



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC. CASE NO. 121 OF 2009

MALINDI MAGAZINE LIMITED.....PLAINTIFF

VERSUS

AISHA OMAR FAMAU.....1ST DEFENDANT

YUSUF BURHANI.....2ND DEFENDANT

ALI ABDALLA TWAHA.....3RD DEFENDANT

MWANAISHA MOHAMMED SAID.....4TH DEFENDANT

LUCY KIMANGU.....5TH DEFENDANT

JUDGMENT

Introduction:

1. In the Plaintiff dated 16th December, 2009, the Plaintiff averred that at all material times, the Plaintiff was the proprietor of land known as L.R. No. 419 Watamu (*the suit land*); that the Defendants trespassed on the suit land and that they should be permanently enjoined from trespassing on the land. Other than an order of permanent injunction, the Plaintiff is also seeking for an order of eviction of the Defendants from the suit land.
2. The record shows that on 19th February, 2010, the Plaintiff entered into a written consent with the 1st, 2nd and 3rd Defendants, which consent settled the suit as between the said parties. It is only the 5th Defendant who defended the suit.
3. In her Defence, the 5th Defendant averred that the suit land belongs to the Municipal Council of Malindi and by extension to the public; that if there was any conveyance of the land to the Plaintiff, then the same was irregular and that the suit should be dismissed.
4. The 5th Defendant later on amended her statement of Defence and introduced a Counter-claim in which she averred that the Plaintiff acquired the title to the suit land through fraud and that it has never been in possession of a genuine title at all.
5. In the particulars of fraud, the 5th Defendant averred that the suit land is marked as an open space in the Watamu Development Map and a preserve of the Municipal Council of Malindi and that the purported allocation of the land to the Plaintiff was not approved by the then Municipal Council of Malindi.
6. In the Counter-claim, the Defendant averred that she is the lawful owner of the suit land having been allocated the land by then Municipal Council of Malindi; that she has been paying the requisite rates and rent; that she has been in possession of the land and that she has developed the land to the tune of Kshs. 15 million.
7. The 5th Defendant is seeking for a declaration that the suit land belongs to her and for the Land Registrar to be compelled to process and issue her with a title in respect to the suit land.

The Plaintiff's case:

8. The Plaintiff's director, PW1, informed the court that the Plaintiff applied for and was allocated the suit land and that the Plaintiff was thereafter issued with the title document for the suit land on 16th July, 2009.

9. It was the evidence of PW1 that he purchased the suit land from two squatters, Dema Kenga and Nickson Tsuma and thereafter obtained a letter of allotment for the land. According to PW1, after he was issued with the letter of allotment, he paid the rates and rent and was issued with clearance certificates whereafter he had the plan for the perimeter fence approved by the Local Authority.

10. PW1 stated that the 5th Defendant had a container on the suit land; that the suit land (Plot No. 419) is not the same as Plot No. 275 and that plot number 275 is behind the suit land.

11. The Plaintiff's director produced in evidence the grant for L.R. No. 419, the Certificate of Postal Search, the stamp duty declaration assessment slip, the rates and rent clearance certificates and the approved layout plan for the proposed boundary wall on Plot No. 419 Watamu. PW1 also produced the survey plan for Plot No. 419.

The Defence case:

12. The 5th Defendant, DW1, informed the court that she was offered the suit land being plot number 419 Watamu vide a letter of allotment Reference number 58/1/x/66 dated 6th May, 1996; that she accepted the offer by paying Kshs. 98,804 and that the letter of allotment she was given shows the location of the plot.

13. DW1 informed the court that she assumed possession of the suit land and that for some reasons, the then Municipal Council for Malindi designated her plot as number "275A" for the purpose of paying the Municipal rates; that the Municipal Council of Malindi granted her permission to construct a boundary wall around the plot which she did and that she only learnt about the Plaintiff's claim over the same land in the year 2011. According to DW1, the Plaintiff obtained the title documents to the suit land fraudulently.

14. According to DW1, plot number 275A has always been behind plot number 275 and that it is the same as plot number 419 which the Plaintiff is claiming; that she has put up a permanent building and that when she went to conduct a search on plot number 419, she was informed that the file did not exist.

15. DW1 produced in evidence the rates clearance certificate for plot "275A", the rates demand notices, the approval for the construction of a boundary wall for Plot No. "275A", the letter of allotment for plot number 419 and the Valuation Report.

16. The Registrar of Titles, DW2, informed the court that he was unable to get the correspondence file for plot number 419; that he found it unusual that a Grant could be issued to the Plaintiff without a correspondence file and that when he called for the Deed file for CR 46027 he discovered that the documents in the Deed file had anomalies.

17. According to DW2, although the title that was issued to the Plaintiff shows that the suit land is in Watamu, the Deed Plan indicates that the suit land is in Kilifi; that the Deed Plan does not indicate the surveyor who prepared it and that this anomalies, coupled with the absence of the correspondence file, made him inquired from the Chief Land Registrar about the authenticity of the Plaintiff's title.

18. DW2 faulted the letter of allotment that was issued to the Plaintiff. According to DW2, the letter of allotment did not state the name of the County Council or Municipal Council on whose behalf the same was issued by the Commissioner of Lands; that he has received a response from the Chief Land Registrar and that the title held by the Plaintiff is suspect.

19. In cross-examination, PW1 stated that there was no register for Watamu; that after a CR number is allocated, a Deed file is usually opened and that an official search is usually issued after the Registrar confirms that the contents of the Deed file and that the due process of opening a Deed file for Plot No. 419 was not followed at all.

