



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 249 OF 2013

KATANA KAHINDI FONDO

(Suing as the legal representative of the estate of KAHINDI FONDO (DECEASED)).....PLAINTIFF

VERSUS

1. LITTLE COTTAGE ESTATED CO. LIMITED

2. REGISTRAR OF TITLES -MOMBASA

3. HON. ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

1. Kahindi Gona Fondo, the Original plaintiff instituted this suit by way of Plaint dated 7th November, 2013. The said Katana Gona Fondo (now deceased) died on 10th January 2014 and the Plaint was amended on 28th September 2015 To substitute the current Plaintiff, Katana Kahindi Fondo as the Legal representative of the Estate of the deceased having obtained grant of letters of administration ad litem in respect of the estate of the deceased in Mombasa HC P & A Cause 79 of 2014.

The Plaintiff is seeking for judgment against the defendants jointly and severally as follows:

- a) A permanent injunction do issue against the 1st and 2nd defendants, their agents and/or servants, successors in title or assigns, restraining them from transacting disposing of or dealing with the suit property in any manner, pending hearing and determination of this suit.**
- b) A declaration that entry No. 2 of the register, the purported transfer to the 1st Defendant is illegal and void in the absence of the authentic original copies of the foresaid documents oR lawful written reason for making the said entries without the foresaid requisite documents**
- c) An order directed against the 2nd defendant for cancellation of the purported transfer in favour of the 1st Defendant and reinstatement of the plaintiff as the registered owner of parcel of land known as PLOT NO.MN/II/3633.**
- d) Costs and incidentals thereto of this suit.**

2. The Plaintiff's case is that he is the registered owner and is and has always been in possession of PLOT NO.MN/II/3633. That on or about October 2013, the Plaintiff conducted a postal search at the Mombasa Lands Registry and the said search revealed that the 2nd Defendant had on 4/4/1995 fraudulently and illegally registered a transfer in favour of the 1st defendant without the following documents as required by law: Transfer signed by the Plaintiff; receipts for land rates and rates clearance certificate issued by Municipal Council of Mombasa to Kahindi Gona Fondo for the period ending 31/12/1994 and prior to 4/4/1995; valuation of the suit property for stamp duty used in the purported transfer from Kahindi Gona Fondo to the 1st defendant and date stamped as received by the 2nd defendant prior to 4/4/1995; personal Identification Number Card (PIN Card) of Kahindi Gona Fondo and the 1st Defendant's Directors used in the purported transfer and date stamped as received by 2nd defendant prior to 4/4/1995; passport size photographs of Kahindi Gona Fondo and the 1st Defendant's Directors duly affixed to the purported transfer of land; receipts for payment of stamp duty for the purported transfer from Kahindi Gona Fondo to the 1st Defendant and date stamped as received by the 2nd Defendant prior to 4/4/1995; application by the 1st Defendant for Certificate of official search and dated prior to 4/4/1995; and the Certificate of Official search if any issued to the 1st defendant prior to 4/4/1995. The plaintiff avers that he is in possession of the suit property but due to the fraudulent acts of the 2nd defendant, he cannot dispose of or deal with the suit property as he desires in exercise of his right as the rightful owner. The plaintiff further stated that there is a suit pending in this Honourable Court touching on the same subject matter, HCCC 175 of 2013, **Ali Abdallah Mwachia –v- Kahindi Gona Fondo & Another.**

