TH DEFENDANT

GITONGA GERRY GRAHAM.....7TH DEFENDANT

(6th and 7th defendants both practicing law in the firm name and style of Bryant & Associates)

JUDGEMENT

1. The plaintiffs have brought this suit as trustees of Kenya Youth Hostels Association. They have sued the defendants jointly and severally for:-

A. As against the 4th defendant only:-

- i. Immediate cancellation by the Chief Lands Registrar of the conveyance dated 4th January 2013 registered vide Day Book NO. 410 as Folio No. 78/17 in Volume N104 File No. 9644 at 1500 hrs of 6th February 2013 against the title to Land Reference No.209/965/2 Nairobi and the restoration of Kenya Youth Hostels Association (KYHA) as the owners thereof by registering the names of 1st and 2nd plaintiffs as the owners by virtue of being the Trustees of Kenya Youth Hostels Association (KYHA).

ii. An order for eviction be issued to remove the 4th defendant and their agents, servants, assigns, representatives, successors-in-title or any person claiming under or through them from the premises known as Land Reference No.209/965/2 Nairobi (adjacent to the old Kenya School of Law) with immediate effect.

iii. An order for permanent injunction restraining the 4th defendant by itself, its servants, its assigns, its representatives, its successor-in-title or any person claiming under or through it or them from offering for sale, selling, transferring, leasing or alienating or demolishing or constructing or in any way altering the character on any building or otherwise dealing in any manner whatsoever with the property known as Land Reference No. 209/965/2 Nairobi (adjacent to the old Kenya School of Law) or removing therefrom any goods, fixtures or fittings that belongs to Kenya Youth Hostels Association (KYHA).

iv. That the officer commanding Kilimani Police Division (OCPD), Kilimani be directed to ensure compliance of prayers ii and iii) above.

B. As against the 1st, 2nd, and 3rd defendants, jointly and severally

i. An order for permanent injunction be issued against the 1st, 2nd and 3rd defendants restraining them from acting as or representing themselves as trustees of Kenya Youth Hostels Association (KYHA) or any of its associates or executing any documents or correspondence or affidavits on behalf of Kenya Youth Hostels Association (KYHA) or any of its associates or initiating and/or continuing any legal proceedings on behalf of Kenya Youth Hostels Association (KYHA) or any of its associates or attending any meetings whatsoever on behalf of Kenya Youth Hostels Association (KYHA) or any of its associates.

ii. A further order be issued directing the 1st, 2nd and 3rd defendants to release or submit to the plaintiffs all documents, seals, books of accounts, title documents or any other documents, assets or thing that may be in their possession that belongs to Kenya Youth Hostels Association (KYHA).

iii. A further order be made directing the 1st, 2nd and 3rd defendants to pay within 10 days of the making of this order to Kenya Youth Hostels Association (KYHA) all the monies that belong to Kenya Youth Hostel Association (KYHA) that the said defendants may have received on behalf of Kenya Youth Hostels Association (KYHA) or any monies that they may have expended or directed to be expended to or by third parties without the authority, knowledge or consent of Kenya Youth Hostels Association (KYHA).

iv. In the event that the 1st, 2nd and 3rd defendants fail to pay such monies as may be ordered under prayer b (iii) hereinabove, their assets, both movable and immovable to attached by an order of judicial sequestration and the same be sold to recover any monies that may be found to be due and payable to KYHA by the said defendants.

C. As against the 6th and 7th Defendants only:

i. An order for immediate deposit into court of any monies received by the 6th and 7th defendants allegedly for an on behalf of the plaintiffs herein.

ii. Payment of damages to Kenya Youth Hostels Association (KYHA) by way of compensation for any loss occasioned upon them in respect to their property known as Land Reference No.209/965/2 Nairobi (adjacent to the old Kenya School of Law).

D. As against all the defendants jointly and severally:

i. Compensation for loss of the property known as Land Reference No. 209/965/2 Nairobi (adjacent to the old Kenya School of Law), which loss includes but is not limited to loss of value of the said property as at the date of filing this suit; loss of income therefrom and interest thereon at court rates.

ii. Costs of this suit.

