



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

E.L.C. CASE NO. 82 OF 2013

PETER KIM BAKER.....1ST PLAINTIFF

ASHOK BALKRISHNA2ND PLAINTIFF

VERSUS

SIDI KATANA BONGO1ST DEFENDANT

BAHATI KATANA BONGO2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. In the amended Complaint dated 23rd September, 2013, the Plaintiffs averred that they are the registered proprietors of a Parcel of land known as Kilifi/Mtondia/1113 and that the 1st and 3rd Plaintiffs are the Registered proprietors of a neighbouring Plot known as Kilifi/Mtondia/114 which they purchased from Kenga Katana Bongo and Gaone Katana Bongo.
2. Plaintiffs have averred that they constructed a permanent workshop on the said plots and assumed peaceful possession thereof; that they have been restrained by the Defendants to put up a perimeter fence on the said plots and that the Defendants have put on the Suit Plots temporary structures.
3. The Plaintiffs have prayed for a permanent injunction and for an order seeking for the eviction of the Defendants from the two (2) suit Plots.
4. In their Defence and counter-claim, the Defendants averred that Katana Bongo Masha has never sold the suit properties as alleged by the Plaintiffs; that if such a sale exists, then it was done fraudulently and that the Plaintiffs have been entering into agreements with the Defendants' siblings without their consent.
5. In the counter-claim, the Defendants have averred that they are the ones entitled to the suit plots and not the Plaintiffs.
6. The Defendants have prayed for a permanent injunction to issue restraining the Plaintiffs from interfering with the two suit properties and for a declaration that the purported sale was illegal.

The Plaintiff's Case:

7. The 1st Plaintiff, PW.1, informed the Court that he purchased parcel of land Number

Kilifi/Mtondia/1113 together with the other two Plaintiffs in the year 2009 from the then registered owner, Katana Bongo Masha. PW.1 stated that the purchase price for the said land was **Kshs.7,857,780.00** which was paid through the vendor's Advocates and that the Title Deed was subsequently issued to them.

8. It was the evidence of PW.1 that later on, him together with the 2nd Plaintiff, purchased the adjacent plot, i.e. Plot Number 1114, for a sum of Kshs.6,000,000.00 from Kenga Katana Bongo and Gaone Katana Bongo vide an agreement dated 15th September, 2010; that it is the firm of Omondi Waweru & Co. Advocates which handled the transaction on behalf of the vendors and that after paying the full purchase price, a Title Deed was issued in their favour on 5th May, 2011.

9. According to PW.1, the family of Katana Bongo Masha was occupying a portion of Plot 1114 and that they were supposed to relocate to an alternative place after receipt of the purchase price.

10. PW.1 informed the court that he put up a workshop on Plot No.1113 and that when he tried to fence the plots, the Defendants became hostile to them.

11. It was the evidence of PW.1 that they bought Plot No.1113 from Katana Bongo Masha and Plot Number 1114 from Kenga Katana and Gaone Katana, the sons of Mzee Masha and that all the payments were made through their Advocate.

12. In cross-examination, PW.1 stated that he was introduced to the vendors by one Joseph Katana; that Mzee Masha was offering 6 acres for sale at Kshs.1,500,000.00 per acre and that the land turned out to be 5.6 acres and not 6 acres.

13. It was the evidence of PW.1 that he never met the Defendants during the transaction and that he was not aware if the suit properties belonged to the entire family.

14. PW.2 informed the court that he is involved in Estate Agency; that Plot Number 86 at the Mtondia Settlement Scheme was allocated to Kenga Katana Bongo and was divided into three plots, that is, plot numbers 1112, 1113 and 1114 and that he was involved in the sale of plot numbers 1113 and 1114.

15. According to PW.2, Mzee Masha offered to sell plot number 1113 in the year 2009 and that when the 1st Plaintiff showed interest in the plot, he accompanied him to the vendor's Advocate's office who processed the transaction.

16. It was the evidence of PW.2 that he attended the meeting of the Board in which the sale of Plot number 1113 to the 1st Plaintiff was approved. It was the evidence of PW.2 that Mzee Masha together with his sons also attended the Board Meeting.

