



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 203 OF 2015

MOHAMED SHABIR KASSAM PLAINTIFF

VERSUS

1. HAFEEZ ABDUL MAJEED

ALIAS ADBIL HAFEEZ ALIAS

ABDUL MAJID ALIAS ABDUL MAJEED

2. ALBERT KUBAI MBOGORI

3. COCO APARTMENT LIMITED

4. REGISTRAR OF TITLES MOMBASA DEFENDANTS

JUDGMENT

1. The Plaintiff, Mohamed Shabir Kassam instituted this suit by a Plaint dated 2nd September, 2015. The Plaintiff is seeking for judgment against the Defendants for:

a. A declaration that the transfer of the suit property by the 1st Defendant to the 2nd Defendant and the transfer of the Suit Property from the 2nd Defendat to the 3rd Defendant, (hereinafter “the transfers of the suit property”) and all other transactions related to the said transfers of the suit property subsequent to the transfer to the Plaintiff are fraudulent illegal and therefore null and void for all intents and purposes.

b. A declaration that the Plaintiff is the legal and the indefeasible proprietor to the suit property.

c. An order directing at the 4th Defendant to delete and/or cancel all the transfers of the suit property and their subsequent registrations thereto after the transfer and registration of the suit property into the Plaintiffs name and restore the title back to the name of the Plaintiff and/or transfer the same to the Plaintiff.

d. A temporary injunction restraining the 1st, 2nd and 3rd Defendants, or their agents or servants and/or any another person from selling, transferring, disposing, changing, leasing or in any manner dealing with the suit property.

e. A permanent injunction restraining the 1st, 2nd, and 3rd Defendants or their agents or servants and any other person from selling, transferring, disposing, changing, leasing or in any manner dealing with the suit property.

f. An order for costs of the suit in favour of the Plaintiff.

g. Any other relief that this court may deem appropriate.

2. The Plaintiff’s case is that at all material times to this suit, he was the legal, equitable and registered proprietor as lessee from the Government of Kenya, vide a grant, of parcel of land known as **LR. NUMBER N.1/3234** comprised in a grant registered as **CR. NUMBER 15906/1**. That the 1st Defendant is the one who originally held the suit property as a beneficial proprietor and duly transferred the leasehold

interest of the suit property to the Plaintiff. The Plaintiff avers that the 1st Defendant and one Abdul Waheed are partners in an entity known as East African Construction Company. The Plaintiff states that on 28th August, 2007, the 1st Defendant and the said Abdul Waheed entered into an agreement with the Plaintiff for the sale of the suit property to the Plaintiff on terms inter alia that the consideration for the sale was KShs.3,000,000/= with its mode of payment being that the said amount should be offset against fuel supplied to the 1st Defendant by the Plaintiff.

3. It is the Plaintiff's contention that he duly settled the said amount in full by delivering the equivalent fuel quantity and the 1st Defendant and the said Abdul Waheed acknowledged the said settlement vide a letter dated 30th January 2008. That upon completion of payment of the consideration, the transfer of the suit property was not effected in favour of the Plaintiff because the 1st Defendant claimed that the title document of the suit property was lost and that he was initiating the process of being issued with a new one. According to the Plaintiff, upon completing payment of the consideration, a constructive trust arose as between the 1st Defendant and the Plaintiff as the 1st Defendant was under a duty to transfer the suit property to the Plaintiff.

