



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CIVIL CASE NO. 454 OF 2009

JAMES MUSAU PETER.....PLAINTIFF

-VERSUS-

1. JOSHUA MBITHI MWINI

2. JOSEPH NDUNDA KINGOO

3. MILDRED NEKESA MUSANYA.....DEFENDANTS

=AND=

AWADH SALEH SHERMAN & TWO (2) OTHERS.....THIRD PARTIES

JUDGEMENT

1. The plaintiff James Musau Peter sued the five (5) defendants vide his plaint dated 4th December 2009 and amended on 31st August 2012. In his claim, the plaintiff sought for judgement against the defendants jointly and severally for:

a) Vacant possession of the parcel of land known as LR No MN/1/7991 and 7992.

b) General Damages.

c) Costs of and incidentals to this suit.

2. The suit is defended by a statement of defence filed on 14th February 2010. The defendants denied the plaintiff's claim entirely and put him to strict proof. The defendants pleaded in paragraph 5 that they purchased their respective plots vide the concept of house without land pursuant to perpetual leases entered between themselves and Awadh Saleh Sherman and Said Saleh Sherman. The defendants pleaded further that the suit plot does not exist as alleged by the plaintiff. They urged the Court to strike out the suit with costs.

3. At the close of pleadings, the parties adduced oral evidence. The plaintiff called two witnesses with him testifying as the first witness. PW 1 stated that he acquired the property while working with Sigiron Freight Ltd. The property was purchased by Sigiron SACCO and subdivided into 23 plots. He produced

the sale agreement dated 15th September 1992. PW 1 stated that he was allocated plot Nos 11 and 12 and made payments as per documents contained in pages 15 – 24 of the bundle. That the plot was transferred to him in 1999 and 2000 respectively. PW 1 testified further that he is paid up on land rates to the county government.

4. PW 1 continued that he made a complaint on the encroachment to the area chief in March 2007. The chief helped him identify the defendants. That 3 to 4 houses are touching on his property. The plaintiff stated that he intended to put up residential houses on the plot. He is seeking vacant possession of his land and costs of the suit. He relied on his documents numbered 1 – 32. In cross – examination, PW 1 said he did not know the defendants physically. That he was shown where the beacons are but not the plot. That the search showing ownership by Mumwajesyi Ltd is with the SACCO and that the bank couldn't have financed the property without documents. That in the year 2000 there were no structures. While in 2007 the structures were half – way done and were completed in the year 2009. The encroachment on his plot are 4 structures. In re – examination he said they are 5 structures.

5. Edward Marenye Kiguru testified as PW 2. He is a registered and licensed land surveyor based in Mombasa. He carried out survey over the suit plots and prepared a report dated 5.7.2012 which showed the three properties had encroachments in form of buildings fully encroaching on them. He signed his report and produced it as Pex 3. In cross – examination, he said he was given copies of the title deeds and he also conducted searches showing the properties are owned by the plaintiff (7991 & 7992) and 7993 owned by Swaffiya Mohamed (plaintiff in case No 455). That the mother title was No 624/MN/1. The number of houses encroaching are 5 whose owners did not have titles. The plaintiff closed his case.

6. The 4 defendants each gave their testimony in the order they are sued. DW 1 Joshua Mbithi Mwini said that he is an accountant with Technical University. He has never met the plaintiff. He owns a portion of plot No 624/MN/1 measuring 65 by 56 feet from 23.3.2004. DW 1 said that he was told about the plot by a friend and that it belonged to Swaleh Nguru. He visited the place, was given a sheet of paper with plot numbers and he chose plot No 39/MN/1. He paid Ksh 150000 for it and produced the receipt & sale agreement as Dex 1 & 2. He also paid for the development plan as per receipt produced as Dex 3. That the plot was vacant and he has developed it with permanent house. That while building some people came to claim the plot. He is staying on the land and urged the Court to give him the land. He does not have a title for the plot.

7. In cross – examination, he said he knew the plot had a number 624/MN/1. He did not do a search nor did he verify whether the person who sold was the registered owner. He paid ground rent of Ksh 300 from October 2004 to December 2007. From 2007 no one was willing to receive the money and no demand has been made. He became aware someone had title after the filing of this case. He admitted the structures PW 2 talked about are on the ground and that the person with title has a right. That he would buy if the person with title agrees to sell to him. He also prayed that he be given 8 – 10 years to pay since he has little income.

8. DW 2 also heard about the sale of these plots. That the advertisement was on 10th December 2003. He bought plot No 87 and paid Kshs 180,000= through Abubakar Rahul who identified himself as having the power of attorney from Saleh Said Nguru dated 17.03.1993. DW 2 was identified for the plot on 24.3.04 by Kea Kondo. He has also developed the property with a residential house worth Kshs 5,000,000. He asserted that he has a right over the property. He filed his documents on 20.9.16 to support his case.

9. In cross – examination, he said the auction was advertised by Kinyua Auctioneers. DW 2 never visited their offices. The plot was 624/MN/1 but he never did any search. He was given a tenancy agreement which stated the rent at Kshs 300 per month. He also stopped paying rent in December 2006 because he heard there was a case over the land. The tenancy agreement provided for one year termination notice. He does not have a title and was willing to pay for the value if ordered by Court.

