



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO 145 OF 2014

TIMA FAROUK ATHMAN.....PLAINTIFF

VERSUS

1. FAIZA AHMED SALIM

2. MBARAK SALIM SAID

3. MAYSUN SAID SALIM

4. MAYYAN SAID SALIM

5. SOFIA ABED SAID.....DEFENDANTS

JUDGMENT

1. The Plaintiff Tima Faruok Athman filed this claim vide the Plaint dated 11th June 2014 and later amended on 30th April 2015 praying for judgment against the 5 Defendants jointly and severally that:

a) A finding be made that the plaintiff is the lawful owner of PLOT NO.430/1/MN situate at Mtopanga and PLOT NO.15135/1/MN also situated at Mtopanga.

b) A finding that the subsequent sale of the suit premises was unlawful and/or illegal and an order of revocation of the sale and or title be made.

c) An order that the two said parcels be registered in the Plaintiff's name.

d) Mesne profits from the years 2008 for the first contract and from 2011 for the second contract.

e) Costs of the suit.

2. The Plaintiff pleaded that he purchased the two plots from Faiza Ahmed Salim sued as the 1st Defendant for **PLOT NO.430/1/MN**, where he bought a portion measuring 30ft by 40ft and Plot No.15135 a portion measuring 40ft by 40 ft. She pleaded that she hired the 1st Defendant to construct for him a house on the 1st plot at a cost of Kshs.1,200,000 and paid the money. That the houses were constructed. Later in January 2013, she learnt the 1st Defendant had sold both houses to the 2nd, 3rd and 4th Defendants yet the 1st defendant knew he had nothing to sell. It is the plaintiff's case that the actions of the Defendants are unlawful, illegal and unprocedural as it is her who is entitled to possession and ownership of the suit properties. She therefore urged the court allow her claim.

3. The 1st Defendant neither entered appearance nor filed a defence. The 2nd Defendant filed a notice of Appointment on 1st July 2014. There are two replying affidavits sworn in favour of the 2nd Defendant but no defence was filed. The 3rd and 4th Defendants also did not enter appearance. The 5th Defendant filed a notice of appointment and statement of defence on 17th July 2015.

4. After the close of pleadings, the Plaintiff and the 5th Defendant gave evidence of one witness each. The 1st, 2nd, 3rd and 4th Defendants did not adduce any evidences. The Plaintiff produced the two sale agreements which she says was executed between her and the 1st Defendant. The 1st agreement is dated 5th May 2008. On its face, the agreement states that it is for construction of a house consisting of 5 rooms on a portion of **PLOT NO.430/1/MN**, in the agreement, the 1st Defendant is referred to as the developer and that the 1st Defendant is

the beneficial owner of a portion measuring 30 by 40 ft of this plot.

5. The 2nd Agreement dated 6th December 2011 between the Plaintiff and 1st Defendant is an agreement for sale of a portion measuring 40 by 40 feet comprised in subdivision **NO.15135** (Original No.10404/10 Section I MM). The purchase price was agreed at Kshs.2,300,00 with a deposit of Kshs.1,500,000 paid on execution of the agreement.

6. The 5th Defendant on her part stated that she learnt about the sale of the **PLOT NO.15135** from the 3rd Defendant. That she did a search before purchasing this plot and it showed it was registered in the names of the 3rd and 4th Defendants. She presented a list of documents dated 31st July 2015. The list contained inter alia;

- i. A sale agreement dated 2/7/2012 between 1st Defendant and 3rd and 4th Defendants.**
- ii. Copy of transfer to the joint names of 3rd and 4th Defendants dated 6/12/12.**
- iii. Copy of certificate of title for PLOT NO. 15135 giving the history of transfers registered on the title.**
- iv. Memorandum of registration dated 6/10/13 in favour of the 5th Defendant**
- v. Stamp duty pay-in slip dated 18/7/2012.**

7. The question this court is tasked to determine is simple i.e. whether or not the plaintiff is entitled to the two properties as a purchaser. In respect to both properties, there is evidence that the Plaintiff entered into some agreement with the 1st Defendant, the 1st agreement over **PLOT NO.430/I/MN** refers to the 1st Defendant as a beneficial owner of a portion measuring 30 by 40 feet. No description is made as to who is the registered owner. The money paid to the 1st Defendant is described as purely for construction of a house consisting of 5 rooms. There is no mention made of purchase of the plot.