E. Any other or further order that this honourable court may deem just and expedient to grant in order to meet the ends of justice.

2. Upon being served with summons to enter appearance and copies of plaint the 1st -3rd, 6th, 7th defendants entered appearance through the firm of M/S Kimani Muhoro & advocates in 19th September 2013. The 4th defendant also entered appearance through the firm of M/S Nyairo & Company Advocates on 17th September 2013. All the defendants neglected and/or failed to file their respective defences within the stipulated period. Interlocutory judgment was entered and the matter fixed for formal proof.

3. PW1, Gedion Chris Maina, adopted his witness statement dated 27th July 2017 in its entirety. He told the court that he is the National Treasurer of the Kenya Youth Hostels Association. He said he is also a member of the Board of Trustees. He told the court that on 14th July 1976, the Kenya Youth Hostels Association purchased parcel No. LR No. 209/965/2 situated along Ralph Bunche Road from one Anna Rosa Lo Guidance and Osman Ali Murgian. That during a special general meeting held on 20th July 2013, the members of Kenya Youth Hostels Association were shocked to learn that the suit property had been sold by the 1st and 2nd defendants, purporting to be the trustees of

the Kenya Youth Hostels Association at Kshs.125,000,000/-. The said amount was never deposited in the Kenya Youth Hostels Association's bank account. On the same day, an election was carried out to elect new office bearers. PW1 was reelected to be a trustee together with James Osogo.

4. He further told the court that the 1st and 2nd defendants had no authority to transfer or to execute the transfer on behalf of Kenya Youth Hostels Association. The 4th defendant ought to have exercised due diligence to ascertain the true and legal trustees of Kenya Youth Hostels Association. In paragraph 4 and 5 of his witness statement he gave the evidence of fraud on the part of the 1st, 2nd, and 3rd defendants who on 6th August 2007 illegally and fraudulently registered themselves as the trustees of Kenya Youth Hostels Association in place of the genuine trustees. Thereafter the 1st – 3rd defendants fraudulently sold and transferred the suit property to the 4th defendant and no consideration was received by Kenya Youth Hostels Association.

5. He further told the court that the 1-3rd defendants presented themselves to the 5th defendant for registration as trustees of Kenya Youth Hostels Association, knowing very well that they had not been appointed as trustees of Kenya Youth Hostels Association. The sum of Kshs.125,000,000 has never been deposited on the Kenya Youth Hostels Association bank accounts. The 5th defendant failed to verify that indeed the members had passed a resolution at an Annual General Meeting appointing the 1st – 3rd defendants as trustees in place of genuine trustees. It is further his case that the 6th and 7th defendant failed to confirm whether indeed the 1st – 3rd defendants were authorized by the constitution of Kenya Youth Hostels Association to appoint advocates and give directions concerning monies received for and on behalf of Kenya Youth Hostels Association. The transfer of the suit property by the 1st – 3rd defendants to the 4th defendant by way of conveyance dated 4th January 2013 is irregular and unlawful. It is incapable of transferring, Kenya Youth Hostels Association's interest in the suit property to the 4th defendant. The transfer ought to be cancelled. PW1 also relied on the witness statement of James Osogo dated 27th July 2017. The said witness statement also confirms what PW1 told the court.

6. In support of the plaintiff's case he also relied on the documents in the list of documents. The said documents were produced as exhibits in this case. He prays that the judgment be entered in favour of the plaintiffs as prayed in the plaint.

7. The matter proceeded ex parte. The plaintiffs' case has not been controverted. The plaintiffs have also put in written submissions which I have considered together with the pleadings and the evidence on record.

8. The notice of a special general meeting was served on all members vide a letter dated 25th June 2013 which is part of the exhibits produced. During the meeting the members were given a chronology of events that led to the selling of the suit property. In the case of **Arthi Highway Developers Ltd vs West End Butchery Limited & Others**, the Court of Appeal expressly stated that the law on fraud and indefeasibility of title has been settled. The court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok vs Justice Moijo Ole Keiwua & 5 Others Civil Appeal No. Nairobi 60 of 1997** where the Court of Appeal categorically stated that:-

“Section 23(1) of the then Registration of Title Act (now reproduced substantially as section 25 and 26 of the Land Registration Act set out below gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title in fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property would be placed on jeopardy”.