17. According to PW.2, the surviving wife of Mzee Masha, the 1st Defendant, authorized her son, the 2nd Defendant, to collect part of the purchase price through his office.

18. It was the evidence of PW.2 that Mzee Masha was still alive during the sale of Plot number 1114 to the Plaintiffs.

19. After the purchase of Plot number 113 and handing over possession of the land to the Plaintiff's, PW.2 informed the court that he was also involved in the sale of Plot Number 1114 to the Plaintiffs.

20. PW.2 informed the court that it was the sons of Mzee Masha who were selling plot Number 1114 and that they are the ones who were the registered proprietors of the said land.

21. According to PW.2, the 1st and 2nd Plaintiffs paid the purchase price of Kshs.6,000,000.00 to the vendor's Advocate and that the sale was approved by the Land Control Board.

22. According to PW.2, he accompanied the Vendors to the firm of Omondi Waweru & Company Advocate where “some” payments were effected.

23. PW.2 stated that the family of Mzee Masha was to relocate from Plot number 1114 to another land owned by Mzee Masha in Mnarani where he was buried.

24. According to PW.2, although Mzee Masha was to pay him a commission for facilitating the sale, he was never paid.

25. PW.2 informed the court that by the time Plot numbers 1113 and 1114 were being sold to the Plaintiffs, Mzee Masha had already sold plot number 1112; that it is Kenga Katana Bongo and Gaone Katana who sold plot number 1114 and that they were already living at Mnarani. However, Mzee Masha’s wife, together with her son and daughter in-law were still in occupation of plot number 1114.

26. Although the family of Mzee Masha is big, PW.2 informed the court that they all agreed to move to Mnarani after the sale of Plot number 1114.

27. According to PW.2, he is the one who effected payment to the family of Mzee Masha and they signed payments vouchers.

28. In cross-examination, PW.2 stated that the 1st Defendant is the wife of Mzee Masha; that Mzee Masha was very old and that he died in the year 2009. PW.2 however disputed the fact that Mzee died in June, 2009.

29. According to PW.2, all the family members of Mzee Masha were aware that they were to receive a portion of the purchase price; that wherever they needed money, they used to go to him; that he used to give them money which they promised to re-pay and that the cheques he received from the firm of Omondi Waweru & Co. Advocates were for his commission.

30. PW.2 informed the court that Kenga Katana Bongo informed him that the firm of Omondi Waweru had paid him the purchase price and that the Death Certificate in respect to Mzee Masha must have been tailored for this suit.

The Defence case:

31. The 2nd Defendant DW.1 informed the court that the whole land belonging to Katana Bongo Masha measured 13 acres; that he divided the land amongst his two wives; that each wife had 6 acres and that he sold one (1) acre to a Mr. Said Hamisi Mohammed.

32. While he was waiting for the issuance of a Title Deed in respect to the land that his mother was occupying, PW.1 stated that the 1st Plaintiff informed him that he had purchased the same.

33. According to DW.1, he has always lived on the land with his family and mother and that when the Plaintiffs purported to purchase the said land, his father had already died.

34. Other than the one acre that was sold by his father to Mr. Said, DW.1 stated that his father never sold the rest of the land; that it is his step brother and PW.2 who sold the land and that in any event, they could only sell their mother’s there.

35. DW.1 stated that when him together his mother visited the offices of Omondi Waweru & Co. Advocates, he was told by the Advocate to sign a document which he declined.

36. According to DW.1, the money he received from PW.2 who in respect to the one (1) acre of land that was sold to Mr. Hamisi and that he received the said money on behalf of his father.

37. DW.1 stated that by the time it is alleged that his father signed the transfer documents for plot Number 1113, his father was already dead; that his father was never paid the alleged Kshs.7,000,000/= and that the Plaintiffs were conned by his step brothers.

38. In cross-examination, DW.1 stated that Plot Number 1112 measures 4 acres and that it belongs to Mr. Hamisi; that he has no problem with his step-brothers selling the remaining 3 acres belonging to their mother's where and that the other six (6) acres should remain in the name of his late father.

