



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 458 OF 2017

(Formerly Machakos ELC Case No. 3 of 2015)

HODHAN DAHIR MAHAMUD and SAIDA MOHAMED

(Suing as the administrators of the estate

of MOHAMOOD MOHAMED HUSSEINPLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL

(Sued for and on behalf of the Land Registrar – Kajiado).....1ST DEFENDANT

JOSEPH GITAU KUNGU.....2ND DEFENDANT

JUDGEMENT

By a Plaint filed on 13th January, 2015 the Plaintiff seeks judgement against the Defendants for:

- a) A declaration that the deceased, MOHAMOOD MOHAMED HUSSEIN is the absolute proprietor of TITLE NUMBER KAJIADO / KAPUTIEI – NORTH/ 1610
- b) A declaration that the 1st Defendant acted unlawfully by issuing the 2nd Defendant with a Title Deed of TITLE NUMBER KAJIADO / KAPUTIEI – NORTH/ 1610
- c) A declaration that any dealings in TITLE NUMBER KAJIADO / KAPUTIEI – NORTH/ 1610 by the Defendants with any party prior to and /or after filing this suit is null and void.
- d) An order directed at the 1st Defendant for the immediate restoration of the property TITLE NUMBER KAJIADO / KAPUTIEI – NORTH/ 1610 in the names of the deceased MOHAMOOD MOHAMED HUSSEIN
- e) An order permanently restraining the Defendants by themselves, servants and/or agents from entering upon, selling or otherwise disposing or in any other way dealing in the suit property without the express written consent or authority of the Plaintiffs.
- f) General Damages
- g) Costs of this suit

The Defendants never entered appearance nor filed a Defence despite being duly served and interlocutory judgement was entered on 17th July, 2017. The suit was thereafter fixed for formal proof on 23rd November, 2017 where the Plaintiff called two witnesses.

Plaintiff's Evidence

PW1 HODHAN DAHIR MAHAMUD adopted her witness statement filed in court on 13th January, 2015 and stated that she is one of the Plaintiffs in the suit. She confirmed that together with her co – Plaintiff they filed Nairobi HC Succession Cause No. 721 of 2007 where they were appointed administrators of the estate of MOHAMOOD MOHAMED HUSSEIN (deceased). Further that as per the Certificate of Confirmation of Grant, land parcel number KAJIADO / KAPUTIEI – NORTH/ 1610 hereinafter referred to as the 'suit land' was distributed to her and the co - Plaintiff herein. She averred that they wanted to sell the suit land but when they undertook a Search, they found a third party namely JOSEPH GITAU KUNGU (the 2nd Defendant herein) had been registered as the owner. She contends that they had in their custody the original title deed to the suit land, in the name of deceased who had been registered as the absolute proprietor on 18th January, 1991. She claims the deceased purchased the suit land from one GADIEL LAMA OLE NKARRO and they have in their custody a Sale Agreement. Further that from the transfer records, it confirms the suit land was transferred from GADIEL LAMA OLE NKARRO to the deceased. She denied that their deceased husband ever sold the land to a third party and that in 1997 he wanted to drill a borehole and was granted the authority to do so. She stated that the 2nd Defendant trespassed on the suit land claiming it is his, has been marketing it and has brought unknown persons to view it. She sought for the Court to grant them prayers as stated in the Plaint and produced a bundle of documents as Plaintiffs' exhibits, which included: Certificate of Confirmation of Grant; Order from the Kadhi; Copy of title deed; Related Conveyance documents; Certificate of Official Search and Receipt; Valuation Report of Knight Frank Limited; Instructions to Sell Property given to LLOYD MASIKA LTD and Newspaper Advertisements.

PW2 SAIDA MOHAMMED confirmed she is the 2nd Administrator of the estate of MOHAMOOD MOHAMED HUSSEIN and that she was allocated a share of the suit land vide Certificate of Confirmation of Grant in the Nairobi HC Succession Cause No. 721 of 2007. She averred that the 2nd Defendant herein claimed he bought the suit land from the deceased before his demise but this is not so. She insisted there was no transaction between the deceased and the 2nd Defendant and sought to be granted prayers as stated in the Plaintiff.

The Plaintiffs thereafter closed their case and filed submissions that I have considered.

Analysis and Determination

After perusal of the pleadings including documents filed herein and upon hearing the testimony of PW1 and PW2, I find that the following are the issues for determination:

- Whether the deceased MOHAMOOD MOHAMED HUSSEIN was the registered proprietor of land parcel number KAJIADO / KAPUTIEI – NORTH/ 1610.
- Whether the 2nd Defendant unlawful and illegally acquired land parcel number KAJIADO / KAPUTIEI – NORTH/ 1610.
- Whether the 1st Defendant should immediately restore land parcel number KAJIADO / KAPUTIEI – NORTH/ 1610 to revert to the names of the deceased MOHAMOOD MOHAMED HUSSEIN
- Whether the Defendants by themselves, servants and/or agents should be permanently restrained from entering upon, selling or otherwise disposing or in any other way dealing with land parcel number KAJIADO / KAPUTIEI – NORTH/ 1610 without the express written consent or authority of the Plaintiffs.
- Whether the Plaintiffs are entitled to general damages
- Who will pay the costs of the suit

