



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC. CASE NO. 38 OF 2015

(Formerly Nairobi ELC. Case No. 1567 of 2014)

ROSE KASIKU WATIA1ST PLAINTIFF

DICKSON KYALO WATIA2ND PLAINTIFF

VERSUS

EDWARD WATIA NZILU1ST DEFENDANT

JAMES TEKLO LOPOYETUM2ND DEFENDANT

THE NATIONAL LAND COMMISSION3RD DEFENDANT

THE ATTORNEY GENERAL *(On behalf of the Government of Kenya*

***& Ministry of Lands and Settlement)*.....4TH DEFENDANT**

JUDGMENT

1. In the Plaint dated 18th December, 2014, the Plaintiffs are seeking for a permanent injunction restraining the 3rd Defendant from making any compensation payments to the 2nd Defendant and a declaration that the transfer and registration of parcel of land known as Lamu/Hindi/Magogoni/682 in the name of the 2nd Defendant was unlawful, fraudulent and wrongful.
2. The prayers in the Plaint are premised on the grounds that the Plaintiffs are the wife and the son of the 1st Defendant respectively; that at all material time, the 1st Defendant was the registered proprietor of the suit land and that the 1st Defendant's family, including the Plaintiffs, live on the suit property.
3. It is the Plaintiffs' case that the suit land is matrimonial land; that in the year 2014, they discovered that the suit land had been transferred to the 2nd Defendant and that they were not aware of the said transaction.
4. The Plaintiffs averred that the suit land being family land, the transfer of the same to the 2nd Defendant was fraudulent, null and void.
5. In his Defence, the 1st Defendant stated that the Plaintiffs and the rest of his family live on the suit land; that the transfer of the suit land was executed through trickery and fraud by the office of the local

chief and that he was tricked into signing a document under the influence of alcohol. It is the 1st Defendant's Defence that the entire process was unlawfully and fraudulently carried out.

6. In his Defence, the 2nd Defendant averred that he is the registered proprietor of the suit land; that the process of transferring the suit land in his name was done procedurally and that the parties to the Sale Agreement applied and were granted the consent of the Board on 25th June, 2009.

7. The 1st Plaintiff, PW1, informed the court that the 2nd Plaintiff is his son; that they live on the suit land with the other children and that they have lived on the land for many years.

8. According to PW1, although the suit land is registered in the name of the 2nd Defendant, she does not know how the said transfer was effected; that she was never involved when the consent of the Board was obtained and that she has buried two of her children on the suit land.

9. In cross-examination, PW1 stated that she knew about the sale of the suit land to the 2nd Defendant when the issue of compensation for the LAPSET project arose; that the family was not compensated for the land and that she still lives on the land with her entire family.

10. The 2nd Plaintiff, PW2, stated that he is the son of the 1st Plaintiff and the 1st Defendant; that he has been on the suit land since the year 1993 and that the land has always been in the name of the 1st Defendant.

11. It was the evidence of PW2 that he lives on the land with his parents, his sister and brothers and that when they went to ask for compensation of the land for LAPSET project, they discovered that the land had been transferred to the 1st Defendant. PW2 stated that none of the family members was summoned to attend to Board meetings before the sale of the land to the 1st Defendant was finalized.

12. The 1st Defendant, DW1, stated that the Plaintiffs are his wife and son respectively; that he has never sold the suit land to the 1st Defendant and that he never attended the Land Control Board. DW1 denied ever entering into a Sale Agreement for the sale of the suit land and that none of his family members or neighbours witnessed the signing of the Sale Agreement.

13. In cross-examination, DW1 stated that he was allocated the land by the Settlement Fund Trustees and that he was registered as the proprietor of the land because he is the head of the family; that the suit land belongs to the whole family and that he has never met the 2nd Defendant.

14. In cross-examination, DW1 denied ever signing the Sale Agreement. He also denied that the passport photographs annexed on the transfer documents were his.

15. According to DW1, he was in a bar drinking alcohol when the area Chief called him and informed him to sign a document which turned out to be an application for the consent of the Land Control Board; that it is the Chief who told him to sign the document and that he lives on the land with his family.

16. The Principal Chief, Lamu County, DW2, stated that he has known the 1st Defendant and his family for many years; that after the 1st Defendant retired from the Ministry of Works, he asked him to find for him someone to buy the suit land and that he is the one who introduced the 2nd Defendant to the 1st Defendant.

