



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 217 OF 1991

JUKO ALEX TABULO.....PLAINTIFF

-VERSUS-

A. M. FADHELKHAN.....1ST DEFENDANT

COUNTY COUNCIL OF KILIFI.....2ND DEFENDANT

JUDGEMENT

1. The dispute herein revolves around the ownership of plot No 405 – 11492/R. 80 situated at Mariakani Township in the Kilifi district. The plot is being claimed by the plaintiff on the one hand and the 1st defendant on the other hand. Vide an amended plaint dated 18th October 1990, the plaintiff sued the two defendants seeking to be awarded the plot through the following prayers:

a) A permanent and mandatory injunction – restraining the First Defendant from in any way interfering with the plaintiff's property known as plot No. 405 Mariakani.

aa) A declaration that the Second Defendant has never lawfully alienated the plot to Rongers Ngumuta or the First Defendant and such Alienation is null and void.

ab) Declaration that only the plaintiff is entitled to possession and occupation of the said plot.

b) General damages for trespass by the First Defendant

bb) Damages for conspiracy.

c) General damages for trespass by the First Defendant.

d) Costs of this suit.

e) Interest on damages and costs.

f) Any other or further relief.

2. The 1st defendant does not agree with the plaintiff's claim therefore he contested the suit via his statement of defence dated 3rd February 1990. The 1st defendant pleaded that the plaintiff is not entitled to the orders of permanent and mandatory injunction. He pleaded that the suit plot was allocated to Rodgers Ngumuta by the 2nd defendant and the property was subsequently sold to him by the said Rodgers. The 1st defendant pleaded further that since 1988 he was in the process of constructing two flats before the plaintiff interfered with the constructions. He urged the Court to dismiss the plaintiff's suit with costs.

3. The 2nd defendant also filed a statement of defence dated 14th June 2010 denying the plaintiff's claim. The 2nd defendant pleaded that all their acts were done lawfully and in accordance with the provisions of the Local Government Act and Physical Planning Act and any contrary allegations are denied and the plaintiff is put to strict proof. The 2nd defendant also pleaded that the plaintiff has no reasonable cause of action and should be dismissed.

4. The plaintiff called 3 witnesses to prove his case. The 1st defendant called two witnesses while the 2nd defendant called no witness. The

plaintiff testified as PW 1 on 18th June 2014 before Mukunya J. He told the Court that he lives in Mariakani Township. That the land was originally occupied by his grandfather and later his father who passed on in 1955. That his father used this plot to cultivate. Then at one time the county council of Kilifi came to the place and recorded their names. PW 1 continued that the 1st defendant came into the picture after Rodgers Ngumuta who was an assistant chief visited his sisters to buy mangoes. Mr Ngumuta is said to have taken mangoes but did not pay for them and only to return later to cut the mango trees in 1988.

5. PW 1 stated that when construction works began on the plot, he was called by his sisters. He went and accosted the fundis. The matter was reported to Mariakani Police Station and later the chief's office. The plaintiff's case is that at the chief's office, the 1st defendant was advised to collect his money from Rodgers and leave the land as it was found that Rodgers was not the owner of the land. In support of his case, he produced rates clearance certificate issued by the 2nd defendant as he was the one paying rates. He also produced a letter dated 23.12.1988 addressed to himself and the chief's letter to the county council together with receipts of rates payments. That he only stopped paying rates because of this dispute. The witness stated that he had never been informed that his ownership had been cancelled.

6. It is the plaintiff's case that when Rodgers sold the land, the land register did not show his name as the owner. He asked the Court to give him his land back and award him costs of this suit. He was put to cross – examination first by Mr Chekera advocate for the 1st defendant. He said that when the county council came to the land he was present and his name was taken. That he had nothing to show the land is his. That Rodgers came to see his sisters in 1988. The witness stated that he is entitled to the land by way of inheritance. He has not sued Rodgers. In cross – examination by Mr Kibara advocate for 2nd defendant, PW 1 said he was registered as owner by Kilifi County Council in 1976 for plot No 405. He has never worked for a local authority. He admitted attending a meeting with the Town Clerk at the council offices where they offered to relocate him to another plot but he declined the offer. That the council came with surveyors in 1976 but the registration was verbal & he was not issued with allotment letters. That in 1988, there was no building except a foundation built in plot No 403, 404 & 406 but he owned plot 405. That item 9 was a demand for rent addressed to Baraza Alex Tabulo for plot 405.

