



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 6 OF 2012

SALIM MOHAMMED MWAWENDE.....PLAINTIFF

VERSUS

1. EDGER GEARS INVESTMENT LTD

2. SHEARS (KENYA) LIMITED

3. REGISTRAR OF LANDS, KWALE

4. ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

1. The Plaintiffs have filed this suit against the Defendants jointly and severally for;

- a) **A declaration that the registration was obtained through fraud.**
- b) **Nullification, cancellation of the titles of Plot Numbers Kwale/Diani Complex/267 and Kwale/Diani Complex/269.**
- c) **Mandatory injunction do issue restraining the Defendants from interfering, selling, alienating or dealing with the parcels of land known as Kwale/Diani Complex/267 and Kwale/Diani Complex/269.**
- d) **Costs of the suit and interest.**

2. By a statement of defence and counterclaim dated 14th February, 2012, the 1st and 2nd Defendants deny all allegations in the plaint. In the counterclaim they aver that the Plaintiffs have trespassed on the suit properties and have threatened them with physical violence and chasing them from the suit properties in an effort to forcibly take possession of the same. In paragraph 18 of the statement of defence and counterclaim they have given the particulars of loss and damages as;

- a) **The 1st and 2nd Defendants have been deprived of the use of quiet enjoyment of their properties.**
- b) **The Plaintiffs have by themselves and/or through hooligans been chasing away the 1st and 2nd Defendants' employees or servants from the properties making it impossible for the 1st and 2nd Defendants to carry out any activities on their plot.**

3. The 1st and 2nd Defendants pray that the Plaintiffs suit be dismissed and that judgment be entered in the counterclaim for;

- a) **A declaration that the 1st and 2nd Defendants are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as Plot Numbers Kwale/Diani Complex/267 and Kwale/Diani Complex/269.**
- b) **A declaration that the Plaintiffs, whether by themselves or their servants or agents or otherwise howsoever are wrongfully in occupation of the 1st and 2nd Defendants properties and are accordingly trespassers on the same.**
- c) **A permanent injunction restraining the Plaintiffs whether by themselves, their servants or agents and/or otherwise howsoever from interfering with the 1st and 2nd Defendants' quiet possession of the above plots.**

d) Vacant possession of the 1st and 2nd Defendants' properties.

e) Costs of the suit.

4. P.W.1, Salim Mohammed Mwavende, the 1st Plaintiff testified on behalf of all the other Plaintiffs. He told the court that parcel numbers Kwale/Diani Complex/267 and Kwale/Diani Complex/269 hereinafter referred to as the suit properties are theirs. He and they have lived there for over 40 years.

He further told the court that five people among them a white man went and told them to stop ploughing the land. They asked the Plaintiffs to accompany them to Diani Police Station. After sometime, they were arrested and charged in Kwale Law Courts.

5. P.W.1 further told the court they do not have title deeds for the suit properties. That after demarcation they were not issued with title deeds. He said he has constructed a two roomed house made of makuti and mud. The said house was demolished while he was in custody.

He told the court the registration of the 1st and 2nd Defendants as owners of the suit properties was fraudulent. He told the court they were acquitted of the charges by the Kwale Court and that they have planted coconut and cashewnut trees.

6. The 1st and 2nd Defendants called two witnesses. D.W.1 Guidalberto Cuturi the director of the 1st and 2nd Defendants told the court that Kwale/Diani Complex/267 was acquired by the 1st Defendant from Swaleh Khalfani and Kwale/Diani Complex/269 was acquired by the 2nd Defendant from Jotham Ngugi Mungai. He told the court he did due diligence before buying the suit properties.

He said before the acquisition the suit properties were a bushy and had no houses or plants except a few coconut trees at the road. He obtained a certificate of official search from the Land Registry to confirm the suit properties were in the names of the allottees.

7. That in 2010, the Plaintiffs invaded the suit properties. The area District Officer summoned all the parties and upon seeing the 1st and 2nd Defendants' documents, he warned the Plaintiffs to keep off the suit properties.

The Plaintiffs continued to threaten the Defendants and they were arrested and charged in Kwale Law Courts vide a Criminal Case No. 218 of 2011. They were convicted and fined.

8. In support of their case, D.W.1 produced the following documents;

- 1) Official records from the Registrar of companies (CR12) exhibit D1 a, b.**
- 2) Certificate of Registration exhibit D2 a, b.**
- 3) Title deed for Kwale/Diani Complex/267 exhibit D4.**
- 4) Title deed for Kwale/Diani Complex/269 exhibit D4.**
- 5) Transfer forms for Kwale/Diani Complex/267 and 269 exhibits D5 and D6 respectively.**
- 6) Certified copy of Green card for Kwale/Diani Complex/267 and 269 exhibits D7 and D8 respectively.**
- 7) Report by the area District Officer exhibit D9.**
- 8) Proceedings of Criminal Case No. 281 of 2011, Kwale Law Courts exhibit D10.**
- 9) Certificate of official searches for Kwale/Diani Complex/267 and 269 exhibits D12 and D13 respectively.**

He prays that the Plaintiff's suit be dismissed and the counterclaim be allowed with costs.

9. D.W.2 Philip Makini, the Land Registrar, Kwale Lands Registry confirmed that the suit properties are registered in the 1st and 2nd Defendants respectively. He produced a true copy of the Green card for Kwale/Diani Complex/267 and 269 as exhibits D14 and D15 respectively.

10. The 3rd and 4th Defendants did not call any witnesses but tendered written submissions.

11. I have considered the pleadings, the evidence on record and the written submissions. The issues for determination are;

- i) Whether or not the Plaintiffs have a good case against the Defendants.**
- ii) Whether or not the 1st and 2nd Defendants' counterclaim has merit.**

iii) Who should bear costs?

12. It is the Plaintiff's case that the suit properties is their ancestral land. That they do not know how the 1st and 2nd Defendants came to be registered as the owners. Further that the said registration was obtained through fraud. They seek that the registration be cancelled and that new title be issued in their names as they are the bona fide owners of the two parcels.

13. They also claim that the 1st and 2nd Defendants have failed to exhibit letters of consent form the Land Control Board hence the original allottees had no good title to pass to the 1st and the 2nd Defendants.

They also claim the titles being held by the 1st and 2nd Defendants are subject to Section 28(a) of the Land Registration Act 2012 and that the court has powers under Section 80 of the Land Registration Act to make the orders sought by the Plaintiffs.

14. The 1st and 2nd Defendants on the other hand have produced exhibits showing how they acquired the suit properties. That by virtue of the Section 26 of the Land Registration act, a certificate of title once issued is conclusive evidence that the person named herein is the absolute and indefeasible owner.

15. When cross examined by Mr. Bwire, P.W.1 told the court; "My father never constructed a house." He also stated, "In 1990s the land was in my father's name." When cross examined by Mr. Makuto for the 3rd and 4th Defendants, P.W.1 told the court that he does not live on the land.

All these confirms the 1st and 2nd Defendants' position that the Plaintiffs invaded the land in 2010.

16. I have considered the report by area District Officer produced as exhibit D9 together with all the other Defendants' exhibits. I find that the 1st and 2nd Defendants are the registered proprietors of the suit properties. Section 26(1) of the Land Registration Act, 2012 provides;

"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 persons proved to be a party; or

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

17. I find that the Plaintiffs have failed to prove that the 1st and 2nd Defendants registration as the owners of the suit properties was obtained through fraud and/or misrepresentation.

In the plaint, the Plaintiffs failed to particularize the allegations of fraud. In the case of Vijay Morjana –versus- Nansingh Madhosigh Darbar And Another (2000) eKLR M. Keiwua J. (as he then was) held;

"It is well established that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleading. The acts alleged to be fraudulent must be set out, and then it should be stated that the acts were done fraudulently. It was also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

I am guided by the above authority.

18. I find that the Plaintiffs have failed to prove their case as against the Defendants on a balance of probabilities. The suit is dismissed with costs.

19. On the other hand, the 1st and 2nd Defendants have exhibited documents to prove ownership of the suit properties. The said exhibits have not been challenged. I find that the 1st and 2nd Defendants succeed in their counterclaim. I enter judgement in their favour as follows;

a) A declaration be and is hereby issued that the 1st and 2nd Defendants are entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as Plot Numbers Kwale/Diani Complex/267 and Kwale/Diani Complex/269.

b) A declaration be and is hereby issued that the Plaintiffs, whether by themselves or their servants or agents or otherwise howsoever are wrongfully in occupation of the 1st and 2nd Defendants properties and are accordingly trespassers on the same.

c) A permanent injunction be and is hereby issued restraining the Plaintiff's, whether by themselves, their servants or agents and/or otherwise howsoever from interfering with the 1st and 2nd Defendants' to quiet possession of the above plots.

d) Vacant possession of the 1st and 2nd Defendants' properties.

e) Costs of the suit and interest.

It is so ordered.

DATED and SIGNED at MOMBASA on the 22nd day of May 2018.

L. KOMINGOI

JUDGE

DATED, SIGNED and DELIVERED at MOMBASA on the 14th day of June 2018.

A. OMOLLO

JUDGE