17. DW2 informed the court that in June, 2009, in the company of the 2nd Defendant, they met the 1st Defendant and that the 1st Defendant was given Kshs. 100,000; that after one week, the 2nd Defendant gave him a cheque of Kshs. 1,000,000 which was in favour of the 1st Defendant which he handed over to him and that the 1st Defendant was aware of the transaction in respect of the sale of the land. DW2 stated that the Plaintiffs do not live on the suit land but on another parcel of land which they own in Boraimani

area in Mokoe Location, Lamu.

18. In cross-examination, DW2 stated that he never involved the 1st Defendant's family in the transaction; that he was not involved in the obtaining of the consent of the Land Control Board and that he only witnessed the payment of the purchase price to the 1st Defendant by the 2nd Defendant.

19. The 2nd Defendant, DW3, stated that he is the registered proprietor of the suit land; that he purchased the suit land from the 1st Defendant and paid him the entire purchase price and that he paid the 1st Defendant Kshs. 100,000 in cash and Kshs. 1,000,000 by way for a banker's cheque.

20. It was the evidence of DW3 that he met the 1st Defendant in Lamu town and that he paid Kshs. 4,000 to the Settlement Fund Trustees for the processing of the Title Deed. DW3 stated that although he had not produced a Sale Agreement, they signed an agreement with the 1st Defendant.

Submissions:

21. The Plaintiffs' advocate submitted that there is no evidence to support the nature of the transaction that led to the transfer of the suit premises from the 1st Defendant to the 2nd Defendant; that the 2nd Defendant did not produce in evidence any Sale Agreement in respect to the suit land and that for any sale of land to be valid, there must be a memorandum in writing giving the names of the parties, the purchase price, the signatures of the parties and that of their witnesses.

22. Counsel submitted that the 2nd Defendant did not produce any evidence to show the payments he made to the 1st Defendant and that there was no consideration for the sale.

23. The Plaintiffs' counsel submitted that pursuant to Section 17(a) of the Land Control Act, the Plaintiffs were Interested Parties who should have attended the Board before the consent could be given; that the 1st Defendant denied signing the Transfer document and that the Plaintiffs are entitled to the suit land.

24. The 2nd Defendant's advocate submitted that "*he who alleges must prove*"; that there is no proof that the 1st Plaintiff is married to the 1st Defendant; that since the transfer of the suit land was done in the year 2009, the Land Registration Act, 2012 which provides for spousal consent does not apply.

25. Counsel submitted that the Plaintiffs did not proof the allegation of fraud as against the 2nd Defendant in the acquisition of the suit land; that the allegation of fraud as against the 2nd Defendant has no basis and that the suit should be dismissed.

Analysis and findings:

26. The Plaintiffs' claim is that being a wife and son respectively of the 1st Defendant, the 1st Defendant could not have legally transferred the suit land to the 2nd Defendant without their consent; that in any event, the 1st Defendant never sold the suit land to the 2nd Defendant and that the title document that the 2nd Defendant is holding in respect to a parcel of land known as Lamu/Hindi/Magogoni/682 was fraudulently obtained.

27. The 1st Defendant has supported the Plaintiffs claim by stating that he never sold to the 2nd Defendant the suit land; that he has never signed the Sale Agreement or a Transfer document and that he only signed the Application for the consent of the Land Control Board consent under the influence of alcohol.

28. The two issues that I am supposed to determine are:

a. Whether a spousal consent was required before the suit land could be legally transferred to the 2nd Defendant.

b. Whether the suit property was fraudulently registered in the name of the 2nd Defendant.

29. The 1st Plaintiff informed the court that she is the wife of the 1st Defendant, while the 2nd Plaintiff is their son. According to the 1st Plaintiff, she only discovered the suit land had been transferred to the 2nd Defendant when she made a follow up for the compensation of the suit land which had been acquired by the 3rd Defendant for the Lamu Port and Lamu-Southern Sudan Ethiopia Transport Corridor (LAPSSET) project.

30. The documents exhibited by the Plaintiffs show that indeed a letter of offer dated 15th April, 1999 was issued to the 1st Defendant. However, before the Title Deed could be issued, the 1st Defendant purportedly sold the land to the 2nd Defendant by way of a transfer dated 30th June, 2009.

31. The said Transfer was registered on 29th July, 2009 after the Land Control Board gave its consent on 25th June, 2009.

32. The Title Deed in respect to the suit property was then issued to the 2nd Defendant on 29th July, 2009 under the Registered Land Act, Cap 300.

33. The applicable law in respect to the suit property is the law that was applicable as at the time the Title Deed was registered in favour of 2nd Defendant, that is the Registered Land Act (*repealed*).

34. This legal positions finds grounding in the provisions of Section 23(3) (c) of the Interpretation and General Provisions Act which provides as follows:

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not affect a right, privilege, obligation, or liability acquired, accrued or incurred under a written law so repealed.”

