



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**CIVIL SUIT NO. 607 OF 2011**

**EVANS MUTHEMBA CHEGE.....PLAINTIFF**

**-VERSUS-**

**1. TWIGA LODGE LTD**

**2. GRACE GACHEKE MWAI**

**3. CATHERINE WANGUI NGENGI MUIGAI as administrators of the**

**Estate of Isaiah Mwai Mathenge.....DEFENDANTS**

**JUDGEMENT**

1. The plaintiff Evans Muthemba Chege sued the three defendants vide his plaint dated 23<sup>rd</sup> November 2011 claiming that he is the registered owner of land title No Mombasa/M. S/Tiwi Beach/62. That the defendants without any colour of right trespassed on to this land and began demolishing existing buildings and digging a well. Reasons wherefore the plaintiff prays to this Court to grant him the following reliefs:

**(a) An order of permanent injunction to restrain the defendants by themselves or their agents from trespassing on parcel of land M. S/Tiwi Beach/62.**

**(b) Costs of the suit.**

**(c) Any other relief.**

2. The defendants filed a joint statement of defence on 7<sup>th</sup> December 2011 which was later amended on 19<sup>th</sup> September 2012 to include a counter – claim. The defendants denied the plaintiff’s claim in toto instead accusing the plaintiff of fraudulently acquiring the suit property. By way of counter – claim they joined the Land Registrar and Attorney General to their suit. They seek judgement in the counter-claim against the defendants in the following terms:

**(i) The plaintiff’s suit be dismissed.**

**(ii) A declaration that the late Isaiah Mwai Mathenge is the lawful owner of the property known as Mombasa/M. S/Tiwi Beach/62.**

**(iii) A declaration that the 1<sup>st</sup> defendant (by way of counterclaim) fraudulently and/or illegally obtained the Certificate of Lease dated 22<sup>nd</sup> August, 2006 and hence it is null and void.**

**(iv) An order directing the 2<sup>nd</sup> Defendant, the Land Registrar, Kwale District to cancel and/or revoke the Certificate of Lease dated 22<sup>nd</sup> August, 2006 and any memorial or entry in the register which is in the name of the 1<sup>st</sup> defendant.**

**(v) Costs of the suit and counterclaim with interest at Court rates.**

3. The parties then presented oral evidence with the plaintiff calling 4 witnesses. The plaintiff testified as PW 1 on 3<sup>rd</sup> June 2015 stating that he is a businessman living in Shanzu. That he brought this suit against the defendants for interfering with the suit land which he bought from Mr Mwai Mathenge on 13<sup>th</sup> October 2005. PW 1 stated that he paid a deposit of 10% equivalent to Kshs 1.5 million in cash on 13.10.2005,

on 29.10.2005 he paid Kshs 6 Million and on 10.11.2005 he paid the balance of Kshs 7.5 Million at the Vendor's office situated along Jomo Kenyatta Avenue. The copy of certificate of title was produced as Pex 1 and he marked copy of the sale agreement as MFI P 2. An official search dated 8.11.2011 was also produced as Pex 3 and transfer form as MFI P 4.

4. PW 1 continued in evidence that he obtained a green card bearing his names which was produced as Pex 6 but later when he made a search on 22.1.2013, the records were indicated as missing. PW 1 stated that it is not true his claim is not genuine. He urged the Court to grant him the orders and any structures put on the land be removed.

5. In cross – examination PW 1 stated that he knew Mr Isaiah Mathenge who was a former P. C in the Coast region in 1972 and that they were friends. He did not know Mathenge's children. That when PW 1 purchased the property, the vendor was sickly but was talking. That he did not know the vendor had come from the ICU at the time of signing the transfer form. He was not issued with any receipt to acknowledge payment of the purchase price. He did not have his bank statements because Trust Bank closed down. He registered the transfer on 22.8.2006 which was after the death of the Vendor. He did not know whether documents sent for examination were returned. PW 1 did not obtain consent of the head lessor before the transfer. That he discovered the defendants were trespassing on the land in 2011. When he bought the land, there were some old buildings on it. That the 1<sup>st</sup> defendant's land is plot No 63. In re – examination, the witness said Mr Katana advocate was alive when he witnessed the documents. That he surrendered his documents to the lands registry and they got registered.

6. Nancy Njoki Ngui testified as PW 2. She worked as the plaintiff's house help from November 2004. PW 2 stated that she accompanied the plaintiff to Red Brick Hotel where they found two people. That she was asked to go out of the office. PW 2 continued that on 10<sup>th</sup> November 2005 she carried some luggage and went along with PW 1 to the same hotel but she stayed in the car. That she knew she was carrying money. During cross – examination, PW 2 said she knew she was carrying money after overhearing the conversation between PW 1 and his wife. She did not see any money exchange hands.