3. The 1st defendant was duly served with summons to enter appearance but did not enter appearance or file defence and upon request made by the plaintiff, interlocutory judgment was entered against the 1st defendant on 7th July 2017.
4. The 2nd and 3rd defendant filed a joint statement of defence dated 17th March 2016 in which they denied all the allegations in the plaint. They stated that the claim is ambiguous, frivolous and vexatious as the suit property lacks definition and/or description. In addition, the 2nd and 3rd defendants stated that they would raise a preliminary objection on the grounds that the plaintiff's claim is time barred and that the plaintiff had failed to issue notice of intention to sue to the 2nd and 3rd defendants as required by law. The 2nd and 3rd defendants however, never raised the said objection, either before or during the hearing nor was any evidence led towards the same.
5. The plaintiff testified that the deceased, Kahindi Gona Fondo was his father and that he died on 10th January 2014 and he was substituted as a legal representative of the estate of the deceased. That some people had invaded the suit property prompting the deceased to carry out a search. The certificate of official search showed that the 1st defendant was the registered owner. The plaintiff stated that his father never sold or transferred the suit property to the 1st defendant. The Plaintiff stated that they are still paying the land rates.
6. The plaintiff produced the Death Certificate (p.exh 1) grand ad litem (p.exh 2) Certificate of Ownership for PLOT NO. MN/II/3633 issued on 7/9/1990 in names of Mary Lillian Ojiambo and Kahindi Fondo (p.exh 3), the certificate of postal search dated 30/9/2013 (p.exh 4) property rates statement dated 30.8.2013 (p.exh 5) and companies search (p.exh 6). The plaintiff wants the entry in favour of the 1st defendant to be cancelled as there is nothing to support their registration. The plaintiff stated that he did not know who the 1st defendant is.
7. When cross-examined by Mr. Makuto, learned counsel for the 2nd and 3rd defendants, the plaintiff stated the he did not know one by the name Ali Mohamed Ali and was categorical that his late father did not sell the suit land to anyone, including the said Ali Mohamed Ali. The plaintiff testified that he was born in the suit land in the year 1967 and still lives thereon with his siblings and their families and that they have never been evicted by anyone.
8. Samuel Kariuki Mwangi testified on behalf of the 2nd and 3rd defendants. He testified that he was the senior Land Registrar currently based on Mombasa. He produced the file for TITLE NO. MN/II/3633 as D. exhibit 1 and the certified copy of certificate of ownership as D.exhibit 2. He stated that the title register indicated the 1st defendant as the current registered owner of the property. That there were records of previous Certificate of Searches on 12/11/2008, 30/10/12 and 30/9/13, all which confirmed the registered owner as the 1st defendant. However, DW1 stated that there were no records of the transfer document slotted as Entry No.2 on the register. He confirmed that the first registered owner was Kahindi Gona Fondo who became registered as owner on 29/8/1990. DW1 stated that he found a record of a payment receipt B13187 in the name of Ali Mohamed Ali dated 4.4.1995, though Ali Mohamed Ali was not the person in whose favour the transfer was registered in. He confirmed that the search form confirmed that the search from the companies registry (p.exhibit 6), the directors of Little Cottage Estate Company Limited are Julius Alloys Owino, Robert Noel Owino and Andrew George Owino.
9. The Plaintiff filed his submissions on 26th April 2019 wherein counsel for the Plaintiff submitted that the Plaintiff's claim against the 1st defendant has never been contested. While referring to Section 26 of the Limitation of Actions Act, the Plaintiff's counsel submitted that the plaintiff's claim is not statute barred because the plaintiff stated that he discovered the fraud in October 2013 and filed suit on 8th November 2013. Counsel relied on the case of **Kioko Muthoka –v- Kalemwani & Ngaamba Farmers Co. Ltd (2017) eKLR**, adding that the defendants did not lead any evidence to prove and substantiate their objection on limitation. On the issue of failing to serve the 30 days notice on the 3rd defendant, the Plaintiff's counsel submitted that it is the court which enjoined the 3rd defendant in the suit, adding that the case was against the 1st defendant who never entered appearance nor filed defence. They relied on the case of **Kenya Bus Services Limited & Another –v- Minister of Transport & 2 Others (2012)eKLR** where the court found that requiring a party who was aggrieved to comply with requirements as to notice was an impediment to the citizens right to access to justice and that such a requirement must give way to the constitutional requirement that such a party access justice unimpeded. The plaintiff submitted that the objections raised by the 2nd and 3rd defendants in their defence was never raised in the proceedings and no evidence was let to prove them, adding that the same are just but technicalities which ought not be used to defeat the substantive cause of justice.
10. On whether the 1st defendant's title to the suit property was fraudulently obtained, the plaintiff's counsel submitted that until 4th April 1995, the deceased was the registered owner of the suit property and that on a date unknown to the plaintiff, an entry shown as No.2 purporting to be dated 4/4/1995 was entered in the land register purporting to transfer ownership of the suit property from the plaintiff to the 1st defendant. The plaintiff submitted that he did not enter into any agreement of sale with the 1st defendant, did not apply for land control board consent, did not attend to a lawyer's office to sign an agreement or to give instructions on preparation of a sale agreement or transfer of land and never received any monies in form of purchase price or otherwise from the 1st defendant. Further, that the Plaintiff never provided his documents to wit, identification card, PIN and photographs to the defendants. It is therefore the Plaintiff's contention that the purported transfer was done without his knowledge or consent and without the foresaid documents which are mandatory and required by law to effect a valid transfer of land. That in the absence of the stated requisite documents, it confirms that the entry No.2 was unlawfully entered vide an act of fraud with an intention to dispossess the plaintiff of his land. The plaintiff urged the court to find that the 1st defendant's actions were fraudulent and therefore did not obtain a good title. The plaintiff urged the court to exercise the powers given under Section 80 of the Land Registration Act and cancel the title issued to the 1st defendant and direct the 2nd defendant to rectify the register thereof by registration of the plaintiff as the owner of the suit property.
11. The 2nd and 3rd Defendants never filed their submission within the time granted or at all.
12. The court has considered the evidence on record, the submissions filed and the relevant laws and make the following findings. The plaintiff is seeking the cancellation of the registration of the 1st defendant as owner of TITLE NO.MN/II/3633 and to have the plaintiff registered as the owner thereof. It is evident that the 1st defendant herein was served with the summons to enter appearance. The 1st defendant, however, failed to enter appearance. The suit against the 1st defendant is therefore undefended. However, even if the suit against

the 1st defendant is not defended, the plaintiff still had the duty to formally prove his case on the balance of probabilities as required by law.