35. In the case of ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 others (2012) eKLR***, the Supreme Court held as follows:

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relates only to matters of procedure or evidence or prima facie prospective, retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”

36. Section 162(1) of the Land Act supports the above holding of the court in relation to the applicable land statutes to any dispute. The section provides as follows:

“Unless the contrary is specifically provided in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

37. The applicable law in the instant case is the repealed Registered Land Act. The repealed Registered Land Act, unlike the Land Act, did not require spousal consent before a spouse could transfer a parcel of land to a third party.

38. The issue of whether the Plaintiffs gave their consent does not therefore arise, considering that the existing law then did not require that the spouse of the proprietor of the suit land must give consent before the land could be transferred to the 2nd Defendant.

39. Both the Plaintiffs and the 1st Defendant have alleged that the suit land was fraudulently transferred to the 2nd Defendant. According to the 1st Defendant, he has never signed the Sale Agreement or the

Transfer document in respect of the suit land. It was the evidence of the 1st Defendant that he was induced to sign the application for the consent of the Board by the area Chief while under the influence of alcohol.

40. On the other hand, the evidence of the area Chief was that he is the one who facilitated the sale of the suit land between the 1st Defendant and the 2nd Defendant.

41. The 2nd Defendant produced in evidence the application of the consent of the Land Control Board dated and signed on 24th June, 2009, the consent of the Board dated 25th June, 2009, the Transfer document dated and signed 30th June, 2009 and the Title Deed issued on 29th July, 2009.

42. Although the Transfer document in respect to the suit land shows that the 1st Defendant signed it on 30th June, 2009, it is not clear on the identity of the person who witnessed the 1st Defendant sign the document on the said date. Indeed, the 2nd Defendant did not call the person who witnessed the 1st Defendant sign the document to testify.

43. The evidence of the person who witnessed the 1st Defendant sign the Transfer document was critical considering that the 1st Defendant denied in his Defence that he signed the document. Indeed, in view of the fact that the 2nd Defendant did not produce any Sale Agreement between himself and the 1st Defendant, the evidential burden of showing that the 1st Defendant signed the Transfer document of 30th June, 2009 shifted to him.

44. The importance of calling the person who witnessed the 1st Defendant sign the Transfer is informed by the provisions of Section 3(3) of the Law of Contract Act which provides as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

a. the contract upon the suit is founded –

i. is in writing;

ii. is signed by all the parties; and

b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

45. The failure by the 2nd Defendant to prove that the 1st Defendant signed the Transfer document dated 30th June, 2009 renders the transaction invalid, null and void.

46. In any event, the 2nd Defendant did not prove that the consideration of Kshs. 1,100,000 was paid to the 1st Defendant. Although DW2 and DW3 stated that the 1st Defendant was paid Kshs. 100,000 in cash before he was paid Kshs. 1,000,000 by way of a banker's cheque, there is no document to show that he indeed acknowledged the said payment.

47. If indeed the 2nd Defendant paid the 1st Defendant Kshs. 1,000,000 by way of a banker's cheque, what was so difficult for him producing either a copy of the banker's cheque or his bank statement to show that the said cheque was cleared?

48. Having denied that he was paid any money for the land, it was upon the 2nd Defendant to produce proof to show that he indeed paid the 1st Defendant the purchase price of the suit land.

49. The analysis of the documents before me shows that there is no evidence to show that the 1st Defendant signed the Transfer document of 30th June, 2009 or that he received the purchase price. There

is also no evidence to show that he attended the meeting of the Land Control Board before the consent of the Board was issued a day after the signing of the Application. Indeed, the Minutes of the Board were not produced in evidence.

50. Consequently, and for the reasons I have given above, I find and hold that the suit land was fraudulently transferred to the 2nd Defendant, with the single aim of facilitating the 2nd Defendant to be compensated for the suit land by the 3rd Defendant.

51. For those reasons, I allow the Plaint dated 18th December, 2014 as follows:

a. An injunction be and is hereby issued restraining the 3rd Defendant from making any compensation payments to the 2nd Defendant; his agents, assigns or anybody else claiming under him;

b. A declaration be and is hereby issued that the transfer and registration of the suit premises in the name of the 2nd Defendant was unlawful, null and void.

c. The Title Deed issued to the 2nd Defendant for a parcel of land known as Lamu/Hindi/Magogoni/682 be cancelled and the Chief Land Registrar or his nominee to issue to the 2nd Defendant a Title Deed in his name.

d. The 3rd and 4th Defendants to pay to the 1st Defendant any compensation in respect to the suit land.

e. The 2nd Defendant to pay to the Plaintiffs the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE