



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 309 OF 2008

MURIUKI MBURU.....PLAINTIFF

VERSUS

1. MWNAHAWA JUMA KIZIANDA

2. SALIM HAMISI BARUA

3. FATUMA BAKARI BADZIKO

4. HASSAN SAID MADEVU

5. ATHUMAN BAKARI SHAURI

6. THE DISTRICT LANDS REGISTRAR, KWALE....DEFENDANTS

JUDGEMENT

1. The plaintiff commenced this suit on 3rd November 2008 against the six (6) defendants seeking the following prayers:

a. An injunction restraining the 5th Defendant by himself, his agents, assigns and/or any other person under his authority from selling, disposing, developing, alienating, leasing, charging or in any manner dealing with that piece of land known as KWALE/KIDIANI/313.

b. A declaration that the proceedings of the Land Dispute Tribunal and the Chief Magistrate's Court and the subsequent decision arrived at and Vesting Order issued therein are invalid, illegal, unlawful, wrongful and against the statute and thus null and void and that the title held by the plaintiff under Registered Land Act Cap. 300 Laws of Kenya in respect of that piece of land known as KWALE/KIDIANI/313 is valid and absolute and an order directed at the District Land Registrar Kwale to rectify the register by cancellation of all entries relating to the registration of the 1st, 2nd, 3rd and 4th Defendants as proprietors of the property and the transfer to the 5th Defendant and for cancellation of the title illegally issued to the 5th Defendant over the same piece of land KWALE/KIDIANI/313 and a further order for the demolition of the structures and/or developments and removal of the debris from the suit land.

c. Costs of and incidental to this suit.

d. Interest thereon at Court rates.

2. Upon being served by substituted service, the 1st to 4th defendants filed a joint statement of defence on 23rd September 2009 as well as the 5th defendant who also filed his statement of defence on 23rd September 2009. All the defendants denied the plaintiff's claim with the 1st – 4th defendants pleading that the suit land belonged to the Wavirizi clan and it was registered in the name of Rashid Dzugwe as trustee. The 5th defendant on his part pleaded that in 2000 when he conducted a search, the property was in the name of the 1st – 4th defendants and therefore he proceeded to purchase it. That he does not know the plaintiff who should pursue his claim against Salim Rashid Dzugwe if at all.

3. On 29th October 2014 when the matter came up for pre – trial, the Presiding Judge confirmed that the plaintiff had complied with Order 11. He gave the defendants 21 days to comply failing which the plaintiff would be at liberty to move the Court to have the defendants pleadings struck out. The defendants failed to comply and on 9th March 2015 the plaintiff filed an application to strike out the defences filed. The defendants though served did not attend Court on 18.5.2015 for the hearing of that application. The application was therefore allowed as presented with the result that the statements of defence on record were struck out. This suit therefore proceeded as undefended.

4. On 24th November 2015 the plaintiff gave his testimony. He stated that he currently lives in Kirinyaga but previously lived and worked in Mombasa. He adopted his witness statement filed in Court on 21st May 2014. He states that he bought the suit property on 10th October 1981 from Salim Rashid as per sale agreement produced. He obtained a title deed on 25th August 1982. The witness said he has never sold this land to anyone.

5. The plaintiff continued that he was never summoned to appear before the Kwale Land Disputes Tribunal who awarded the land to the 1st – 4th defendants. The title was later changed into the name of the 5th defendant. He asked the Court to grant him prayers as per the plaint and that the entries made in the land register be cancelled and his name be entered. He also prayed for costs of the suit.

6. In support of his claim; the plaintiff filed the following documents:

i. Copy of the sale agreement dated 10.10.1981.

ii. Letter dated 3.11.1981 forwarding the sale agreement to the Director of Land Adjudication by the Chief Land Registrar.

iii. Certificate of title issued to him on 25th August 1982.

iv. Certificate of official search dated 10.3.2000 showing the 1st – 4th defendants as the registered owners of the suit property.

7. From the plaint, the plaintiff pleaded that he lost his registration by virtue of an award made by the Kwale Land Disputes Tribunal which he said was illegal, null and void. The plaintiff itemized the particulars of illegality of the 1st – 4th defendants in paragraph 16 of his plaint as follows:

a. Instituting a claim at the Land Disputes Tribunal over that piece of land known as KWALE/KIDIANI/313 without any *locus standi*.

b. Illegally and unlawfully selling the said piece of land to the 5th Defendant while it was registered to the Plaintiff.

Purporting to pass a good title to the 5th Defendant when they did not have a good title or at all to the land herein.

d. Dealing with the said piece of land without following the due legal process.

e. Colluding with the 5th and 6th Defendants so as to defeat the absolute title of first registration of a land owner as protected by statute.

8. The plaintiff also pleaded that he was condemned unheard and that the Land Disputes Tribunal had no jurisdiction to hear this case. Through his advocates he submitted at length on the two issues. The plaintiff submits that section 3 of the Land Disputes Tribunal Act (repealed) from which the jurisdiction of the tribunal is derived did not confer on it authority to handle issues on title to land. He referred this Court to the Court of appeal decisions of:

i. Jotham Amunavi vs The Chairman Sabatia Land Disputes Tribunal & Another C. A No 256 of 2002.

ii. Joseph Malakwen Lelei & Another vs Rift Valley Land Disputes Appeals Committee & 2 others (2014) eKLR.

iii. Owners of Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd (1988) KLRI

9. I am in agreement with the pronouncements made in the first two decisions to the extent that the plaintiff title being a first registration the same could only be cancelled through a suit filed in the High Court as stated under the provisions of section 143 of the Registered Land Act Cap 300 (repealed) but replicated in section 80 of the Land Registration Act, 2012. The said section provides thus:

“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.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land for valuable consideration unless the proprietor had knowledge of the fraud, omission or mistake in consequence of which the rectification is sought”

10. The Court is stated to be the High Court in both Statutes thus the Land Disputes Tribunal had no jurisdiction to hear and determine the dispute and subsequently cancel the plaintiff’s title. Further the defendants failed to present to this court evidence that the plaintiff was a party to the fraud and or omission in terms of knowing that the suit land belonged to the Wavirizi clan. As a result, the award given to the 1st – 4th defendants and later adopted by the Magistrate’s Court was null and void abinitio. Similarly their registration as owners of the suit property was irregular and invalid. Accordingly the 1st, 2nd, 3rd and 4th defendants had no valid title to pass on to the 5th defendant whether by sale or otherwise. Although the suit is undefended, I am satisfied that the plaintiff has made out a good case and indeed is entitled to the orders as prayed in the plaint. Wherefore I allow the claim in terms of prayer (a) & (b). I also award him costs of the suit.

Dated & signed at Mombasa this 28th day of JUNE 2017

A. OMOLLO

JUDGE

Delivered at Mombasa this 29th day of JUNE 2017 by

C. YANO

JUDGE