7. AMBROSE MGENYI MWALUMA started by saying he is a good friend of the plaintiff. That on request of the plaintiff, he accompanied him on 13.10.2005 to Red Brick Hotel where he was introduced to Mr Mathenge and the advocate. The witness said he saw the plaintiff pay Kshs 1.5 Million. PW 3 again accompanied the plaintiff on 29.10.2005 and saw Kshs 6 Million counted in cash and paid. He said he also witnessed the payment of the Kshs 7.5 Million. That the plaintiff was running a hardware store in Mwembe.

8. In cross – examination, PW 3 said he knew the plaintiff in the 70's. That he did not see the ID card of Isaiah Mathenge to confirm the identity of the person paid. That he saw PW 2 on 29.10.2005 and 10.11.2005. He was told the Vendor was selling land that is at Tiwi. No family member of Mathenge was present.

9. PW 4 Emanuel Kenga gave his evidence on 28.7.2015. He is a retired police officer and forensic document examiner of more than 25 years. That he received documents from Kenzi advocate for examination without the known signatures of the deceased and was informed the known signatures were with CIP Alex Mwangera. Mr Mwangera told him those documents were lost thus he was unable to examine the said documents. The documents sent to PW 4 were Transfer of lease in original form and agreement for sale. He produced the two as Pex 2 & 4 respectively.

10. In cross – examination, PW 4 stated he was not aware the defendants had disputed his examination of the documents. That the documents he has produced were given to him by the plaintiff's advocate. That he got in touch with Mr Mwangera but he was not made aware of the order of 7<sup>th</sup> September 2012. That in Pex 2, the colouring of the photos of Mathenge & Evans are different. That document at page 50 is a copy of Pex 2 and document at page 51 – 52 is also a copy of Pex 4. In re – examination, the witness said when he received the documents, there was an order dated 14.5.2012. He has never received the known signatures. This marked close of plaintiff's case.

11. The defendants opened their case on 19.7.2017. Mr James Mwai Mathenge – DW 1 introduced himself as a director of the 1<sup>st</sup> defendant and also a son to the 2<sup>nd</sup> defendant. He stated that the 2<sup>nd</sup> defendant is 83 years old while the 3<sup>rd</sup> defendant is his sister. DW 1 said he is also one of the administrators of the estate of Mwai Mathenge – deceased and produced a certificate of grant issued to them on 29<sup>th</sup> November 2006 as Dex 1. It is DW 1's case that the suit property belongs to his late father and because they could not trace the title, they reported loss and were issued with a police abstract produced as Dex 2.

12. Mr Mathenge continued in his evidence that his father bought the suit property in 1975 and the search done on 11<sup>th</sup> October 2011 (Dex 4) shows the property in his father's name. He denied the claim made by the plaintiff. He continued that in the year 2005, his father was very ill, bedridden thus could not transact any business. DW 1 produced a bill from Mombasa hospital dated 19.10.2005 which indicated that Mwai Mathenge had been in the ICU from 16.10.2005 – 23.10.2005. That the patient's condition worsened and was transferred to Nairobi Hospital on 23.10.2005 where he was hospitalised until 12.1.2006 when he passed on. The witness stated that he had hospital bills to show his father was hospitalised in Nairobi as at 10.11.2005 when it is alleged he signed the transfer forms (Dex 6 & 7). DW 1 maintained that their advocate has always been Mwangi Njenga.

13. DW 1 stated further that he engaged a forensic expert to examine the signatures on the transfer form and the sale agreement. The examiner made a report on 15.7.2014. That before the report, they got a Court order and exchanged correspondences which he produced as Dex 9 (a) – (e). That the forensic examiner found the signatures did not belong to his father. He urged the Court to revoke the plaintiff's title as it is not genuine. The defendant says they have always been in possession of the suit property with the beach front used as a campsite by the 1<sup>st</sup> defendant and backside is used as a poultry farm. That from 2005 to the date of filing this suit, no demand to vacate had been made to them. He prayed for dismissal of the plaintiff's suit with costs and judgment entered in their favour as prayed in the counter – claim.

14. In cross – examination, DW 1 said the property has not been distributed. That he did not have the sale agreement his father used to purchase the land. That they reported the loss of title after the filing of this suit in preparation to defend themselves. That the official search done in 2008 shows there was a prohibitory order issued in HCC No. 1568 of 1977. That according to their documents, his father was admitted on 16<sup>th</sup> October 2005. That plot 63 is registered in the name of Twiga Lodge. That the structures, one house was built by the

original owner. That the bill estimate is a print out with no stamp from Mombasa hospital. In re – examination, the witness said he has not been shown documents that the prohibitory order was lifted.