10. DW 3 Mildred Nekesa stated the plot was bought by her deceased husband. Her late husband paid Kshs 180000 for the plot. She does not have a title. DW 3 said they entered into a tenancy agreement with Saleh Said Nguru for lease of plot No 40/1/MN which is a portion of plot No 624/1/MN dated

23.3.2004. She has also developed the plot with a residential house valued at Kshs 6,000,000 and asserts her right over this portion. She did not do a search before buying and that they were told the tenancy was for 99 years. According to DW 3, she still pays rent to date. She admits the plot is the same as what PW 2 says except the plot numbers are different. The defendants then closed their case.

11. Both parties filed written submission which I have read and considered. The issues that come out from the evidence of both sides and which are not in dispute are the following:

- i) **Both the plaintiff and the defendants are claiming as purchasers of the same parcel of land which had original number as 624/1/MN.**
- ii) **All the defendants have developed their respective portions with permanent residential houses.**
- iii) **The plaintiff is claiming ownership as registered owner while the defendants are claiming ownership under the concept of “house without land.”**

12. The issue which the parties do not agree on and which I find for my determination is **who has a better title and therefore should be entitled to use, occupation and possession of the suit plots.** The plaintiff said he purchased the suit land through his SACCO who had previously purchased the land from Mumwajesy Development Ltd. He exhibited the sale agreement between the Sacco & Mumwajesy Development Ltd. The plaintiff also exhibited the correspondences exchanged between himself and Siginon SACCO that subsequently resulted into his acquisition of the titles for the purchased plots. The plaintiff annexed a transfer form dated 1st March 2000 from the SACCO to himself in respect of title No 7992/1/MN, postal search as at 21st June 2012 showing him as the registered owner and a certificate of title issued in his favour showing registration of a transfer in his favour as entry No 5 dated 28th March 2000.

13. The defendants on their part stated they heard about the sale of these plots. That the property had been advertised by Kinyua Auctioneers and was being sold by Abubakar Rahul Ndira who held power of attorney from Said Saleh and Awadh Said Saleh. The defendants exhibited copies of; the power of attorney, newspaper cutting, receipts for payment of the purchase price issued by Mugina enterprises and subsequent ground rents, sketch map of sub-division of plot No 624/1/MN and tenancy agreement of lease for each of the plots sold to them. None of them had a title for the plots they had bought. All of them admitted they did not do a search before purchasing the plot.

14. In justifying their claim to the title, the defendants relied on the decision of Angote J. in the case of **Mutahar Ahmed & Another vs Athumani Sudi (2013) eKLR paragraph 24** which stated thus, *“under the Mohamedan Law and the Lands Titles Act Cap 282, a building erected by one person even by a trespasser on the land of another does not become attached to the land but remains the property of the person who erected it. Such interests however are supposed to be noted on the certificate of title”* (underline mine for emphasis)

15. In this case, the interests of the defendants have not been noted in the register. Secondly the plaintiff is not claiming ownership of the houses built by the defendants but instead wants vacant possession. Thirdly the defendants have not demonstrated that the person who leased the land under the concept of house without land was the owner of the original title MSA plot No 624/1/MN. In my view I find this case was quoted out of context and cannot aid the defendants in the circumstances of this case.

16. The plaintiff's title remain unchallenged as provided for in Section 23 of the Registration of Titles Act (repealed) and now replicated in section 26 of the Land Registration Act which was quoted by the Court of Appeal in the case of **Dr Joseph Arap Songok vs Justice Moiwo Ole Keiwua & 5 Others**, Civil Appeal No 60 of 1997 thus;

“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or

misrepresentation to which the owner is proved a party to. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and it takes precedence over all the alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

17. The plaintiff has also established through the evidence of PW 2 the extent of the encroachments. This was equally admitted by the defendants that indeed their structures are on the suit plots and their willingness to pay for the value should the Court so order. It is my finding that the plaintiff has therefore proved his case and that he has a better right to use, possess and occupy the suit plots Nos 7991 and 7992 over the defendants. I say so because the defendants although purchasers for value did not do due diligence to verify the ownership of the land before entering the leases hence they cannot rely on the principle of purchaser for value without notice.

18. The cannot claim any compensation from the plaintiff as the plaintiff was already a registered owner long before their purchase. Further the defendants in their defence only blamed Saleh Said and Awadh Saleh although they did not make any claim against them. In conclusion, I find the plaintiff has proved his case in terms of prayer (a) of the plaint. He however did not lay a basis why this Court should award him damages. He also brought this suit as soon as he realized the defendants were on the land which was seven (7) years after he acquired the registration into his name. Before 2007, nothing stopped him from undertaking development on the suit properties. The defendants are given 90 days from the date of this judgement to surrender vacant possession although the parties are at liberty to agree on terms of sale if any. If none is reached and at the lapse of 90 days the plaintiff will be at liberty to demolish any offending structures standing on his plots No 7992 and 7991/1MN to gain vacant possession.

19. Finally I also award the plaintiff costs of the suit since this matter was defended to the end. As earlier agreed between the parties herein, the terms of this judgement shall also apply to HCC 455 of 2009 Mutatis Mutandis in regard to parcel No 7993.

Dated, signed & delivered at Mombasa this 18th day of July 2017

ANNE OMOLLO

JUDGE