7. Narikoni Tabulo testified as PW 2. She is a sister to the plaintiff. PW 2 said she has lived on the suit property for 63 years. That the land belonged to her mother before it was given to her brother. That she knew Rodgers who had visited them around 1987 – 88 to buy mangoes. They sold to him but he never paid. That he returned after one week with a young man and started cutting their mango trees. Her sister went and reported to the chief who came and stopped him. They informed the plaintiff who was working in Nairobi. The plaintiff came and followed up the matter. That the plot No 405 belongs to the plaintiff who got it from his mother having received the same from her husband.

8. PW 3 is **NOOR KIMANI** who is also sister of the plaintiff. She gave similar evidence as PW 2 above as contained in her witness statement. That marked the close of the plaintiff's case.

9. I heard the defendant's case from 29th November 2016. **Nasim Yusuf Ali** who had a Power of Attorney from the 1st defendant testified as DW 1. The 1st defendant is her husband. She knew about the suit plot sold to them by Rodgers Ngumuta. That the 2nd defendant through the Town Clerk confirmed the plot belonged to Rodgers. That after the confirmation, they drew a sale agreement and paid Rodgers. She drew a plan of the house she wanted to build and demolished the existing house. That she began to build her foundation is when she was told she had taken somebody's land. She had a title deed for the plot. DW 1 continued that when the dispute began, she reported to the police. That Rodgers showed them documents that he owned the plot. The witness said she is the one paying rates.

10. In cross – examination by Mr Wafula advocate for the plaintiff, DW 1 admitted not producing a copy of the search. That in the advocates office, Rodgers did not give her a title, what he had was a plan. That she never saw the receipts of the plaintiff paying rates. She did not produce a picture of the first house because it was demolished. The title deed was issued in 1996 when the suit was pending. She does not know the people living in the neighbouring plots. That it is the Court to decide who is to blame.

11. **RODGERS NYAWA NGUMUTA** testified as DW 2. He stated that he sold the suit plot to the 1st defendant in 1988. That while desiring to own a plot in Mariakani, he visited the offices of the 2nd defendant where he was shown a plan. He was shown plot No 405 which was vacant. He paid and was taken to be shown physical boundaries. Later he presented a building plan which was approved in 1987 and began building. When he became appointed the Chief of Mtaa location he had to relocate and decided to sell the suit plot. He met the 1st defendant and after negotiations they agreed on a price. He was paid KShs 27000 leaving a balance of KShs 8000 still outstanding todate.

12. DW 2 denied buying mangoes from this plot. That he was a crane driver with Kenya Ports Authority and had no business of selling mangoes. He said he gave the 1st defendant all receipts of payment made to the 2nd defendant. Later when the plaintiff was disturbing the 1st defendant, he took the 1st defendant to the town clerk. The town clerk confirmed he was the owner. In cross – examination, DW 2 said he purchased the land in 1986. That there were two ladies living in the neighbouring plot and he used to keep his building materials with them. He admitted cost of clearance dated 24.3.1988 bears the plaintiff's name. That by 1984 he had not acquired the plot. He was not shown proceedings that the 2nd defendant had repossessed the land from the plaintiff. In re – examination, DW 2 stated he was told was vacant with no structure on the land. This also marked the close of the 1st defendant's case.

13. Parties advocates filed written submissions which I have taken time to read. The gist of the 2nd defendant's submissions is that the plaintiff was the owner of the suit plot until 1983 when he defaulted. The plot was therefore repossessed and given to Rodgers Ngumuta who later sold to the 1st defendant. The 2nd defendant submitted that they duly sanctioned the sale between Rodgers and the 1st defendant. The 2nd defendant concluded that the plaintiff's suit should be dismissed as he has not produced a title document to rival the 1st defendant's title. The Court is active to the fact that the 2nd defendant called no evidence to support his defence on record.