13. The certificate of ownership which was produced by the plaintiff as p.exhibit 3 shows that the deceased was the registered owner of the suit property as at 29th August 1995 jointly with one Mary Lillian Ojiambo and were issued with the said title on 7th September 1990. Entry No. 2 in the same title indicates that the property was transferred to Little Cottage Estates Company Limited the 1st defendant, on 4th April, 1995 vide a transfer dated 3rd April 1995. The Plaintiff's evidence is that he never sold nor signed the transfer in favour of the 1st defendant. It is the Plaintiff's case that the entry in the register made on 4/4/1995 by the 2nd defendant in the 1st defendant's name is fraudulent as the plaintiff never sold or transferred the property to the 1st defendant. Further, that the purported transfer in favour of the 1st defendant was done without the consent or knowledge of the plaintiff and was not supported by the requisite documents required for effecting valid transfer or land.

14. DW1, the Land Registrar and the custodian of the documents at the Land Registry confirmed that the Deed file did not have the said documents such as valuation report, rates clearance certificate, stamp duty payment receipt and the transfer form signed by the Plaintiff in favour of the 1st Defendant to support the transfer that was done on 4/4/1995. Further, DW1 confirmed that the receipt on the file is for a different person, one Ali Mohamed Ali who as a matter of fact, is not the Plaintiff nor the 1st defendant. In addition the said Ali Mohamed Ali is not one of the Directors of the 1st defendant company as confirmed by P.exbit 6. No doubt, the evidence of DW1, the Senior Land Registrar in charge of the records at the Land Office and the custodian of the documents at the Lands registry seem to support the evidence by the plaintiff. There was clearly no evidence adduced to explain how the 1st defendant came into ownership of the suit property.

15. Chronologically, the evidence presented in my considered view showed that the earliest to be in existence and to have acquired was the title to the plaintiff. The material on record indicates that the Plaintiff was duly registered as the owner of the suit property on 7th September, 1990 while the transfer to the 1st defendant was on 4th April, 1995. As already stated, there was no evidence adduced in support of the alleged transfer in favour of the 1st defendant. In this case, the plaintiff alleges that the 1st defendant fraudulently acquired title to the suit property with the complicity and unlawful assistance of the 2nd and 3rd defendants. However, DW1 gave evidence confirming that there were no documents in the file at the lands registry in support of the 1st defendant's title. In my view, whereas fraud against the 1st defendant has been proved as the Plaintiff's evidence was not challenged and remains uncontroverted, there was no evidence to prove the alleged fraud on the part of the 2nd and 3rd defendants.

16. In the case of **Munyu Maina –v- Hiram Gathiha Maina (2013) eKLR**, the Court of Appeal expressed itself thus:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of the title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interest which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony”

17. The plaintiff has demonstrated the manner in which he acquired his title. The 1st defendant had the evidential burden to prove how it acquired the suit property in order to dislodge the evidence of the plaintiff and in particular the testimony of the plaintiff that he never sold or transferred the suit property to the 1st defendant and that the transfer in favour of the 1st defendant was fraudulent. Whereas the title of the suit property is now in the name of the 1st defendant and has been so from 4th April, 1995, there was no evidence availed to demonstrate convincingly the manner in which the 1st defendant came to be the title holder of the suit property. There was no evidence whatsoever, that was availed to show that the 1st defendant acquired the suit land from the plaintiff who was the registered owner prior to the purported transfer in favour of the 1st defendant.

18. From material placed before the court, I am satisfied that the Plaintiff has proved his case on a balance of probabilities. The plaintiff has proved that the case falls within the exceptions provided under Section 26(1) of the Land Registration Act and the court should invoke the provisions of Section 80 (1) of the Land Registration Act to correct the anomaly. I am persuaded that the 1st defendant fraudulently obtained title to the suit property. As I have stated above, the 1st defendant did not defend the suit. The court has powers under Section 80 of the Land Registration Act to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. The Plaintiff having proved his case on a balance of probabilities is entitled to the prayers sought in the plaint.

19. Consequently, I hereby enter judgment for the Plaintiff against the defendants in the following terms:

a) A declaration be and is hereby made that the entry No.2 of the register of TITLE NO.MN/II/3633 being the purported transfer in favour of the Little Cottage Estates Company Limited, the 1st defendant herein is illegal, fraudulent, null and void.

b) The 2nd defendant to cancel the registration of Little Cottage Estates Company Limited as the owner of TITLE NO. MN/II/3633 CR. 20520

c) The 2nd defendant to register the plaintiff as the owner of and issue a certificate of title to the plaintiff of TITLE NO. MN/II/3633 CR 20520

d) As the 1st defendant did not defend the suit, I order that each party to bear own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of November, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Bosire for plaintiff

Ms. Kiti holding brief for Mkok for 2nd and 3rd defendants

No appearance for 1st defendant.

Yumna Court Assistant

C.K. YANO

JUDGE