



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.57 OF 2016 (FAST TRACK)

MONIKA HERTA ELFRIEDE BEHRMANN.....PLAINTIFF

VERSUS

MUBIA HOLDINGS LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit by way of a plaint dated 6th April 2016 and filed on even date. The plaintiff is seeking for judgment against the defendant for orders directing the Land Registrar to:

- a. **Cancel the registration of Mubia Holdings Limited as the owner of Plot Number 533 Section III Mainland North, C. R. Number 14272.**
- b. **Register the plaintiff, Monika Herta Elfriede Behrmann as owner of Plot Number 533 Section III Mainland North, C.R. Number 14272.**
- c. **Issue a certificate of title to the plaintiff over plot No. 533 Section III Mainland North, C.R. Number 14272.**
- d. **Costs of the suit.**
- e. **Any other remedy and/or relief that the court may deem fit and just to grant.**

2. The plaintiff's case is that on 23rd January 1994, she purchased Plot Number 533 Section III Mainland North, C.R. No.14272 from a company known as Mubia Holdings Limited for a sum of 20,000 Deutch Marks, equivalent to Kshs.2, 000,000.00. The plaintiff avers that she duly signed an agreement of sale and a transfer for the suit properly both in triplicate, but both the agreement for sale and transfer are in possession, custody and control of Mubia Holdings Limited which has refused to give them to the plaintiff.

The plaintiff further avers that she conducted an official search on 20th November, 1996 and the certificate of postal search showed that as at 20th November, 1996 the suit property was registered in the name of Mubia Holdings Limited.

3. It was the plaintiff's contention that on 23rd January, 2014, one Caroline Mwelu Mwandiku through proxies, namely Tonny Kamande and Patrick Kuria Mwangi incorporated a new company with the same name as Mubia Holdings Limited and thereafter fraudulently obtained a provisional title over the suit

property in the name of the new company. The particulars of fraud are enumerated in the plaint.

4. The plaintiff avers that upon noticing the defendant's fraud, she lodged a complaint with the National Land Commission and the Commission, after hearing the parties reached a determination inter alia, that the plaintiff is the rightful claimant of the suit property and directed that the chief Land Registrar to issue a title to the plaintiff over the suit property. It was the plaintiff's contention that when she presented the decision of the National Land Commission to the Registrar of Lands in Mombasa, the Registrar refused to issue a Certificate of Title to her on the grounds that the plaintiff should first obtain an order from the court directing the Land Registrar to do as claimed in the plaint.

5. The defendant was served with summons to enter appearance but failed to do so. Upon request by the plaintiff, interlocutory judgment was entered against the defendant in default of appearance on 16th May 2016. The matter proceeded for formal proof on 14th February 2017 wherein the plaintiff gave evidence and did not call any witness.

6. In her testimony, the plaintiff stated that she purchased the suit property from one Anne Wairagu who was trading as Mubia Holdings Limited and she produced the handwritten agreement dated 23rd January 1994. According to the plaintiff, the seller refused to transfer the suit property to her. The plaintiff stated that when she carried out a search on the suit property the certificate of official search which was also produced as an exhibit showed that the same property was registered in the name of Mubia Holdings Limited. The plaintiff further stated that sometime in August 2013, she sold the said property to one Caroline Mwelu Mwandiku who made a down payment of Kshs.2,000,000.00 out of the agreed purchase price of Kshs.23, 000,000.00. According to the plaintiff, the said Caroline Mwelu Mwandiku did not pay the balance of the purchase price as agreed or at all, but instead fraudulently incorporated a company known as Mubia Holdings Limited, now the defendant and obtained a Provisional Certificate of Title in the defendant's name. The particulars of fraud attributed to the defendant by the plaintiff are:

- a. Incorporating a new company called Mubia Holdings Limited in 2014 and obtaining a Provisional Certificate of Title over the suit property.**
- b. Obtaining a provisional Certificate of Title over the suit property without any colour of right.**
- c. Incorporating a new company with a name similar to the company which was already in existence in 1996 so as to claim ownership of the suit property.**
- d. Obtaining a Provisional Certificate of Title over the suit property which had been sold to the plaintiff in 1994.**

