



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTIONAL PETITION NO. 8 OF 2014

(ORIGINAL 69 OF 2014, MOMBASA)

IN THE MATTER OF:

THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(4)

AND

THE CONSTITUTION OF KENYA

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS

AND

CONSTITUTION UNDER ARTICLE 10, 27, 40, 50 & 75 OF THE CONSTITUTION OF KENYA

BETWEEN

**MARY MURIZA ONDATTO (Suing as the Legal Representative
of the Estate of LINUS JUMA ONDATTO.....PETITIONER**

VERSUS

THE DISTRICT LANDS ADJUDICATION AND SETTLEMENT

OFFICER, KILIFI.....1ST RESPONDENT

CHIEF REGISTRAR OF LANDS.....2ND RESPONDENT

SAID SHEIKH SAID.....3RD RESPONDENT

JUDGMENT

BACKGROUND

1. By this Petition dated 10th November 2014 initially filed at the High Court of Kenya at Mombasa, the Petitioner Mary Murizza Ondatto prays for:-

a) A declaration that the deletion of the name of Linus Juma Ondatto from the Adjudication record/register for the parcel of land known (as) Kawala “B” Adjudication Section Plot No. 118 and the insertion of the name of Said T Sheikh Said therein is unlawful and a nullity;

b) An order of injunction(to be) issued restraining the 2nd Respondent either by himself, his agents, employees and any other person on his behalf whomsoever and howsoever from issuing (a) title deed or any other proprietorship documents for the parcel of land known as Kawala ‘B’ Adjudication Section Plot No. 118 in the name of Said T. Sheikh Said;

c) A mandatory order directing the 1st Respondent to rectify the adjudication record/register for Kawala “B” Adjudication Section Plot No. 118 by deleting the name Said T Sheikh Said and the name Linus Juma Ondatto be inserted therein;

d) An order (to) issue compelling the 2nd Respondent to issue (a) title deed for Kawala “B” Adjudication Section Plot No. 118 in the name of Linus Juma Ondatto;

e) Any other order or award the Honourable Court may deem just and expedient to grant in the circumstances; and

f) Costs of and incidental of this Petition.

2. The Petitioner’s prayers are premised on her contention that sometime in the year 1993, he husband the late Linus Juma Ondatto bought the parcel of land in contention from one Rose Koli Mazeghe. The said property came to be known as Kawala “B” Plot No. 118 once the land adjudication process commenced in the area.

3. It is further the Petitioner’s contention that her husband passed away in 2004 and that sometime in 2011, her brother-in-law one Cyril Muhanji Ondatto unlawfully decided to have himself registered as the owner of the land when the Petitioner and her children were away in Canada. The Petitioner objected to the area Land Adjudication Officer and a decision was made that the name of her husband be inserted into the adjudication register. The Petitioner was therefore surprised when she came back in 2014 to find that the title was being processed in the name of the 3rd Respondent and hence this Petition.

4. In a Replying Affidavit filed on 20th February 2015, the said 3rd Respondent Said Tahir Sheikh Said entered into an agreement for sale of the land measuring approximately 4.3 acres with Cyril Muhanji Ondatto who was the vendor, for a consideration of Kshs 5,160,000/-. It is the 3rd Respondent’s case that he said Cyril Muhanji Ondatto had in turn purchased the land from one Rose Koli Maseghe on 12th January 2008 and that he was not aware that any party had lodged an objection with the adjudication officer in regard to the parcel of land.

5. The 3rd Respondent avers that at the time he purchased the land, he had no knowledge whatsoever of the Petitioner’s interest in the land as he was neither informed nor made aware of the Petitioner’s interest therein. It is therefore his case that he is a bonafide purchaser for value without notice of any impropriety on the title of the parcel of land he had purchased.

6. Despite being served, the District Land Adjudication and Settlement Officer Kilifi as well as the Chief Registrar of Lands named herein respectively as the 1st and 2nd Respondents neither entered appearance nor filed any response to the Petition. By the consent of the Petitioner and the 3rd Respondent, directions were given that the Petition proceeds by way of viva voce evidence.

THE PETITIONER’S CASE

7. At the trial herein, the Petitioner called two witnesses in support of her case and produced a number of documents which she urged the Court to rely on and to make a decision in her favour.

8. PW1- Mary Murizza Ondatto (the Petitioner herself) testified that she was married to the late Linus Juma Ondatto. She produced as Pex 2 a copy of the Marriage Certificate showing that they got married on 6th September 1986. PW1 also produced as Pex 1 a Certificate of Confirmation of Grant issued on 14th August 2014 indicating that she was the Administrator of the Estate of the said Linus Juma Ondatto who passed away on 10th October 2004.

9. PW1 testified that sometime in the year 1993, her husband had purchased the disputed parcel of land situated in Mariakani from one Rose Koli Masege. She produced the Original Sale Agreement executed on 5th November 1993 between her husband and the said Rose Koli Masege as Pex 5.

10. PW1 told the Court that later in 2004 while she was away in Canada, her husband passed away. Her brother-in law Cyril Ondatto then decided to take over the parcel of land on the basis that he was the 'caregiver' for the children of the Petitioner and her late husband.

11. In this regard, PW1 told the Court that the said Cyril Ondatto filed a matter before the area elders who on 24th February 2011 made a determination that the Petitioner's husband's name be deleted from the parcel of land and that the name of the said Cyril be inserted in the Adjudication Register. Thereafter, the Petitioner lodged an objection in Land Tribunal Case No. 265 of 2012 which then overturned the earlier decision and decided that the name of the Petitioner's husband would be the one to be retained in the Adjudication Register.

12. PW1 testified that later on after fencing the land and putting a caretaker thereon, she went to the Land Adjudication Officer where she discovered that the 3rd Respondent's name had been inserted instead of her husband's in the Register. According to PW1, she did not at any time sell the land to the 3rd Respondent and she could not therefore understand how the 3rd Respondent came to acquire interest in the disputed parcel of land.

13. On her part PW2-Rose Koli Masege- testified that the land in question originally belonged to her. She then sold it to Linus Juma-the Petitioner's husband in 1993. She told the Court that she was paid Kshs 300, 0000/- for the land in two instalments by the Petitioner's husband.

14. PW2 further told the Court that she came to know the Petitioner's brother-in-law Cyril Ondatto after the Petitioner's husband died. It was PW2's testimony that her husband disclosed to Cyril that she (PW2) had sold a parcel of land to the late Linus. Cyril then approached PW2 and told her that he (Cyril) needed her help to enable him take care of the land and in the interest Linus' Children.'

15. PW2 told the Court that thereafter, Cyril took to her a Sale Agreement which she signed in good faith. It was however her case that she did not sell the land twice as Cyril did not pay her any money for the land.

THE RESPONDENT'S CASE

16. Testifying on his own behalf, the 3rd Respondent Said Tahir Sheikh Said (DW3) told the Court that he is the owner of Plot No. 118 Kawala B, in Mariakani. He told the Court that he had purchased the land in 2010 from Cyril Ondatto who told him the land belonged to him. DW3 told the Court that Cyril went to see him with a Surveyor who confirmed that the land existed.

17. According to DW3, he then took Cyril to an Advocate who prepared a Sale Agreement which they executed on 10th November 2010. He produced a copy of the Sale Agreement as Dex 1. It was his testimony that he did not know how Cyril came to own the land. Cyril took to him the documentation and he went ahead to pay for the land.

18. DW3 further told the Court that he did not attend any proceedings before the Land Disputes Tribunal and further that he had only seen the Petitioner in Court when these proceedings begun. DW3 denied that he has violated the Petitioner's Constitutional rights in any manner as to warrant this Petition or at all.

DETERMINATION

19. I have considered the Petitioner's testimony that of her witness and the evidence upon which they rely. I have equally considered the 3rd Respondent's testimony and the evidence placed before me. In addition, I have taken into account the written submissions and authorities placed at my disposal by the Learned Advocates for the parties.

20. The proceedings before me have been brought by the Petitioner in her capacity as the Legal representative and Administrator of the Estate of the late Linus Juma Ondatto. The Petitioner produced a copy of the Certificate of Confirmation of Grant of Administration Intestate issued by the High Court of Kenya at Mombasa on 14th August 2014(PEX 1) in confirmation of the same.

21. From a copy of the Certificate of Marriage produced herein (Pex 2), it is clear that the Petitioner and the deceased got married on 6th September 1986. As it were, it is apparent that there were some strains in the relationship and the Petitioner and her three children at some point in time migrated to Canada while the deceased retreated to his homeland in Bunyala Busia Kenya. It is indeed apparent that when the deceased passed away at the age of 53 years on 10th October 2004 at Kileleshwa in Nairobi, the Petitioner was away in Canana and never attended the burial in Bunyala.

22. From the proceedings of the Kilifi Land Adjudication Committee Case No. 106/2011 produced herein as Pex 6, it is apparent that the brothers of the deceased, led by one Cyril Muhanji Ondatto, were not very pleased with the Petitioner's marriage and her subsequent relocation to what they considered far away Canada in the absence of his brother.

23. Whatever the case, I was not left in doubt that during happier times, and more particularly on 5th November 1993, the late Linus Juma Ondatto entered into a Sale Agreement with PW2- Rose Koli Maseghe, for the purchase of an unregistered parcel of land which later upon adjudication came to be known as Plot No. 118 Kawala "B" Adjudication Section.

24. PW2 told this Court that she sold the land which initially belonged to her to the Petitioner's husband for Kshs 300,000/=. She was paid this money by the late Linus in two instalments. While I will return to the testimony of PW2 at a later stage, I must state that I had no reason not to believe her testimony that she sold the land to the late Linus. She repeated the same position clearly and without contradiction during her cross-examination by Mr. Mohammed, the Learned Counsel for the 3rd Respondent.

25. It was also apparent to me that the proceedings in Land Adjudication Committee Case No. 106 of 2011 aforesaid (Pex 6) were prompted by the Petitioner's unexpected return into the country. A perusal of the testimony of the said Cyril Muhanji Ondatto brings out what transpired as follows:-

"When my sister in-law Mary went to Canada (in) 1994, she never get (sic) in touch with my brother or me. My brother became sick and died in the year 2003. About two years ago my sister in-law came back from Canada and she had not informed me. She only called me afterwards and told me she was heading to Bunyala where my brother was buried. She never spends the night there but she left for Nairobi. She tried to communicate with my other brother but he refused because of what she had done to us. She then came to Mombasa and met with General Kibwana.

Kibwana told her that she cannot stay with her (sic) and she left. Last year she came again and enquired from me if Linus had any property. I told her she is the one in good position to tell me for my brother was her husband.....

We as Ondatto's family does not (sic) recorgnize Mary but we recorgnise my brother's kids if they ever come. Our clan elders are the only ones who have (a) mandate to decide about our property sharing according to our custom. My family understands that Mary is already married, to another person in Canada....."

26. Having heard the dispute in which the Petitioner herein was absent but was duly represented by one Marie Antoinette Gikonyo, the Committee rendered its decision on 23rd February 2011 as follows in the penultimate paragraph:-

“This land dispute involves a brother and his sister-in-law. According to the Plaintiffs evidence, this land was bought in partnership with his brother. He also claims he does not want to be awarded this land for himself but as a garden for his late brother’s children including the defendant’s children. The Committee have (sic) seen that Plaintiff has more right to be registered this land than the defendant.

JUDGMENT

Case No. 106 allowed. Names of the defendant Mary Muriza Ondatto to be deleted from the register and those of Cyril Muhanji Ondatto are entered.

