



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CIVL SUIT NO 92 OF 2014

- 1. JUMA MZEE KHAMIS**
- 2. MWINYI MZEE KHAMIS**
- 3. TATU KHAMIS MOHAMADI**
- 4. JUMA MWINYI MOHAMADI**
- 5. MWANATUMU MWINYI MOHAMMED.....PLAINTIFFS**

VERSUS

- 1. TABU ATHMAN NYUNDO**
- 2. CHIEF LAND REGISTRAR**
- 3. REGISTRAR OF LANDS.....DEFENDANTS**

JUDGEMENT

1. The plaintiffs have filed this suit against the defendants jointly and severally seeking;

- a. A declaration that the deceased and/or Estate of the deceased is the sole legal and beneficial owner of the suit property to Wit Plot Number 158, Section II Mainland North.
- b. A declaration that the purported transfer of title for the suit property in favour of the 1st defendant is unlawful and void ab initio;
- c. An order of injunction restraining the Defendants, their agents, employees and/or servants from selling, transferring and/or in any way dealing with Plot Number 158 Section II Mainland North in any manner whatsoever adverse to the interests of the Estate of the deceased.
- d. An order of this Honourable Court cancelling and/or revoking the title over Plot Number 158 Section II Mainland North transferred to and issued in the name of the 1st defendant and/or any other title issued in furtherance thereof;
- e. Costs of this suit and
- f. Any other further relief as this Honourable Court shall deem fit and just to grant.

2. The 1st defendant was served by way of substituted service by advertisement in the Daily Nation Newspaper of 4th December 2014. The 1st defendant neglected to enter appearance and/or file defence within the stipulated period. Interlocutory judgment was then entered against him. The 2nd and 3rd defendants filed a statement of defence dated 23/11/2015 denying each and every allegation in the plaint.

3. I have considered the pleadings and the evidence on record, the exhibits produced and the written submissions of both counsels. I have also considered the authorities cited. The issues for determination are:-

- i. Whether the Plot Number 158 Section II Mainland North belongs to the Estate of the late Mohammed Bin Mambo.

ii. Whether the copy of the certificate of title at the lands registry has an illegal or irregular entry purporting transfer of title thereof.

iii. Whether the plaintiffs are entitled to the orders sought in the plaint.

4. P.W.1 Juma Mzee Khamis told the court that he is one of the trustees of the Estate of the late Mohammed Bin Mambo Mdigu. That the deceased is the owner of Plot Number 158 Section II Mainland North. He produced a copy of title as exhibit P1, a certificate of official search showing the parcel of land as now registered in the names of Tabu Athman Nyundo, the 1st defendant and as exhibit P2. He also produced the order from the Kadhis Court as exhibit P3.

He further told the court that the late Mohammed Bin Mambo Mdigu was his great grandfather. He says him and the co-plaintiffs together with other heirs are in possession and occupation of the suit property.

5. He also told the court that when they realized the plot was registered in the names of Tabu Athman Nyundo they made a report at Urban Police Station and later filed this suit. He said the 1st defendant is a stranger to them. They have not sold the suit property to him.

He prayed that the register be rectified to reflect the names of the deceased.

6. The 2nd and 3rd defendants did not call any witnesses but filed written submissions. In his testimony P.W.1. produced a certificate of ownership as exhibit P1.

The plaintiffs' story has not been controverted. The 1st defendant never appeared in court to defend his claim. The plaintiff's claim stands uncontroverted.

I therefore find that Plot Number 158 Section II Mainland North belongs to the Estate of the late Mohammed Bin Mambo Mdigu.

7. The plaintiffs also produced a certificate of official search which shows that the suit property is registered in the name of Tabu Athman Nyundo, the 1st defendant. It is the evidence of P.W.1. that they stumbled upon this information when they were going through the deceased's assets for purposes of distribution among the heirs.

P.W.2 confirmed that neither him nor his co-plaintiffs knew the 1st defendant. They did not sell to him the plot.

The certificate of official search was produced as exhibit P2. It confirms that there is an illegal or irregular entry purporting to transfer the title to the 1st defendant.

A report was made to the police to investigate. As it stands the 1st defendant is not a legal nor beneficial owner of the suit land.

An explanation ought to have come from the 2nd and 3rd defendants as to who made the entries. There was no such explanation.

8. I find that the plaintiffs have established their case on a balance of probabilities as against the defendants. I rely on the case of ***Trust Bank Limited –versus- Paramount Universal Bank Limited And 2 others, Nairobi Milimani HCCS Number 2430 of 2001.*** Where it was held that, "where a party fails to call evidence in support of its case, the party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vain, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged".

9. All in all I find that the plaintiffs have made out a good case against the defendants jointly and severally. I enter judgment in their favour as against the defendants jointly and severally as follows;

a. A declaration be and is hereby issued that the deceased and/or Estate of the deceased is the sole legal and beneficial owner of the suit property to Wit Plot Number 158 Section II Mainland North.

b. A declaration be and is hereby issued that the purported transfer of title for the suit property in favour of the 1st defendant is unlawful and void ab initio.

c. An order of injunction is hereby issued restraining the Defendants, their agents, co-employees and/or servants from selling, transferring and/or in any way dealing with Plot Number 158 Section II Mainland North in any manner whatsoever adverse to the interests of the Estate of the deceased.

d. An order is hereby issued cancelling and/or revoking the title over Plot Number 158 Section II Mainland North transferred and issued in the name of 1st defendant and/or any other title issued in furtherance thereof.

e. The plaintiffs shall have costs of the suit and interests.

It is so ordered.

L. KOMINGOI

JUDGE

11/10/2017