14. The 1st defendant relied on the sale agreement signed between him and Rodgers; the correspondences by the 2nd defendant asking the plaintiff to stop interfering with the suit plot and payment of rates receipts from 1989 todate. The 1st defendant also relied on the title deed obtained. He submitted that failing to pay rates by the plaintiff resulted in cancellation of his TOL and allocation of the suit plot to Rodgers.

15. From the evidence adduced and submissions rendered, the Court frames three issues for determination of this case:

i) Whether the plaintiff defaulted in paying rates resulting in cancellation of rights over the land.

ii) Whether Rodgers Ngumuta had a good title to pass to the 1st defendant.

iii) The effect of registration of the 1st defendant as owner of the suit plot.

16. The plaintiff testified that the land was originally occupied by his grandfather who later left it to his father. He inherited the plot by virtue of his ancestry. This is confirmed by the plaintiff's siblings who testified as PW 1 & PW 2. The plaintiff did not deny that the plot attracted rates from Kilifi County Council which rates he used to pay. The plaintiff stated further that the plot was sub-divided into four portions i.e. 403, 404, 405, 406 and each plot given to members of their family. That he was allocated plot No 405. It is not in dispute that the plaintiff owned the suit plot upto 1983 when according to the 2nd defendant he defaulted in paying rates and the plot was repossessed.

17. The plaintiff produced receipts issued by the 2nd defendant for payment of rates from as early as 1977 – 1983 pursuant to a demand note dated 19th February 1990 issued to Baraza Alex Tabulo. There was produced a receipt No 006 dated 22-4-1983 for the sum of Kshs 3296= issued to Baraza Alex Tabulo for plot Nos 403 – 406 for the period 1981 – 1983 on account of rates. There is also produced a receipt No 082 dated 24 – 3 – 1988 issued to the plaintiff for sum of Kshs 2000 on account of rates for plot Nos 405 & 406 for the period 1984 – 1988. The plaintiff produced also a certificate of rates clearance certificate dated 24.3.1988 which was indicated to be valid upto 31st December 1988. This document is disputed by the defendants because they alleged it was signed by a junior clerk instead of the town clerk. It is however not denied that Mr G. M Baya who signed the certificate was an employee of the 2nd defendant.

18. DW 2 stated that he was reallocated the plot after the plaintiff defaulted in paying the rates. DW 2 stated that he desired to own a plot in 1986 in Mariakani and that it is when he visited the offices of the 2nd defendant. From the documents produced by the 1st defendant, there is nothing showing that DW 2 was re-allocated the plot or he even made a request to be allocated a plot by the 2nd defendant. There is only one receipt in the name of DW 2 dated 29th December 1986 for the sum of Kshs 180= being approval and sale of form “G” fees. It does not specify the plot number. The other document is the letter dated 5th May 1988 addressed to DW 2 confirming to him that the change of name from his name, (Rodgers Ngumuta) to the 1st defendant had been effected as per his request in respect of the suit plot.

19. In one of the 1st defendant's documents is a receipt No 677 dated 11 – 3 – 1988 issued to A. M Fadhilkhan for the sum of Kshs 600 on account of rent for plot No 405 for the period 1984 – 1986. The same day, he also paid Kshs 200= vide receipt No J 631010 being transfer fees for plot No 405. The 1st defendant also produced rates receipts dated 10.5.1988 for the period 1984 – 1988 in the sum of Kshs 496.80 issued in his name. The sale agreement between DW 1 & DW 2 was entered on 7th March 1988. The question ringing in this Court's mind is what was Rodgers Ngumuta (DW 2) selling to the 1st defendant? By the time they were entering the sale agreement it is clear **“the rates and rents were outstanding between the period 1984 – 1986.”** The 2nd defendant is alleging to have repossessed the land from the plaintiff for non-payment of rates. Rodgers Ngumuta did not pay **“these outstanding/unpaid rates accrued by the plaintiff”** so what bestowed the interests of the plot upon him in the absence of letter of allocation or payment of the rates? I find nothing did.