7. The plaintiff stated that upon discovering the fraud perpetuated by the defendant, she lodged a complaint with the National Land Commission who, after deliberation, determined that the suit property rightly belonged to the plaintiff. In its decision which was produced as an exhibit, the National Land Commission arrived at a conclusion that the provisional title in the defendant's name was obtained fraudulently and went ahead to revoke it and directed the Chief Land Registrar to issue title over the property in the plaintiff's name. After the close of the plaintiff's case, the plaintiff's counsel filed written submissions which mainly summarized the plaintiff's case as pleaded and the evidence relied on.

8. The court has carefully considered the evidence on record, the submissions made and the relevant laws and make the following findings. The plaintiff is seeking the cancellation of the registration of the defendant as owner of plot No.533 Section 14272 and to have her registered as the owner thereof. The plaintiff is also seeking to be issued with a Certificate of Title over the said property. It is evident that the defendant herein was served with the summons to enter appearance. The defendant, however failed to enter appearance. The suit is therefore undefended. However, even if the suit is not defended, the plaintiff still had the duty to formally prove her case on the balance of probabilities as required by law.

9. The Certificate of Postal Search which was produced by the plaintiff as an exhibit shows that the

defendant is the registered owner of the suit property. Section 26 (1) of the Land Registration Act provides as follows:

“the Certificate of Title issued by the Registrar upon registration, 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 the proprietor shall not be subject to challenge, except –

b. On the ground of fraud or misrepresentation to which the person is proved to be a party

b. Where the Certificate of Title has been acquired illegally unprocedurally or through a corrupt scheme.

Section 80 (1) of the Land Registration Act provides:-

80 (1) “Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

10. The plaintiff testified that she purchased the suit property from one Ann Wairagu who was trading as Mubia Holdings Limited in 1994. The property was not transferred to the plaintiff. The plaintiff further testified that sometime in August 2013, she sold the suit property to one Caroline Mweu Mwandiku for Kshs.23,000,000.00 but the sale was never completed as the purchaser only paid deposit of kshs.2,000,000.00 and failed to pay the outstanding balance of the purchase price within the time agreed or at all. According to the plaintiff, the said Caroline Mweu Mwandiku, instead of paying the balance of the purchase price, fraudulently incorporated a new company with the same name as Mubia Holdings Limited and thereafter obtained a provisional title over the suit property in the new name, now the defendant herein. According to the plaintiff, the defendant at all times had knowledge of the fraud and substantially contributed to it by obtaining a Provisional Certificate of Title over the suit property. The defendant knew that the suit property belonged to the plaintiff as even an attempt was made by Caroline Mweu Mwandiku to purchase it from the plaintiff. The said Caroline Mweu Mwandiku was instrumental in incorporating the defendant and even securing a provisional certificate of title in its name.

11. I am satisfied that the plaintiff has proved her case on a balance of probabilities. The plaintiff has proved further that the case falls within the exceptions provided under section 26 (1) of the Land Registration Act and the court should invoke the provisions of section 80 (1) of the Land Registration Act to correct the anomaly. I am persuaded that the defendant fraudulently obtained the Provisional Certificate of Title. As I have stated above, the suit was not defended. The court has the powers under section 80 of the Land Registration Act to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. The plaintiff having proved her case on a balance of probabilities, is entitled to the prayers sought in the plaint.

12. Consequently, I hereby enter judgment for the plaintiff against the defendant in the following terms:

a. The Land Registrar to cancel the registration of Mubia Holding Limited as the owner of Plot Number 533 Section III Mainland North, C.R. Number 14272.

b. The Land Registrar to register the plaintiff, Monika Herta Elfriede Behrmann as owner of Plot Number 533 Section III Mainland North, C.R. Number 14272.

c. The Land Registrar to issue a certificate of Title to the plaintiff, Monika Herta Elfriede Behrmann over Plot Number 533 Section III Mainland North, C.R. Number 14272.

d. The plaintiff shall have costs of the suit.

13. Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF APRIL 2017

C. YANO

JUDGE