15. CIP Alex Mwangera testified as DW 2 on 21<sup>st</sup> May 2018. He has been a document examiner since 2007. That on 5.7.2012 their office received some exhibits for examination forwarded from Mwangi Njenga & Co advocates. The documents comprised A1 & A2 being those with questioned signatures as well as B1, B2 & B3 being the known signatures. His duty was to ascertain if the signatures in documents marked A1 & 2 and B1, B2 & B3 were made by the same person. After examination, he prepared a report dated 15.7.2014 which he produced as Dex 11.

16. In cross – examination, DW 2 stated that all the documents were forwarded to them by Mwangi Njenga & Co. advocates. DW 2 admitted that the signatures of someone can differ due to illness, state of mind or intoxication. Further that one person can have different signatures out of choice. In re – examination, DW 2 said that from the documents forwarded, B1 – B3 were made by the same person but in comparison to A1 – A2 they were different. This marked the close of the defence case.

17. Parties then agreed to exchange written submissions. The plaintiff filed his on 20<sup>th</sup> July 2018 and the defendant filed theirs on 8<sup>th</sup> August 2018. The plaintiff began by giving a summary of the evidence adduced by both parties. In his analysis the plaintiff submitted that the defendants did not establish fraud against him. That the Registrar Kwale was not called to give evidence on whether the plaintiff's title was fraudulent or genuine. He cited the case of **Gitway Investment Ltd vs Tajmal Ltd & Another (2006) E A 76** to support this submission. That since the issue of fraud was raised by the defence, the burden of proof was upon their shoulders. The plaintiff in submitting on the authenticity of his title quoted the provisions of section 25 and 26 of the Land Registration Act. The plaintiff also submitted that there was no evidence of service of summons to enter appearance on the parties introduced in the counter – claim. In conclusion, the plaintiff urged the Court to grant the reliefs sought.

18. The defendants also gave a summary of the evidence adduced. In their analysis, the defendants submitted that there was no evidence that the prohibitory order registered on the title on 17.9.1981 prohibiting any transfer or charge was ever lifted and put reliance on the provisions of section 31 of the RLA (repealed) thus urging the Court not to uphold the transfer in favour of the plaintiff. The defendants also submitted that the sale agreement dated 13.10.2005 were forgeries, that the plaintiff did not demonstrate capacity to pay the purchase price. Further that the defendants have demonstrated the signatures on the transfer & sale were forged. They put reliance on the holding in **Ali Mohamed Sunkar vs Diamond Trust Bank Ltd (2011) eKLR** “*that an expert report can only be challenged through a counter expert report.*” The defendants also submitted that the registration undertaken by the plaintiff after the death of the deceased owner amounts to intermeddling with the estate of the deceased. The defendants urged the Court to dismiss the plaintiff's case with costs.

19. Having summarised and analysed the evidence and the submissions, it is not in dispute that the suit property was in the name of deceased Mwai Mathenge as at 2005. It is also not in dispute that the plaintiff is holding a title to the same in his name.

The questions I frame for my determination are two:

*(1) Whether or not the plaintiff's title is valid and therefore he is entitled to orders of vacant possession as prayed in the plaint*

OR

*(2) Whether or not the defendants have established that the plaintiff fraudulently acquired the title thus the reliefs sought in the counter – claim ought to be granted.*

*(3) Who bears the costs of the suit.*

20. Section 3 (3) of the Law of Contract Act Cap 23 requires that a disposition of an interest in land can only be passed if the same is reduced into writing signed by the parties and their signatures witnessed. The sale agreement dated 13<sup>th</sup> October 2005 produced as Pex 2 on the face of it is signed by the Vendor & the Purchaser and their signatures witnessed by Katana Kalama advocate. The plaintiff also produced a transfer of lease as Pex 4 signed by the Vendor and his signature witnessed by the same advocate. It is these two documents that form the born of contention in this suit.

21. The defendants aver that the signatures of Isaiah Mwai Mathenge named as Vendor appearing on the two documents were forged. They gave two reasons for this; first that the deceased was too ill to transact any business at the time and secondly that the plaintiff has not demonstrated that he had capacity to pay the purchase price if at all any money exchanged hands. In support of the first assertion the defendants produced hospital bills showing the deceased was admitted into I.C.U on 16<sup>th</sup> October 2005 at Mombasa Hospital before being transferred to Nairobi hospital on 23<sup>rd</sup> October 2005 where it is said he stayed until he died. The other limb of evidence is the forensic examiner's report produced as Dex 11 which made a finding that the known signatures on the documents provided was not signed by the same person in the questioned signatures.