39. DW.2 informed the court that he is "**a human rights activist**" and a "**freelance photographer**;" that he is aware that the Defendants live on Plot numbers 113 and 114 Mtondia Settlement Scheme and that Mzee Masha had two wives: Jumwa Katana Bongo and Sidi Katana Bongo.

40. According to DW.2, Mzee Masah divided his land into two portions; that when Mzee Masha died, Kenga Katana Bongo and his son Kazungu Kenga , through PW.2, sold the land without the consent of Sidi and her children; that the Plaintiffs were conned by PW.2 and that Sidi and her children were never involved in the transaction at all.

41. Out of the six (6) acres that belonged to their mother, it was the evidence of DW.2 that the elder son of the first wife, Katana Kenga, with his brother took three (3) acres out of their mother's share and sold them to Mr. Hamisi. After that, they took the remaining three (3) acres together with the other remaining 6 acres which belonged to the 1st Defendant and sold them to the Plaintiffs.

42. The 1st Defendant, DW.3, informed the court that she has lived on the Suit Property with her family for many years; that the late Mzee Masha was her husband; that the first wife of Mzee Masha had twelve children and that Kenga Katana Bongo and Gaone Katana Bongo are the children of the first wife.

43. According to DW.3, the late husband sold one (1) acre of the 13 acres of land he had to Mr. Said Hamisi; that she is not aware that her husband sold 9 acres to the Plaintiffs and that when she visited the law firm of Omondi Waweru & co. advocates, she was told to sign a document which she refused.

44. It was the evidence of DW.3 that the Plaintiffs came into the picture after the death of her husband and that she has never agreed to vacate the suit land.

45. DW. 3 denied having been paid Kshs.900,000/=to vacate the suit land and that she has never consented to the sale of the land.

46. Other than the one (1) acre of land that her husband sold, DW.3 informed the court that the sons of her co-wife sold the portion that had been allocated to her by her late husband.

Submissions:

47. The Plaintiff's Advocate submitted that the Plaintiffs purchased Plot number Kilifi/Mtondia/113 from the late Katana Bongo Masha vide an agreement dated 1st September, 2009 for Kshs.7,857,780/=; that they subsequently purchased Plot number 1114 from Katana Bongo and Gaone Katana Bongo vide an agreement dated 15th September, 2010 and that they paid the full purchase price for the two plots.

48. Counsel submitted that his clients are the registered proprietors of the suit properties; that if the Defendants have any claim, they should direct it to their advocates and that the Plaintiffs took possession of Plot Number 1113 without any resistance from the Defendants.

49. The Plaintiffs Counsel submitted that the Plaintiffs exercised due diligence before purchasing the suit properties by carrying out searches; that the Plaintiffs hold titles deeds in respect to the two plots and that the Defendants do not have any interest in the suit land.

50. Counsel submitted that the Defendants did not adduce any evidence to prove that the Plaintiffs were

involved in any fraudulent dealings while acquiring the suit properties.

51. On his part, the Defendants Counsel submitted that the Plaintiffs had no authority to buy the suit land without the consent of the Defendants; that it is the Defendants who are in occupation of the suit land and that the sale of the suit land to the Plaintiffs was illegal.

52. Counsel submitted that even if the sale was legal, the said sale still fails because there was no passing of the consideration; that PW.2 received more than Kshs.700,000/= from the firm of Omondi Waweru and Company Advocates and that the said agent had no mandate to pay to the vendors the purchase price by way of petty cash vouchers.

Analysis and findings:

53. After going through the pleadings and the evidence on record, the issues for determination in this matter are as follows:-

(a) Whether there was any valid sale between the Plaintiffs and the late Katana bongo Masha in respect to parcel of land known as Kilifi/Mtondia/1113.

(b) Whether there was any valid sale in respect to parcel of land known as Kilifi/Mtondia/1114.

(c) Whether the consent of the Defendants was required before the sale of the suit properties.