Right of Appeal of 14 days granted with effect from today 23rd February 2011.....”

27. From the material placed before me it is evident that the Petitioner opted to appeal the decision. By a letter dated 4th May 2011, addressed to the Demarcation Officer, Kawala ‘B’ Adjudication and copied to her, the District Land Adjudication/Settlement Officer advised that she should wait for the matter to reach the Objection Stage so that she can raise her concerns in regard to the decision.

28. The Objection No. 265 of 2012 was eventually heard on 18th September 2012 in the presence of the Petitioner’s brother-in-law Cyril M. Ondatto. The Panel then proceeded to render its decision thus:-

“In view of the above stated arguments, this Court is of the opinion that the balance of truth tilts in favour of the Plaintiff but there is a question as to whether she was still the legal wife to the late Ondatto which dilutes the award.

DECISION

The objection is partly allowed. The name of the Respondent be deleted and in its place be inserted the names of Juma Linus Ondatto so that succession could be sorted legally.”

29. Section 29 of the Land Adjudication Act (Cap 284 of Laws of Kenya) sets out the process and procedure that any person who is aggrieved by the determination of such an objection may take. It provides as follows:-

“29(1) Any person who is aggrieved by the determination of an objection under Section 26 of this Act may within sixty days after the date of determination appeal against the determination to the Minister by:-

a) Delivering to the Minister an appeal in writing specifying the grounds of appeal;

b) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereto as he thinks just and the order shall be final.

30. From the material placed before me, there was no evidence that the said Cyril Muhanji Ondatto, who this Court was informed is also now deceased, appealed the determination within the said 60 days or at all. In the absence of any appeal therefrom the land adjudication officer is required under Section 26A of the Act to forward to the Director of Land Adjudication a final adjudication register for transmission to the Chief Land Registrar for purposes of registration.

31. It would however appear that that is not what transpired herein. According to the Petitioner, when she came back from Canada in 2014 and checked with the Land Adjudication Office, she found to her shock and dismay that they were processing title in the name of the 3rd Respondent. Indeed during his cross-

examination herein by Mrs Oballa, Learned Counsel for the Petitioner, the 3rd Respondent confirmed that indeed title for the disputed parcel of land had been issued in his name even though he was yet to pick it.

32. According to the 3rd Respondent, he is a bona fide purchaser for value without notice having purchased the suit property from the said Cyril Muhanji Ondatto vide a Sale Agreement executed on 10th November 2010.

33. In the Ugandan Case of *Katende –vs- Haridar & Company Ltd(2008)2EA 173*, the Court of Appeal stated as follows:-

“For the purposes of this appeal, it suffices to describe a bonafide purchaser as a person who honestly intends to purchase the property offered for a sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine,...(he) must prove that:-

a) He holds a certificate of title; b) He purchased the property in good faith;

c) He had no knowledge of the fraud;

d) He purchased for valuable consideration;

e) The Vendors had apparent valid title;

f) He purchased without notice of any fraud; and

g) He was not a party to any fraud.

34. In his testimony before the Court and in the Replying Affidavit he filed on 20th February 2015, the 3rd Respondent repeatedly asserts that he relied on the information given to him by the late Cyril Muhanji Ondatto and a Surveyor who went with Cyril to his office. It was his case that Cyril had earlier bought the property from Rose Koli Maseghe (PW2).

35. In her own testimony before this Court, PW2 narrated how she came to sign the so-called Sale Agreement between herself and Cyril. In an Affidavit PW2 swore on 2nd April 2015 (annexed to the Petitioner’s Supplementary Affidavit filed herein on 23rd April 2015) She narrates how she came to sign the said Agreement at paragraphs 4 to 7 thereof as follows:-

“4. That in the year 2008, one Cyril Muhanji Ondatto hereinafter “Cyril” approached me, that he was handling the affairs of the late “LINUS’ who had passed away before the suit property could be adjudicated and registered in his name.

5. The said “Cyril” presented to me that in order for the property to benefit the family of his late brother, he had to legitimize the sale to appear as if it had been between myself and Cyril.

6. Satisfied by the explanation, I signed the agreement since it basically contained the same information and the same price, as the actual agreement between myself and the late Linus in 1993.

7. I have been summoned by the Independent Ethics & Anti-Corruption Commission over the alleged sale as between myself and Cyril and I here categorically state here once again

i) No money exchanged hands between myself and Cyril

ii) I only signed the sale agreement of 2008 thinking I was assisting the estate & the dependants of the late ‘LINUS’ as I was made to believe.

iii) It is incorrect for Cyril and his cronies to allege that I sold him any property. I DID NOT.

iv) I did not pass any proprietary title to “Cyril”.

36. PW2 stated basically the same things when he testified before this Court and as I stated earlier I found little reason to doubt her narration of the events that led to the signing of the “agreement” between herself and the said Cyril.

37. As it were, it was the said “Sale Agreement” between PW2 and Cyril that the 3rd Respondent relied on to purchase the suit property. It is however evident to me that if the 3rd Respondent had carried out any due diligence, he would not have purchased the suit property from Cyril. I say so because from the material placed before me, Cyril’s name could not have been in the Adjudication Register that the 3rd Respondent produced herein as Dexh 2.

38. This is so because by then Cyril was yet to file Land Dispute Case No. 106 of 2011 seeking to have his name inserted in the Register. That case was heard on 17th February 2011 and the panel rendered its decision six days later on 23rd February 2011. As we had seen earlier it is that decision that directed that the Petitioner’s name be deleted from the Register and ordered that Cyril’s name be entered therein.

39. It therefore goes without saying that Cyril Muhaji Ondatto had no right, interest and/or title capable of being sold and/or transferred to the 3rd Respondent on 3rd November 2010 when he entered into a Sale Agreement with the 3rd Respondent.

40. In my respectful view, the conduct of the 3rd Respondent was not that of a diligent bona fide purchaser as described in the case of *Katende –vs- Haridar & Company Limited (supra)*. When he testified before me, it was evident that the 3rd Respondent is not an illiterate person. He testified before this Court in English and told me he was in travel business. He definitely knew or ought to have known how to go about a land transaction; particularly where no title deed had been issued and he was expending a huge sum of money in the transaction. In any event the 3rd Respondent had an Advocate who prepared and witnessed the Sale Agreement. If he did not understand the process of land adjudication as he told this Court, at least he had the benefit of legal counsel.

41. In the circumstances of this case, it is evident to me that the suit property rightfully belongs to the Petitioner. Having fully complied with the requirements under the Land Adjudication Act, I am unable to see on what basis the 1st and 2nd Respondents proceeded to process title in the name of the 3rd Respondent.

42. Accordingly I hereby allow the Petition and make the following orders:-

a) A declaration is hereby issued that the deletion of the name Linus Juma Ondatto from the Adjudication Record/Register for the parcel of land known as Kawala “B” Adjudication Section Plot No. 118 and the insertion of the name of Said T Sheikh Said therein is unlawfull and a nullity;

b) A mandatory order is hereby issued directing the 1st Respondent to rectify the Adjudication Record/Register for Kawala “B” Adjudication Section Plot No. 118 by deleting the name Said T Sheikh Said and the name Linus Juma Ondatto be inserted therein.

c) An order is hereby issued compelling the 2nd Respondent to cancel the title issued in the name, Said T Sheikh Said and instead rectify the Register and issue a title deed for Kawala “B” the name of Linus Juma Ondatto.

d) The Petitioner shall have the costs of this Petition.

43. Arising from the foregoing, I did not find merit in the Plaintiffs application dated 10th May 2017. The same is dismissed with costs to the Defendants/Respondents.

Dated, signed and delivered at Malindi this 21st day of September, 2018.

J.O. OLOLA

JUDGE