



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 218 OF 2004

ATHUMAN JUMA MWAKUANDIKA.....PLAINTIFF

VERSUS

1. MARTHA WANGUI MURIITHI

2. ELIJAH WAICHANGURU MURIITHI.....DEFENDANTS

JUDGMENT

1. By a plaint dated 30th September 2004 and filed on even date, the Plaintiff instituted this suit against the 1st and 2nd Defendants seeking the following orders:

a. Declaration that the PLOT TITLE NUMBER KWALE/GALU KINONDO/51 belongs to the Plaintiff

b. An order cancelling and revoking the title deed issued to the Defendants herein in PLOT NUMBER KWALE/GALU KINONDO/51

c. The Lands Registrar Kwale to be compelled to issue a title document of PLOT NO.KWALE/GALU KINONDO/51 to the Plaintiff herein.

d. Costs and interest of this suit to be provided for.

2. The Plaintiff's case as pleaded is that the Plaintiff and his family lived on the suit land since time immemorial. That the land was declared an adjudication Section in 1970's and his late father's name was entered in the adjudication register and allocated plot number 51. The Plaintiff pleaded that sometime in 1995 he went to inquire about the Title deed at the Kwale Lands Registry but was shocked to discover that the land had been registered in the 1st and 2nd Defendants names. The Plaintiff averred that the information in the adjudication records were falsified by the Defendants in collusion with the Land Adjudication Officer, one Mr. Mwangi. The Plaintiff contended that the registration of the 1st and 2nd Defendants as proprietors of the suit property was wrongful, fraudulent and illegal. The 2nd Defendant is now deceased.

3. Vide a consent filed on 6th October 2004, the Plaintiff's suit was allowed in its entirety. This effectively cancelled and revoked the title in favour of the 1st and 2nd Defendants and a new title was issued pursuant thereto in the name of the Plaintiff who then sold the suit property to the 3rd and 4th Defendants. The 1st and 2nd Defendants however successfully moved the court and had the said consent order set aside and the court ordered the parties to maintain status quo.

4. The Defendants (hereinafter referred to as 1st and 2nd Defendants) filed their joint statement of defence dated 11th May 2007 which was later amended on 30th November 2007 introducing a counter-claim seeking following orders against the Plaintiff and Jimmy Muinde, Mark Muinde and Yvonne Muinde (hereinafter referred to as 3rd, 4th and 5th Defendants respectively):

i. That the registration of the Plaintiff as owner of suit property on 26th October, 2004 be set aside and subsequently entry numbers 6, 7, 8, 9, 10, 11, 12 and 16 of the register of the TITLE NUMBER KWALE/GALU KINONDO/51 be set aside

ii. An order be made that the names of Yvonne Muinde and Mark Muinde be cancelled from the register reflecting them as owners of PROPERTY KNOWN AS KWALE/GALU KINONDO/51, and further that the certificate of title issued to them dated 12th October, 2005 similarly be cancelled.

iii. The names of the Defendants in the main suit be inserted in the said register as the true proprietors and/or owners of property known as KWALE/GALU KINONDO/51 and a certificate of title in their names be issued to that effect.

iv. The subdivision numbers KWALE/GALU KINONDO/1605 and 1606 be canceled and the property revert back to its original position as plot number KWALE/GALU KINONDO/51.

v. Costs of the suit and counter-claim

vi. A permanent injunction be issued restraining Jimmy Muinde, Mark Muinde and Yvonne Muinde by themselves, their servants and/or servants from in any whatsoever and howsoever transferring, leasing, charging, disposing off, subdividing or in any way whatsoever and howsoever dealing with the land comprised in and the titles known as KWALE/GALU KINONDO/1605 and 1606 respectively.

5. The 1st and 2nd Defendants denied the Plaintiff's claim in its entirety. The 1st and 2nd Defendants averred that the suit property was purchased by Ismael Elijah Muriithi (now deceased) from one Bakari Mohamed Mwatete vide an agreement of sale dated 27th October, 1973 and that they are the duly registered owners of the suit property by reason of being the personal representatives of the deceased. It is contended that the change of particulars in the register and consequent issuance of title to the 4th and 5th Defendants was done illegally and unlawfully. That the Plaintiff fraudulently caused to be filed a consent in court whereby the 1st and 2nd Defendants title was cancelled and a title issued in the name of the Plaintiff who fraudulently transferred the suit property to the 4th and 5th Defendants. The 1st and 2nd Defendants have given particulars of connivance conspiracy and fraud against the Plaintiff and the 3rd, 4th and 5th Defendants. Accordingly, the 1st and 2nd Defendants state that the dealings by the Plaintiff and the 3rd, 4th and 5th Defendants are unlawful, illegal, fraudulent and a nullity and of no effect to the 1st and 2nd Defendants' ownership of the suit property and that the purported registration and subsequent subdivision are unlawful and a nullity.

6. The Plaintiff did not file a defence to the counter-claim. Jimmy Muinde, Mark Muinde and Yvonne Muinde filed a joint statement of defence in which they denied the counter-claim and averred that they acquired the property for valuable consideration with no knowledge that the Plaintiff had no good title to the suit land.

7. The Plaintiff adopted his witness statement and testified that he had authority of the family of the late Juma Mwakuandika. The Plaintiff testified that the suit property was ancestral land and that he acquired it from his late father Juma Mwakuandika. The in 1974, the area was declared an adjudication section and the suit property was allocated number plot 51 upon issuance of an allotment letter to the late Juma Mwakuandika. He stated that after the adjudication exercise was completed, his family was informed that the title to the suit property would be processed and that the deceased would collect his title from the Land Registrar, Kwale. That as a family, they kept checking with Kwale Land Registry about the title until 1995 when they discovered a title had been processed in the names of the 1st and 2nd Defendants. The Plaintiff stated that he held discussions with the 1st and 2nd Defendants and their representatives and reached a consensus and subsequently filed consent in court in which judgment was entered in the Plaintiff's favour, and the 1st and 2nd Defendants' title was cancelled and a title issued in favour of the Plaintiff on 26/10/2004. The Plaintiff further stated that he sold and transferred the property soon thereafter to Jimmy Ndaka Muinde and the property title issued in names of Yvonne Muinde and Mark Muinde. The Plaintiff produced the bundle of documents filed on 8/10/17 as p.exhibits 1 to 27.

In cross-examination, the Plaintiff confirmed that he had no grant of representation in respect to the estate of his deceased father who died in 1982 save for a letter from the area chief.

8. It was the 1st and 2nd Defendants evidence that by an agreement of sale made on 26th October 1973, Ismael Elijah Muriithi (deceased) purchased the suit property from Juma Mohamed Mwakuandika, Abdallah Mohamed Mwakuandika and Rashid Mohamed Mwakuandika. That the said Ismael Muriithi took possession of the property and on 15th November 1974 he was registered as the proprietor of the suit property. Upon his demise letters of administration were granted in respect to his estate and to the 1st and 2nd Defendants who were subsequently registered as proprietors by transmission. The 1st and 2nd Defendants produced the sale agreement dated 26/10/1973 together with the documents filed on 4th July 2014 and supplementary list of documents filed on 14th November 2017, and on 3.9.18. The 1st and 2nd Defendants denied reaching a consensus with the Plaintiff and stated that there were no subdivisions done on the ground as they still hold the original title, and reiterated the particulars of fraud in the counter-claim.

9. Emmanuel Kenga, a retired Commissioner of Police and a qualified document examiner who testified on behalf of the 1st and 2nd Defendants found that the signatures on the consent order and the Memorandum of appearance herein did not match the known signatures of the 1st and 2nd Defendants, and therefore concluded that they were forgeries.

10. Jimmy Ndaka Muinde testified on his own behalf and on behalf of Mark Muinde and Yvonne Muinde. It was his evidence that in January 2005, he developed an interest to purchase the suit property, and after carrying out due diligence, he entered an agreement of sale dated 22.2.2005 with the Plaintiff. He stated that pursuant to an application dated 25/1/05, they obtained consent to transfer on 26/1/2005 from the Land Control Board, Msambweni. That the Plaintiff's advocates, Stephen Oddiaga and Company Advocates refused to release the title and completion documents necessitating the Plaintiff to file Mombasa HCCC No. 143 of 2005 wherein the court ordered the release of the said documents which were presented for registration on 2/10/2005 and a title deed issued on the same date in favour of Yvonne Muinde and Mark Muinde. Later the suit land was subdivided to Land parcel No. KWALE/ GALU KINONDO/1605 and 1606 thereby extinguishing PARCEL NO. KWALE/GALU KINONDO/51. It is their case that they acquired the suit property for valuable consideration without knowledge of notice of any omission, fraud or mistake for which their title could be cancelled.

11. Ms Ndege & Company Advocates for the Plaintiff submitted inter alia, that Yvonne Muinde and Mark Muinde are in possession of the suit land having obtained the same from the Plaintiff and that the 1st and 2nd Defendants have never had possession. It was their submission

that the registration of the suit property in the name of Ismael Muriithi after adjudication exercise was completed is null and void and relied on the case of **Mohamed Ahmed Khalid (chairman) & 10 Others –v- Director of Land Adjudication & 2 Others (2013) eKLR**. The Plaintiff's counsel further submitted that the transaction between the Plaintiff's father and Ismael Muriithi is void for lack of consent from the Land Control Board as required by Land Control Act. Counsel relied on the case of **of Isaac Ngatia Kihagi –v- Paul Kaiga Githui (2017) eKLR** and submitted that the 1st and 2nd Defendants do not have not any rights over the suit land. The Plaintiff's counsel further submitted that the suit land was lawfully transferred to the 3rd and 4th Defendants and relied on the case of **Joseph Gitari –v- Muthii Chomba and 7 Others (2018)eKLR**.

12. Ms. Kanyi & Company Advocates for the 1st and 2nd Defendants on their part submitted inter alia that the Plaintiff has not proved that he was a lawful owner of the suit property and that the Plaintiff lacked the requisite *locus standi* to institute the suit as he had no grant of representation in respect of the estate of his deceased father. They relied on the case of **Hawo Shanko –v- Mohamed Uta Shanko (2018)eKLR** and argued that the proceedings are a nullity and that the Plaintiffs suit should be dismissed. Counsel submitted that the 1st and 2nd Defendants lawfully acquired the suit property, adding that the their title was a first registration and therefore could not be defeated by virtue of the provisions of section 143 (1) of the Registered Land Act Cap 300 (repealed). They relied on the case of **Kuria Kiarie & 2 Others –v- Sammy Magera (2018)eKLR**. They further submitted that the 3rd, 4th and 5th Defendants acquired the suit property through connivance, conspiracy and fraud and relied on the case of **Vijay Morjaria –v- Nansingh Madhusing Darbar & Another (2000)KLR**. They submitted that the subdivision was done hurriedly and with intend to defraud the 1st and 2nd Defendants of the suit land. They denied that the 3rd, 4th and 5th Defendants are bona fide purchasers and relied on the case of **Weston Gitonga and Others –v- Peter Rugu Gikanga & Another (2017)eKLR**. Counsel further submitted that the 1st and 2nd Defendants still hold the original title which was issued first in time and therefore prevails. They relied on the case of **Lawrence P. Mukiri Mungai, Attorney Of Francis Muroki Mwaura –v- Attorney General & 4 Others (2017)eKLR**. Counsel urged the court to invoke the provisions of Section 80 (1) of the Land Registration Act and order the rectification of the register.

13. I have considered the pleadings, the evidence adduced and the submissions made. The issues for determination are:

- i. Whether the Plaintiff had locus to file suit.**
- ii. Whether the Plaintiff legally acquired the suit property.**
- iii. Did the 1st and 2nd Defendants prove fraud against the Plaintiff and the 3rd, 4th and 5th Defendants.**
- iv. Was the suit property lawfully transferred to the 4th and 5th Defendants?**
- v. Is the Plaintiff entitled to the orders sought in the plaint.**
- vi. Are the 1st and 2nd Defendants entitled to the orders sought in the counter-claim.**

14. The Plaintiff's evidence was that the suit property was ancestral land which on adjudication was allocated to the Plaintiff's late father Juma Mwakuandika and allotted PLOT NO. 51. The Plaintiff testified that his late father died in 1982. The Plaintiff's evidence was that he acquired the suit property from his deceased father. The plaintiff testified that he had authority from other family members to deal with any matter arising from or pertaining to the suit property. Presumably, this included authority to file this suit. The Plaintiff confirmed that he had not taken out grant of letters of administration in respect to the estate of his deceased father. The only document relied on by the Plaintiff was a letter dated 18th October 2004 written by the Chief, Kinondo Location. The said letter states that the family members of the late Juma Mwakuandika who died on 22/6/1982 had authorized Mr. Athuman Juma Mwakuandika (the Plaintiff herein) and Mr. Salim Juma Mwakuandika, the sons of the deceased person to deal with and stand for any issues pertaining or arising for the family.

15. It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who had been issued grant of letters of administration has capacity to represent the estate of a deceased person. The powers of the personal representation are set out under Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya which provides as follows:

82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers:-

- a. to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representative;**
- b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all any part of the assets vested in them as they think best;**
 - i. Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased and**
 - ii. No immovable property shall be sold before confirmation of the grant.**
- c) To assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof;**
- d).....**

16. Section 80 (2) of the Law of Succession Act provides as follows:

80 (2) A grant of letters of administration, with or without the will annexed shall take effect only as from the date of such grant.

It is clear therefore that the granted letters of administration takes effect from the date when it is issued. A party can therefore not commence suit on behalf of the estate of a deceased person without letters of administration and where a suit is commenced without letters of administration in respect of a deceased estate such a suit is null and void ab initio.

17. in the case of Rajesh Pranjivan Chudasama –v- Sailesh Pranjivan Chudasama (2014)eKLR, the Court of Appeal stated:

“...in our view the position in law as regards... locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession . In the case of Otieno-v- Ongo (supra) this court differently constituted rendered itself thus:

“...an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

18. In light of the foregoing, and in view of the fact that the Plaintiff has admitted that the suit land belonged to his deceased father and considering that the Plaintiff has not taken out letters of administration, it is my finding that the Plaintiff in as far as he claims through his deceased father lacked the requisite locus standi to institute the suit and the same is incompetent, null and void.

19. The second issue is whether the Plaintiff legally acquired the suit property. The Plaintiff stated that he acquired the suit property from his deceased father. Section 119 of the Registered Land Act (repealed) under which regime that suit land was registered provided as follows:

“if a sole proprietor in common dies, his personal representatives, on application to the registrar in the prescribed form and on production to him of the grant, shall be entered to be registered by transmission as proprietor in the place of the deceased....”

20. The Plaintiff did not tender any evidence to show that the suit property had been acquired by him through a transmission. Further, the Plaintiff stated that upon filing this suit, and after discussions with the 1st and 2nd Defendants and filed a consent in court on 1st October, 2004 allowing the Plaintiffs claim. That the said consent was adopted as an order of the court and through that order, the Plaintiff was registered as the proprietor and issued with a title deed in his name on 26.10.04. The court however has noted that the consent order was disowned by the 1st and 2nd Defendants who filed an application to have the order set aside. Indeed the court found in favour of the 1st and 2nd Defendants and proceeded to set aside the purported consent order. Further, Mr. Emmanuel Kenga, the document examiner who testified on behalf of the 1st and 2nd Defendants was categorical that the signatures on the memorandum of appearance and the consent order allegedly signed by the 1st and 2nd Defendants were forgeries. It is also puzzling to note that the Plaintiff proceeded to sell and transfer the suit property pursuant to filing and obtaining orders in HCCC No.143 of 2005 when this suit was still pending. The only conclusion one can make for this, in my view, is that this was meant to preempt the outcome of this case. It is also not clear how the restriction that was registered on 1st March 2005 was removed when the dispute was still pending before court. Further, the transfer was done and a new title deed issued in the Plaintiff's name while the 1st and 2nd Defendants were still holding the original title. As a matter of fact, it is the Plaintiff who instituted this suit and among the reliefs he is seeking is cancellation of the title deed issued to the 1st and 2nd Defendants and for an order compelling the Land Registrar Kwale to issue him with a title document for the suit property. Those prayers are the subject of this judgment and therefore it is puzzling how the Plaintiff obtained title before the matter was concluded. A transfer could not be made without first producing the original title document as required by Section 33 of the Registered Land Act (now repealed). Therefore the process of registration of the Plaintiff as proprietor of the suit land was not done above board and was fraudulent. His registration as proprietor could not have been in accordance with the law. Therefore, from the material on record, it is my finding that he Plaintiff did not acquire a genuine title to the suit property.

21. The next issue to consider is whether the 3rd, 4th and 5th Defendants were innocent purchasers for value and whether they now hold good title to the suit property. In my view, for the reason that the Plaintiff acquired his title fraudulently, he did not have any or any good title to pass to the 3rd, 4th and 5th Defendants. Further, from the evidence on record, it is doubtful that the 3rd, 4th and 5th Defendants were innocent purchasers for value and that they acquired the same for valuable consideration. I say so because the documents relied on by the said Defendants are not adding up. Not only are they contradictory but have several material gaps which have not been explained satisfactorily. For example some documents including application for registration for Land Control Board Consent, Sale Agreement, transfer and Land Application as well as mutation forms were executed by the 3rd Defendant even before he obtained the alleged power of attorney. The said documents were executed in the year 2005, whilst the power of attorney relied was only registered on 26th April 2007, a period of over two years later. It is also vital to note that whereas in his evidence, Jimmy Ndaka Muinde alleged that he executed the sale agreement dated 22/2/2005, the said agreement shows that the same was signed by the Plaintiff as vendor and Robert Muinde and Mark Muinde as purchasers. Another discrepancy that the court has noted is that the application for consent of Land Control Board for the sale of the property from the Plaintiff to Robert Muinde and Mark Muinde is dated 25/1/05, about one month before the agreement for sale was executed. The alleged letter of consent dated 26/1/2005 was given long before the parties entered into the Agreement of sale. Logically, it is expected that parties enter into an agreement before applying for and obtaining consent from the Land Control Board. In this particular case, the chronology followed is the opposite. In my view, the said transaction was not above board and in the absence of a plausible explanation, it was fraudulent. The 3rd, 4th and 5th Defendants in conclusions with the Plaintiff were aware of what they were doing and knew that their actions were not genuine. Even the transfer was casually changed from Robert Muinde and Mark Muinde to Yvonne Muinde and Mark Muinde. Of course there was no consent in favour of Yvonne Muinde. Taking into account all these discrepancies, it is my finding that the Plaintiff in collusion with the 3rd, 4th and 5th Defendants were intent to defraud the 1st and 2nd Defendants of the suit land. Certainly, the 3rd, 4th and 5th Defendants cannot be described as innocent purchasers. What is surprising is that all these happened when the 1st and 2nd Defendants still

held the original title and when this case was still pending before court. No wonder they quickly subdivided the land to extinguish the original number.

22. In light of the above, I am satisfied that the 1st and 2nd Defendants have proved fraud against the Plaintiff and 3rd, 4th and 5th Defendants. Consequently, it is my finding that the suit property was not lawfully transferred to Yvonne Muinde and Mark Muinde. In the result the Plaintiff is not entitled to the prayers sought in the plaint.

23. The 1st and 2nd Defendants tendered evidence to prove that Ismael Muriithi (deceased) purchased the suit property on 26.10.1973 from Juma Mohamed Mwakuandika, Abdalla Mohamed Mwakuandika and Rashid Mwakuandika. The said Ismael Muriithi was registered as the proprietor of the suit property on 15th November, 1974. Upon the death of Ismael Muriithi on 20th March, 1985, the 1st and 2nd Defendants were granted letter of administration and were then registered as proprietors by transmission. From the evidence on record, I am satisfied that the 1st and 2nd Defendants lawfully acquired the suit property. There was no evidence to prove any fraud against them. I am thus satisfied that the 1st and 2nd Defendants have proved their counter-claim on a balance of probabilities and are entitled to the orders sought therein.

24. The next issue to consider is whether the court has power to cancel the titles in the names of Yvonne Muinde and Mark Muinde since fraud was proved to have existed during the acquisition of their titles. The law relating to cancellation of titles is to be found in Section 80 of the Land Registration Act which provides inter alia, that:

(1) "Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of omissions, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by act, neglect or default."

25. The court has examined the evidence on record and is satisfied that fraud on the part of the Plaintiff and the 3rd, 4th and 5th Defendants was proved. It is also clear that they were aware of the fraud, mistake or omission. The evidence on record shows that the Plaintiff did not have a good title to pass to the 3rd, 4th and 5th Defendants. The court is also of the view that the 3rd, 4th and 5th Defendants contributed to such factors through fraud, mistake or omissions. In the circumstances, the 1st and 2nd Defendants have sufficiently discharged the legal burden of proof placed upon them.

26. The upshot of this is that this court is not satisfied that the Plaintiff has proved his case against the 1st and 2nd Defendants on a balance of probability. On the other hand, this court is satisfied that the 1st and 2nd Defendants have proved their case against the Plaintiff and the 3rd, 4th and 5th Defendants. Accordingly, I enter judgment as follows:

a) The Plaintiff's suit is dismissed with costs to the 1st and 2nd Defendants.

b) The 1st and 2nd Defendants' counter-claim is allowed in its entirety with costs to be borne by the Plaintiff, the 3rd, 4th and 5th Defendants jointly and severally.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF DECEMBER 2019.

.....

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Gichira holding brief for Ms. Mango for defendants

Furaha holding brief for Ndege for Plaintiff.

Yumna Court Assistant

C.K. YANO

JUDGE