54. The documents produced in evidence shows that parcel of land known as Kilifi/Mtondia/1113 was registered in favour of the late Katana Bongo Masha (Mzee Masha) on 13th March, 2009 and a Title Deed was issued to him on the same day.

55. According to the title Deed; the land measures 2.12 Ha (5.3 acres). The said plot arose after subdivision of Plot Number 86 which gave rise to the other two plots being Plot numbers 1112 measuring 1.62 Ha (approximately 4.05 acres) and Plot number 1114 measuring 1.22 Ha (approximately 3.05 acres).

56. The Plaintiffs produced in evidence a copy of the Title Deed that was issued to Mzee Masha on the 13th March, 2009 in respect of Plot number 1114 together with a certificate of search showing that as at 21st January, 2010, Plot Number 1114 had been registered in favour of Kenga Katana Bongo and Gaone Katana Bongo.

57. According to the evidence of the 2nd wife of Mzee Masha, DW.3, Katana Bongo and Gaone Katana bongo are the sons of Mzee Masha from the first wife.

58. The evidence of PW.1 was that he was approached by an agent, PW.2, who informed him that Mzee Masha intended to sell Plot number 1113, and that he agreed to buy the land for Kshs.7,857,780.00.

59. According to the Agreement dated 1st September, 2009 that was purportedly signed by the Plaintiffs and Mzee Masha, a deposit of the purchase price of Kshs.785,778.00 was to be paid to the vendor's advocate and the Plaintiffs were to take possession of the land upon payment of the said deposit.

60. What is intriguing about the Agreement of 1st September, 2009 which was drawn by the firm of Omondi Waweru is that it does not state when the balance of the purchase price was to be paid.

61. In any event, by the time the sale of Plot number 1113 was completed, Mzee Masha was already dead.

62. Although PW.2 stated that Mzee Masha died in the year 2009, he could not recollect the month when he died. The Defendants on the other hand were categorical that Mzee Masha died in June, 2009. They exhibited a Certificate of Death which shows that Mzee Masha died on 23rd June, 2009.

63. Whether Mzee Masha died in June, 2009 or towards the end of the year 2009, the balance of the purchase could only amount to his assets and the same could only be paid to the administrators of his Estate, or at least to all his dependants, including the Defendants herein.

64. Although the issue of who received the balance of the purchase price is not a good reason to invalidate the Agreement of 1st September, 2009, I am not convinced that Mzee Masha signed the Agreement of sale on the said date.

65. Considering that the Defendants have all along maintained that Mzee Masha died in June, 2009, it was incumbent on the part of the Plaintiffs to call the person who witnessed Mzee Masha sign the Agreement on 1st September, 2009 to testify. The Plaintiffs never did that.

66. Having discharged their burden of showing that Mzee Masha died in June, 2009, the burden of showing that Mzee Masha died after 19th September, 2009, shifted to the Plaintiffs. All that the Plaintiffs were required to do was to call the Advocate who witnessed the late Masha sign the impugned document and or to produce a burial permit or a Death Certificate showing otherwise.

67. Having failed to show that Mzee Masha was alive as at 1st September, 2009 and that he indeed received the 10% deposit and the balance of the purchase price that was paid to the firm of Omondi Waweru & Co. Advocates, I find that Plot number 1113 was fraudulently transferred to the Plaintiffs.

68. Indeed, it would appear that the fraud in respect to Plot 1113 was perpetrated by the deceased's sons in conjunction with PW.2 and the firm of Omondi Waweru & Co. advocates.

69. I say so because from the evidence of PW.2, he used to pay the dependants of Mzee Masha some money in installments every time they went to see him.

70. PW.2 produced several payments vouchers showing how he was paying the children of Mzee Masha money "***to be deducted on the final pay at M/S Omondi Waweru & Co. Advocates.***"

71. Why was he making this periodic and sporadic payments to the children of the deceased when the Plaintiff's Advocate had settled the full payment of Kshs.7,072,002.00 to the firm of Omondi Waweru & Co. Advocates way back in December 2009?

72. Considering that he was merely an agent it baffles the court how PW.2 became a paying agent in respect to the purchase price.

73. The actions of PW.2 shows that he collected part of the purchase price after illegally selling the land belonging to Mr. Masha and enticed the family members of Mr. Masha with the said money. Why the Firm of Omondi Waweru & Co. Advocates did not pay the Estate of the late Mzee Masha a whopping Kshs. 7,072,002.00 that it had received from the firm of Ransley, MC Vicker and Shaw Advocates remains a mystery.

74. I will now turn to the sale of Plot number 1114. Having unlawfully sold Plot number 1113, the two sons of Mzee Masha together with PW.2 embarked on the process of selling Plot number 1114 to the Plaintiffs notwithstanding that this was the plot that was being occupied by the Defendants.

75. Although the Title Deed for Plot number 1114 was issued to Mzee Masha on 13th March, 2009, the Certificate of Official Search produced by the Plaintiffs shows that the said land was transferred in favour of Kenga Katana Bongo and Gaone Katana on 21st January, 2010.

76. The said Kenga Katana Bongo and Gaone Katana then sold the 2 suit property to the Plaintiffs vide an agreement dated 15th September, 2010 for Kshs.6,000,000.00.

77. The Plaintiffs did not call any evidence to show how the plot was transferred from Mzee Masha to

his two sons. Indeed, I was not shown any Succession Proceedings in respect to the said Plot. Although a copy of the transfer document was produced by the Plaintiffs to show that the deceased transferred Plot No.1114 to his two sons, the transfer document was never registered.

78. Indeed, no evidence was called to show that Mzee Masha appeared before “Samuel Odhiambo Elekim” to sign the Transfer in respect of Plot number 1114 on a date that is not indicated on the instrument.

79. Again, there is no indication that the consent of the 1st Defendant, who is the wife of Mzee Masha and who was living on the suit land was ever obtained before the purported transfer of the land.

80. No evidence was called to show the circumstances under which Mr. Masha transferred the suit property on an unknown date to his two sons, considering the mother to the two sons, including the said sons were not living on Plot number 1114. Was the intention of the two sons, Kenga Katana Bongo and Gaone to disinherit the Defendants?

81. Considering that the Plaintiffs knew or ought to have known before purchasing plot number 1114 that the Defendants were living on the suit land and that the land initially belonged to Mzee Masha, they should have made further inquiries before entering into an agreement with the two vendors. The Plaintiffs cannot therefore be said to be innocent purchasers for value without notice.

82. The totality of the evidence that was presented before the court shows that Plot number 1114 was fraudulently transferred in favour of Kenga Katana Bongo and Gaone Katana, who are the step sons of the 1st Defendant. The two sons of Mzee Masha then transferred the said land to the Plaintiffs, who knew or ought to have known, that the said land had been acquired by the two sons fraudulently.

83. For those reasons, I find that the two Plots, that is ***Kilifi/Mtondia/1113*** and ***Kilifi/Mtondia/1114*** were fraudulently transferred to the Plaintiffs.

84. In the circumstances, I dismiss the Plaintiffs’ suit and allow the Defendants’ Counter-claim as follows:-

(a) A Permanent injunction be and is hereby issued restraining the Plaintiffs, their servants, employees, agents or anybody acting through them from interfering with the Defendants occupation of Parcels of land known as Kilifi/Mtondia/1113 and Kilifi/Mtondia/1114.

(b) An order be and is hereby issued to the Kilifi Land Registrar to cancel the Title Deeds that were issued to the Plaintiffs in respect of parcels of land known as Kilifi/Mtondia 1113 and Kilifi/Mtondia 1114 and replace them with the names of Katana Bongo Masha (deceased).

(c) An order be and is hereby issued to the Kilifi Land Registrar to rectify the register by cancelling the entries transferring the suit properties to the Plaintiffs.

(d) The Plaintiffs to pay the costs of the suit and the Counter – Claim.

DATED AND SIGNED AT MACHAKOS THIS 2ND DAY OF MAY, 2017.

O. A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 12TH DAY OF MAY, 2017.

J. O. OLOLA

JUDGE