20. The 2nd defendant vide a letter dated 5th March 1990 addressed to Mr S. E Abdullah and produced by the 1st defendant & raised two important things. The 1st issue is in clause 2, of the letter stated that property belonged to whoever is given a T.O.L or title deed by the Commissioner of Lands after meeting the requirements. The letter continued that people who enter government land without consent and construct buildings illegally would have to undergo the balloting system together with other qualified applicants. There is nothing produced that the suit plot was put to balloting from 1984 – 1986 and that DW 2 was found to have met the requirements mentioned in the said letter. The 2nd issue is brought out in clause 9 where the letter stated that there is a procedure to follow before a plot allocated. The 2nd defendant did not bring to this Court's attention via evidence that they followed that procedure in allocating the suit plot No 405 to Rodgers Ngumuta. The evidence on record by the plaintiff that this was his ancestral land thus remains unchallenged and if any repossession was done for none payment of rates, such evidence was not put before this Court. In any event, the 2nd defendant received the outstanding rates if any in March 1988 before the land was changed into the 1st defendant's name in May 1988. Having received the rates payment, the 2nd defendant had no reason to enter the name of the 1st defendant as the owner of the plot No 405.

21. It is therefore my finding that yes the plaintiff defaulted in payment of rates. The default however did not result in cancellation of his rights over the land given that no evidence of demand or notification of cancellation was shown to have been issued to him by the 2nd defendant. Secondly there was no evidence put before the Court that indeed the plot was re-allocated to DW 2 and when his name was entered in the records of the 2nd defendant as they have not produced any receipt paying for the plot or for the rates. Rodgers had no interest in plot to sell to the 1st defendant. The subsequent correspondences from the 2nd defendant cannot cure the failure passing any interest to DW 2 and was therefore inconsequential. I conclude by stating that the plaintiff remains the owner of plot No 405 until the repossession is properly done. If the 1st defendant has been paying rates/rents, he has been doing so on behalf of the plaintiff and he is therefore entitled to a refund from the plaintiff.

22. On the title obtained by the 1st defendant, the same contravenes the orders of injunction in force and the provisions of section 143 (2) of the Registered Land Act Cap 300 (*repealed*) then in force. Section 143 (2) provided thus;

“The register shall not be rectified so as to affect the title of a proprietor who has acquired land/lease for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

23. The 1st defendant submitted that the orders of injunction issued on 19th January 1990 which he paraphrased its contents only stopped him from trespassing and carrying out any works and alienating the plaintiff's plot. This in my view is a rigid interpretation as the word "alienating and or dealing or interfering with the plaintiff's land which in my view have a wider meaning. In section 3 (b) of Cap 300, **dealing is stated to include disposition and transmission. Disposition is defined to mean any act by a proprietor whereby his rightsover his land, lease or change** are affected but does not include an agreement to transfer. The registration of the 1st defendant did affect the plaintiff's right over the suit property and therefore against the purport and intent of the order. Further, the 1st defendant already knew about the dispute long before the suit was filed vide the correspondences addressed to the plaintiff and copied to him which he has produced in evidence. The plaintiff brought this suit against him before the title deed was processed. By the 1st defendant going on with processing of the title in his names other than contrary to the doctrine of his prudence, the act was in breach of the law section 143 (2) of Cap 300. The current applicable law is section 26 (1) of the Land Registration Act. The 1st defendant did therefore acquire the title unprocedurally and through illegal means for the reasons given above and to steal a match against the plaintiff. This Court has powers to cancel such registration obtained unprocedurally by the 1st defendant which I hereby do.

24. In the final analysis, I am satisfied that the plaintiff has proved his case and accordingly enter judgement in his favour in the following terms:

(1) Prayers (a), (b) and (c) of the amended plaint is allowed as presented.

(2) I shall not award any damages as the 1st defendant has not been in possession of land and no evidence was presented to the Court of the developments the plaintiff intended to put the land to use which has been delayed.

(3) The plaintiff shall re-imburse all monies paid to the 2nd defendant by the 1st defendant as rates once receipts are presented.

(4) The registration of the 1st defendant by virtue of the title deed issued on 1st July 1996 or any title deed issued in favour of the 1st defendant be and is hereby invalidated.

(5) The costs of this suit is awarded to the plaintiff to be paid by the 2nd defendant.

Dated, signed & delivered at Mombasa this 16th February 2018.

A. OMOLLO

JUDGE