4. The Plaintiff avers that he took possession of the suit property and upon obtaining requisite approvals from relevant authorities with the assistance of the 1st Defendant effected developments on the suit property. The Plaintiff states that the 1st Defendant obtained a provisional certificate of title that was gazetted under Gazette Notice Number 8436 of 14th August 2009 and the same was registered against the title on 24th July, 2009 and the 1st Defendant effected transfer in favour of the Plaintiff which was registered on 7th June 2010, hence the Plaintiff became the registered proprietor of the property. The Plaintiff further states that upon effecting the aforesaid transfer, the 1st Defendant in collusion with officers working under the 4th Defendant fraudulently caused the disappearance of the deed file from the Lands Registry. That the 1st Defendant then filed **Nairobi High Court Succession Cause No.410 of 2011**, in which he represented himself as beneficiary to his father's estate and that the suit property was part of the estate. That the 1st Defendant concealed the fact that he had already transferred his beneficial interest in the suit property to the Plaintiff and proceeded to fraudulently transfer the same to himself and vide a deed of indemnity dated 20th September 2012 and in further collusion with the 4th Defendant caused a new deed file to be constructed with first entry thereon being a registration of the letters of administration obtained and subsequently a registration vide an assent of purported transfer of the suit property to himself before transferring it to the 2nd Defendant who in turn transferred it to the 3rd Defendant. The Plaintiff has listed particulars of fraud, negligence, carelessness, abuse of office, and breach of duty of care variously attributed to the Defendants as a result of which the Plaintiff avers has deprived him of his rights as the legal and genuine proprietor.

5. The Defendants were served with summons to enter appearance but did not enter appearance or file defence and upon request by the Plaintiff, interlocutory judgment was entered against the Defendants on 27th January 2017. The suit proceeded for formal proof on 21st March, 2018 when the Plaintiff testified and did not call any witness.

6. The Plaintiff relied on his witness statement dated 3rd September 2015 in which he reiterated the contents of the Plaintiff's statement. The Plaintiff also produced the entire list of documents dated 3rd September, 2015 and filed on 8th September, 2015, including the original title document. The Plaintiff's advocates also filed written submissions and cited decided cases.

7. The court has carefully considered the evidence on record and the submissions made. The issue that calls for determination is whether the Plaintiff has proved his case to the required standard and whether he is entitled to the prayers sought.

8. The Plaintiff has tendered documentary evidence that show that he purchased the suit property. He produced the sale agreement dated 28th August 2007 between him and the 1st Defendant and another. The Plaintiff also produced receipts showing payment of the purchase price in the mode agreed between the parties as well as a letter dated 29th June 2009 in which the 1st Defendant acknowledges receipt of the purchase price in full and allowing the Plaintiff to take possession of the suit property pending registration of transfer in his favour.

9. The Defendant having acknowledged receipt of the full purchase price and having allowed the Plaintiff to take possession had no right to again process title in his favour in whatever manner and purport to transfer it to the 2nd Defendant.

10. It is the finding of this court that indeed there was a valid agreement between the Plaintiff and the 1st Defendant. The Plaintiff's evidence remains uncontroverted. The Defendants actions on the land already sold to the Plaintiff were unlawful. I find the evidence on record sufficient to prove that the Plaintiff is the rightful owner of the suit property and is therefore entitled to the reliefs sought in the Plaintiff's prayer.

11. The upshot of this is that this court is satisfied that the Plaintiff has proved his case against the Defendants on a balance of probabilities. Accordingly, I enter judgment for the Plaintiff as follows:

a) A declaration that the transfer of LR. NUMBER MN/1/3234 comprised in a grant registered as CR Number 15906/1 by the 1st Defendant to the 2nd Defendant and the transfer from the 2nd Defendant to the 3rd Defendant and all other transactions related to the said transfers of the suit property subsequent to the transfer to the plaintiff are fraudulent, illegal and therefore null and void for all intents and purposes.

b) A declaration that the plaintiff is the legal and indefeasible proprietor to the suit property.

c) An order directing at the 4th Defendant to delete and/or cancel all the transfers of the suit property and their subsequent registrations thereto after the transfer and registration of the suit property into the plaintiff's name and restore the title back to the name of the plaintiff and/or transfers the same to the plaintiff.

d) A permanent injunction restraining the 1st, 2nd and 3rd defendants, or their agents or servants and or any other person

form selling, transferring, disposing, changing, leasing or in any manner dealing with the suit property.

e) The plaintiff will have costs of the suit.

DATED, DELIVERED and SIGNED at MOMBASA this 8TH day of October, 2018

C. YANO

JUDGE