Since the matter proceeded through formal proof, evidence presented by the Plaintiffs' was not

controverted. It is hence not in dispute that the 2nd Defendant illegally and unprocedurally got registered as the proprietor of land parcel number KAJIADO / KAPUTIEI – NORTH/ 1610 which belonged to the deceased. The Plaintiffs’ claim the Defendants’ fraudulently transferred the suit land from the deceased estate to the 2nd Defendant. They contend that it is the 1st Defendant who was responsible for the said transfer which culminated in the 2nd Defendant being registered as proprietor of land parcel number KAJIADO / KAPUTIEI – NORTH/ 1610, yet they had the original title deed in their custody. Further that vide the Nairobi HC Succession Cause No. 721 of 2007 the two Plaintiffs were appointed administrators of the deceased estate with land parcel number KAJIADO / KAPUTIEI – NORTH/ 1610 being distributed to the two of them. The Plaintiffs insists the deceased could not have sold the suit land and yet he sought for permission to drill a borehole thereon which was granted. What is curious is that the Plaintiffs’ still have in their custody the original title deed and yet it is trite law that where property is sold and transferred to a third party, the title deed of the vendor has to be surrendered at the Land Registry, for cancellation, before a fresh one is issued. I note this was not the case herein. The Plaintiffs’ averred that when they conducted a search at the Land Registry in Kajiado, it revealed that the property had exchanged hands and transferred to the 2nd Defendant and backdated to allegedly imply the transfer was registered on 25th October, 1994 when the deceased was alive. If indeed this was the position then how come the Plaintiffs still hold the original title in their custody. Which hence leads one to decipher that there were indeed fraudulent dealings that culminated in the transfer of the suit land to the 2nd Defendant. It is the Plaintiffs’ contention that the 2nd Defendant has been marketing the suit land to would be buyers claiming the land is his. They produced the following documents as exhibits;

- Certificate of Confirmation of Grant;
- Order from the Kadhi; Copy of title deed;
- Related Conveyance documents;
- Certificate of Official Search and Receipt;
- Valuation Report of Knight Frank Limited;
- Instructions to Sell Property given to LLOYD MASIKA LTD
- Newspaper Advertisements

I note the Plaintiffs had even given instructions to messrs LLOYD MASIKA LTD to market the suit land and an newspaper advertisement was put out but the 2nd Defendant did not challenge it. Further I note the 2nd Defendant did not lodge objection proceedings in the succession cause where the suit land had been indicated as forming part of the deceased estate.

Section 26 of the Land Registration Act provides as follows:

‘(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’

In the current scenario, I note the Plaintiffs still have the deceased original title deed in their custody and insist the suit land belongs to the estate of the deceased. Further that they have been in actual occupation of the suit land, put up structures thereon and hired a caretaker to take care of it. They reiterate that it is the Defendants especially the 2nd Defendant who are interfering with it, by claiming ownership and marketing it to third parties. All these allegations have not been controverted by the Defendants. It is against the foregoing that I find that the Plaintiffs title deed to the suit land is indeed prima facie evidence

that the deceased was the absolute proprietor of the suit land.

In a similar case in Kisii - **AMOS ONYANGO ODONGO Vs. MAURICE WERE OJOWI AND 3 OTHERS (2016) eKLR** Justice Mutungi stated as follows: ' **The court cannot condone an illegality as to do so would lead to a proliferation of the application of the law of the jungle which could lead to a breakdown of the rule of law. The court would be failing in its duty of upholding the rule of law if it failed to condemn the acts of the 1st Defendant for being contrary to the law. Having regard to all the attendant circumstances of this matter, this court has an obligation and duty to ensure that the rule of law is applied. The rule of law requires that the estate of the deceased be administered in accordance with the law so that any person with a claim such as the Plaintiff can establish his claim, if at all in the succession cause. The actions by the 1st Defendant were void and a nullity. In the premises therefore I am persuaded the Plaintiff has established his case on a balance of probabilities and I accordingly enter judgement against the Defendants.'**

In relying on the facts herein as well as the, judicial authority cited above and since the Plaintiffs evidence was not controverted, I find that the 2nd Defendant indeed acquired the title to the deceased estate fraudulently. Further that since the deceased estate was already distributed and with the suit land forming part of it, and the 2nd Defendant failing to lodge an objection, nor tendering any evidence whatsoever that he purchased it from the deceased, I hold that the suit land indeed belongs to the deceased estate.

As to general damages, the Plaintiffs did not canvass any evidence to prove the damages they had suffered hence, I will decline to grant them.

As to costs, since the Plaintiffs have suffered an inconvenience, I will grant them the costs of the suit.

In the circumstances, I find that the Plaintiffs have proved their case on a balance of probability and enter judgement in their favour as against the Defendants as prayed. I further make the following order:

- a) The deceased MOHAMOOD MOHAMED HUSSEIN be and is hereby declared as the registered proprietor of land parcel number KAJIADO / KAPUTIEI – NORTH/ 1610
- b) The 1st Defendant through the Land Registrar Kajiado be and is hereby directed to forthwith cancel the title deed of land parcel number KAJIADO / KAPUTIEI – NORTH/ 1610 held by the 2nd Defendant and register the same in the name of MOHAMOOD MOHAMED HUSSEIN.
- c) The Defendants, by themselves, servants and/or agents be and is hereby permanently restrained from entering upon, selling or otherwise disposing or in any other way dealing in the land parcel number KAJIADO/KAPUTIEI NORTH/1610 without the express written consent or authority of the Plaintiffs',
- d) Costs of the suit are awarded to the Plaintiffs

Date signed and delivered in open court at Ngong this 19th day of April, 2018.

CHRISTINE OCHIENG

JUDGE