8. The Plaintiff confirmed that the house was built and he received rents from the 1st Defendant until 1st December 2012 when the 1st Defendant started giving him problems. That he used to receive rent of Kshs.14,000 per month although he did not show evidence of any such payment received. Since no evidence has been tendered by the 1st and 2nd defendant to contradict the Plaintiff's evidence, it is my finding that on the basis of the construction agreement dated 5th May 2008, the Plaintiff is entitled to ownership of the house standing on a portion measuring 30 by 40 feet on **PLOT NO.430/I/MN**. However he is now entitled to the land as he did not satisfy this court that he purchased the said plot. The Plaintiff is thus declared as an owner of the house without land on **PLOT NO. 430/I/MN**.

9. Is the plaintiff entitled to ownership of Plot No. 15135? The second agreement dated 6th December 2011 is for sale of portion measuring 40 by 40 feet. Completion date was set at 30 days from the date of execution. A deposit of Kshs.1,500,000 was acknowledged on signing date (6/12/11). At clause 4, the balance was made payable within 4 months from date of agreement. The 1st Defendant is described as legal and beneficial owner. In her evidence, the Plaintiff stated that she paid the whole purchase price. Other than the payment of Kshs.1,500,000 she did not present any document to demonstrate the payment of the balance.

10. From the copy of title annexed by the 5th Defendant the transfer to 1st Defendant was registered on 23/7/2012. The title has 5 entries and none of them includes an encumbrance registered against the title by the Plaintiff. The 5th Defendant testified that she was shown a copy of this title by the 3rd and 4th Defendants and it bore their names. Secondly, she also did a search which confirmed there was no restriction on the title. Consequently she entered into the transaction with 3rd and 4th Defendants, paid the purchase price and had the title registered in her name on 16th December 2012. It was for the Plaintiff to prove that the 5th Defendant acquired her registration through fraud or misrepresentation (as set out in section 26 of the Land Registration Act). The Plaintiff only alluded that the matter was pending investigations at Urban Police so the 5th Defendant ought to have known. This contradicts the Plaintiff's own evidence that she learnt of the sale in January 2013 where upon she made a report to the police. It appears that the investigations were commenced after the 3rd and 4th Defendants had bought the land from the 1st Defendant. It is unconscionable in the circumstances to make the 5th Defendant carry the cross of the 1st, 3rd and 4th Defendants, where the Plaintiff had not taken steps to register her interest on the title to stop any dealings pending the outcome of nay investigations if at all.

11. I find that the Plaintiff was indolent and only entitled to a refund of monies paid to the 1st Defendant but not ownership of the suit property No. 15135 hold that. Consequently, I hold that the order seeking to revoke the registration of the 3rd and 4th Defendants and subsequently the 5th Defendant does not lie. The same is dismissed with costs.

12. In conclusion, I make the following findings as regards the prayers sought in the Plaintiff and

- a) The Plaintiff be and hereby declared as the owner of a house without land built on portion of Plot No. 430/I/MN measuring 30 by 40 feet.**
- b) The Plaintiff is not entitled to ownership of sub division No.15135 (Original No.10404/10/I/MN)**
- c) Prayer (d) of the amended Plaintiff is dismissed**
- d) Mesne profits are awarded from 1st January 2013 until possession is obtained recoverable from the 1st Defendant in respect of**

hose without land on **Plot No.430/I/MN.**

e) Each party to bear their cost of the suit.

Judgment delivered, dated and signed at Mombasa this 13th day of December 2018

A. OMOLLO

JUDGE