From the evidence on record it is clear that there was fraud and misrepresentation.

9. In the case of **Samuel Kamere vs Land Registrar Kajiado Civil Appeal No. 25 of 2015**. The Court of Appeal held that:-

“....in order to be considered a bona fide purchaser for value, they must prove that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly, that they paid valuable consideration for the purchase of the suit property.....”.

The 4th defendant in my view did not exercise due diligence before purchasing the suit property. If it had done due diligence, it would have discovered that it was not dealing with the genuine trustees of Kenya Youth Hostels Association. The 1st – 3rd defendants lacked capacity to confer the interest of Kenya Youth Hostels Association in this suit property to the 4th defendant.

I am satisfied that the particulars of fraud as pleaded by the plaintiffs have been proved on a balance of probabilities. No consideration was received by Kenya Youth Hostels Association out of the said sale.

10. In conclusion, I find that the plaintiffs have proved their case as against the defendants on a balance of probabilities. I hereby enter judgment in favour of the plaintiffs as follows:-

(a) As against the 4th defendant

i. The Chief Lands Registrar is hereby ordered to cancel the conveyance dated 4th January 2013 against the title to Land Reference No.209/965/2 Nairobi and the Kenya Youth Hostels Association (KYHA) be restored as the title owners thereof by registration of the names of 1st and 2nd plaintiffs by virtue of being the Trustees of Kenya Youth Hostels Association (KYHA).

ii. An order for eviction be and is hereby issued against the 4th defendant and their agents, servants, assigns, representatives, successors-in-title or any person claiming under or through them from the premises known as Land Reference No.209/965/2 Nairobi (adjacent to the old Kenya School of Law) within sixty (60) days from the date of this judgment.

iii. An order of permanent injunction be and is hereby issued restraining the 4th defendant by itself, its servants, its assigns, its representatives, its successor-in-title or any person claiming under or through it or them from offering for sale, selling, transferring, leasing or alienating or demolishing or constructing or in any way altering the character on any building or otherwise dealing in any manner whatsoever with the property known as Land Reference No. 209/965/2 Nairobi (adjacent to the old Kenya School of Law) or removing therefrom any goods, fixtures or fittings that belongs to Kenya Youth Hostels Association (KYHA).

iv. That the officer commanding Kilimani Police Division (OCPD), Kilimani ensure compliance of prayers (i and iii) above.

(b) As against the 1st – 3rd defendants jointly and severally

i. An order for permanent injunction be issued against the 1st, 2nd and 3rd defendants restraining them from acting as or representing themselves as trustees of Kenya Youth Hostels Association (KYHA) or its association or executing any documents or any of its associates or initiating and/or continuing any legal proceedings on behalf of Kenya Youth Hostels Association (KYHA) or any of its associates or attending any meeting whatsoever on behalf of Kenya Youth Hostels Association (KYHA) or any of its associates.

ii. A further order be issued directing the 1st, 2nd and 3rd defendants to release or submit to the plaintiffs all documents, seals, books of accounts, title documents or any other document, asset or thing that may be in their possession that belongs to Kenya Youth Hostels Association (KYHA).

(c) As against the 6th and 7th defendants.

i. An order for immediate deposit into court of any monies received by the 6th and 7th defendants allegedly for and on behalf of the 1st plaintiff and that of the other plaintiffs.

ii. Payment of damages to KYHA by way of compensation for any loss occasioned upon them in respect to their property known as Land Reference No. 209/965/2 Nairobi (adjacent to the old Kenya School of Law).

D. As against all the defendants jointly and severally

i. Compensation for loss of the property known as Land Reference No. 209/965/2 Nairobi. (Adjacent to the old Kenya School of Law), which includes but not limited to loss of value of the said property as at the date of filing this suit; loss of income therefrom and interest thereon at court rates.

ii. Costs of the suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 24th day of October 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mbaabu with Ms Gasansure for the Plaintiffs

Mr. Mbaji for Mr. Ngare for the Interested Party

No appearance for the Defendant

Kajuju - Court Assistant