22. The expert (PW 4) called by the plaintiff said he was not able to examine the signatures on the transfer form and the sale agreement because no known signatures were provided. His evidence did not in my view add any value to the plaintiff's case. PW 2 and PW 3 did not state that they saw the deceased sign the two documents. Like PW 4, PW 2's role was also minimal. All she did was accompany the plaintiff to the hotel “*carrying the money*” and left the plaintiff together with the person he was meeting in that office at Red Brick hotel. From her evidence, she was not even introduced to that person or told the purpose of their visit.

23. The plaintiff has submitted that it was the burden of the defendants to establish that there was fraud. According to the plaintiff, he felt the defendants did not discharge this burden as there was no evidence showing his certificate of title was forged. The provisions of section 24 of the Land Registration Act states that a title deed is taken as conclusive evidence of ownership unless the title is proved to have been acquired

by fraud or misrepresentation to which the registered owner is proved to be a party to. Section 26 requires the process of obtaining the title to be lawful. It is thus not enough to state my title is valid when it is not properly acquired. In the case before me, the defendant has laid evidence to show that the deceased was hospitalised from 16<sup>th</sup> October 2005 until his demise in January 2006.

24. If the Court proceeds on the premise that the deceased indeed executed the sale agreement on 13<sup>th</sup> October 2005 as pleaded, then the burden remains on the plaintiff to demonstrate that he indeed paid the balance of the purchase to the deceased. His evidence is that he did so on 29<sup>th</sup> October 2005 and 10<sup>th</sup> November 2005. He did not however produce evidence of acknowledgement of these monies by the deceased. Instead he relies on the evidence of PW 2 and PW 3. PW 2 stated she suspected she was carrying money having eaves dropped on the conversation of PW 1 and his wife. But she cannot ascertain whether it is the deceased who received this money. She also cannot ascertain how much money it was she was carrying. PW 3 on his part testified that the money was counted in his presence in both instances. PW 3 did not state that the deceased signed anything to acknowledge receipt of the money. Even PW 3 himself did not sign any document to confirm he witnessed the transaction between the plaintiff and the deceased. It is the plaintiff who had introduced him to the deceased. He did not see any identification of the deceased to confirm that it was indeed Isaiah Mwai Mathenge they were dealing with. If he knew Mr Mathenge – deceased was a retired P. C who then was a public figure why then did he need to be introduced to him? I find the evidence of PW 3 in the absence of signed acknowledgment of the monies does not sound credible.

25. The terms of the said agreement at clause (8) also provided that the completion was to take place at the offices of Katana Kalama advocate. If Katana was alive during this transaction, the plaintiff did not clear the air why payments were being made at Red Brick hotel instead of Katana's office. The plaintiff did not state when the deceased provided all the completion documents stated under clause 8. He also did not provide certified copies of the same which he could have accessed on request from the lands registry. Therefore I safely conclude that even if the signatures on the agreement belonged to the deceased, the plaintiff has not satisfied this Court that he performed his part of the bargain by proving "*paying the purchase price*" in full.

26. The issue of forgery/fraud raised by defendants has been aptly explained in the forensic examiner's report. DW 2 said the known signatures provided did not match those in the questioned documents. The plaintiff did not in his evidence state that he requested for provision of the known signatures and the same were denied. The submission that the fraud could only be proved by the evidence of the Land Registrar Kwale is without a foundation as a Land Registrar is not a handwriting expert to investigate signatures. There was also an order registered on the title prohibiting any transfer. There is no evidence the same had been lifted at the time of registration of the title into the plaintiff's name. Once it was raised, the plaintiff had the obligation of rebutting it by producing a certificate of search he did before entering into the agreement to purchase the land.

27. Finally on irregularity of registration of the plaintiff's title, the plaintiff conceded that he was aware the Vendor died in January 2006. Yet he proceeded to present a document for transfer six months after the death i.e. on 22.8.2006 without disclosing the information to the Land Registrar. Once the proprietor died, the estate vested in his personal representatives. A similar holding was made by E. M. Githinji J in the case of **Grace Waruiru Ngigi & Another vs Ngugi Nguri & 4 Others (2002) eKLR** at page 2. In conclusion, my answer is in the negative on the question whether the plaintiff's title is valid. Consequently I find that he is not entitled to the orders sought in the plaint with his suit being hereby dismissed as not proved.

28. The resultant consequence of the finding that the plaintiff's title was not regularly acquired is for the said title to be cancelled and the property revert back to the name of Isaiah Mwai Mathenge – deceased. Further the orders prayed in the counter – claim dated 19<sup>th</sup> September 2012 succeeds and I hereby enter judgement in favour of the defendants in the said terms with costs of the suit awarded to them.

**Dated, signed & delivered at Mombasa this 22<sup>nd</sup> November 2018**

**A. OMOLLO**

**JUDGE**