20. An officer from the County Government of Kilifi, DW3, informed the court that plot number 419 was planned as an open space by the then Municipal Council of Malindi; that it is only the Council that can allocate the land and that the Defendants' application to the Council to be allocated the land was approved.

21. It was the evidence of DW3 that the land was allocated a number being "275A" for identification; that plot number 419 is a bigger portion of land and that plot number 275A is a portion of Plot No. 419.

Submissions:

22. The Plaintiff's advocate submitted that from the documents filed in court from the County Government of Kilifi, the Plaintiff is the rates payer for plot number 419 while the 5th Defendant is the rates payer for Plot No. 275 Watamu; that plot number 419 has a tile and a Deed Plan and that plot number 275A is distinct from plot number 419.

23. The Defendants' counsel submitted that plot number 419 and 275A are one and the same plot; that the Defendant was allocated the suit land by the Municipal Council of Malindi and that it is the Defendant who is entitled to the suit land.

Analysis and findings:

24. Both the Plaintiff and the Defendant are claiming that they are the legal owners of plot number 419 Watamu.

25. The Plaintiff's director informed the court that he purchased the suit land from two squatters whereafter he was issued with the Grant for

plot number 419. According to the said Grant, the Government allocated to the Plaintiff the suit land being a leasehold for 99 years on 22nd September, 2008. The same was registered by the Registrar of Titles in the Land Titles Registry, Mombasa on 16th July, 2009. PW1 produced in evidence the Certificates of Postal Searches “as on 2nd June, 2005” and 7th September, 2009 which shows that the Plaintiff is the registered owner of plot number 419.

26. The Plaintiff also produced in evidence the clearance certificate from the then Municipal Council of Malindi dated 16th October, 2009 showing that the Plaintiff had cleared all the rates for plot number 419.

27. In addition to the above documents, PW1 produced a copy of the letter dated 26th September, 2008 by the representative of the Commissioner of Lands forwarding the Grant to the District Land Registrar, Mombasa, for registration.

28. The survey plan dated 4th November, 1982 was also produced by PW1. The said plan shows that plot numbers 318-472 were surveyed in 1982. The same plan shows some unsurveyed plots behind plot number 419. According to the evidence of PW1, the plot that the Defendant is entitled to, which is plot number 275A, is behind plot number 419 and is among the unsurveyed plots.

29. The evidence of the Defendant was that she was allocated the suit land by the Municipal Council of Malindi, which, for purposes of paying rates, designated it as plot number 275A. According to the Defendant, plot number 275A is the same as plot number 419.

30. DW1 produced a letter of allotment dated 6th May, 1996 showing that she was allocated plot number 419 Watamu by the Commissioner of Lands. She then paid the requisite stand premium on 13th April, 2001. DW1 also produced the Rent demand notice that she was issued with by the Ministry of Lands dated 8th August, 2013 and the receipt showing that she settled the said rent on 9th September, 2013.

31. Although the Defendant produced a letter of allotment showing that she was allocated plot number 419 in 1996, all the documents that she produced from the then Municipal Council of Malindi shows that her plot was number “275A”.

32. Indeed, when the Defendant applied to be allowed to construct a boundary wall, the notification of approval dated 8th April, 2010 shows that she was to build a wall around plot number 275A and not Plot No. 419.

33. All the rates clearance certificates from the Municipal Council of Malindi between the years 2010-2013 shows that the Defendant was paying rates for plot number 275A. The Defendant did not inform the court why she never informed the Municipal Council of Malindi that she was in possession of a letter of allotment for plot number 419 and not 275A for all those years.

34. When the representative of the County Government of Kilifi, DW3, testified, he informed the court that plot number 419 “is a bigger” portion of land and that plot number 275A is a portion of plot number 419. However, the said witnesses did not explain how plot number 419, which was surveyed in 1982, subsumed plot number 275A, if at all.

35. In any event, the evidence of DW3 contradicted the evidence of the Defendant who informed the court that plot number 419 and 275A are one and the same thing.

36. The Registrar of Titles, DW2, confirmed that indeed a Deed file for CR 46027 exists in their office. He produced the Deed file as an exhibit in this court. Although DW2 stated that the Plaintiff’s title is suspect because he could not trace the correspondence file, he did not inform the court how the Deed file came into existence without the correspondence file.

37. Having admitted that a Deed file is usually opened on the basis of a correspondence file, and having not received any communication from the head office indicating that the Commissioner of Lands did not issue the Grant for CR 46047, L.R No. 419, the evidence of DW2 that the Plaintiff’s title is suspect is without a basis.

38. As was held in the case of *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another (2000) eKLR*, fraud cannot be inferred from the facts, but must be pleaded and proved.

39. Indeed, the evidence before this court shows that plot number 419 was surveyed in 1982 and a Grant was issued to the Plaintiff. Considering that there was no evidence to show that the said Grant or the Deed Plan was fraudulently issued to the Plaintiff, and in view of the contradictory documents in possession of the Defendant, I find that the Defendant has not proved that the Grant for L.R. No. 419 was fraudulently obtained.

40. For those reasons, I allow the Plaintiff dated 16th December, 2009 as prayed and dismiss with costs the Defendant’s Counter-claim dated 1st October, 2014.

DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19TH DAY OF APRIL, 2018.

J.O. OLOLA

JUDGE