



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 136 OF 2012

MOHAMED KASSAM MOHAMED

ABDUL LATIF MOHAMED

IRSHADALI SUMRA

AMEERALY SUMRA.....PLAINTIFFS

- VERSUS-

HAMISI MOHAMED MWAWASAA

FANUEL CHAMWONA WOPWOKO

LAND REGISTRAR MOMBASA

JELLANI BAHSHANI SHARIFF

PIONEER GENERAL ASSURANCE SOCIETY.....DEFENDANTS

JUDGEMENT

1. The plaintiffs commenced this suit vide their plaint dated 16th July 2012 and filed in Court on the same day. They pleaded that they have been in continuous and non – interrupted occupation of all that parcel known as Mombasa/Block XVII/429. That in an effort to have their rights recognized on the suit parcel, they instituted MSA HCCC No 473 of 1996 (OS) which is still pending to date.

2. The plaintiffs continued that about 5th November 2002, the 3rd defendant working in cahoots with the 1st and 2nd defendants caused the suit parcel to be irregularly and fraudulently transferred to the 1st & 2nd defendants as per the listed particulars of fraud in the plaint. That as a result of the said action, there has been constant confrontations between the plaintiffs and the 1st & 2nd defendants in respect of the suit parcel. And inspite of demand being issued the defendants have failed to vacate or cancel the transfer and registration in favour of the 1st and 2nd defendants. Wherefore the plaintiffs pray for judgement to be entered against the defendants jointly and severally for:

a) **A declaration that the registration of that parcel known as MOMBASA BLOCK/XVII/429 in favour of 1st, 2nd and 4TH Defendants on 5th November, 2002 was fraudulent and/or irregular.**

b) Cancellation of the Title issued to the 1st, 2nd and 4th Defendants therein on 5th November, 2002 in favour of the all that parcel known as MOMBASA/BLOCK/XVII/429.

c) A mandatory injunction restraining the Defendants, their assigns, employees, agents, relatives, spouses and/or otherwise from interfering with the title to parcel number MOMBASA/BLCIK/XVII/429 pending the hearing and determination of this suit.

d) Costs of this suit and interest thereto.

3. The 1st defendant was served with summons to enter appearance through the newspaper which was done by placing an advertisement in star newspaper of 15th March 2013. The 2nd defendant filed a notice of appointment of advocate on 11th February 2013. The 3rd defendant also filed appearance and a defence on 25th February 2013. Subsequently on 2nd December 2014 the 1st and 2nd defendants filed their documents and witnesses statements. The plaint was later amended to introduce the 4th & 5th defendants. Other than the additional parties, the prayers remained the same. I have perused the file but did not locate the statements of defence filed on behalf of the 1st, 2nd, 4th and 5th defendants. All of them are represented by counsels.

4. The hearing commenced on 9th September 2016 with the plaintiffs calling only one witness. The plaintiffs' witness IRSHADALI MOHAMED SUMRA who is the 3rd plaintiff told Court that he is a businessman and Member of Parliament of Embakasi South Constituency. The first plaintiff is his father whom PW 1 said died on 27th November 2012 while the 2nd and 4th plaintiffs are his brothers. He had a power of attorney donated to him by the 2nd & 4th plaintiffs dated 4th April 2012 and 14th June 2012 respectively. He produced the powers of attorney as Pex 2 and 3 respectively. The witness continued that the suit land is situated in Narok road, Tononoka Mombasa and that they have been carrying on family business on it for over 40 years. That it is developed with offices and shops.

5. PW 1 stated further that the property ownership was given to them by the Court in August 1999 vide a decree issued on 27.11.1997 in HCCC No 473 of 1996. He produced copies of the decree and the pleadings as Pex 4 and 5. That he presented the decree at the lands office for registration but was faced with uncoperation and promises from the registrar. This took about six months and the decree was not registered. He did a search on 16th February 2006 which search had the name of the original owner as Khadija against whom they got the decree. The search is produced as Pex 6 (a) and receipt as 6 (b). The witness stated further that on 22.2.2006, they applied to have a caution registered on the title whose copy he produced as Pex 7 (a) and payment receipt as 7 (b). On 24.2.2006, he did a search again which confirmed the caution had been registered – Pex 8.

6. That as they were still following with the lands office, PW 1 did another search on 24.4.2006 which now had the 1st & 2nd defendants as owners of the land having been registered on 5.11.2002 – produced as Pex 9. His previous advocates therefore wrote to the District Land Registrar on 8.5.06 and they received a reply on 15.5.2006. The two letters were objected to and only the letter dated 25th May 2006 was agreed and produced as Pex 10. The witness also relied on the copy of the register filed with the 3rd defendants documents and produced it as Pex 11. Further he had a new card showing registration of their restriction on 24.2.06 which he produced as Pex 12. The plaintiff stated that the defendants also supplied another card dated 18.2.2015 without the entry for restriction. The suit land was later transferred to the 4th defendant on 28/4/06 as per the card produced as Pex 13.

7. PW 1 stated that he reported the matter to the C.I.D because the registrar told him there was nothing he could do. He avers that the issuance of title to the 1st & 2nd defendant was fraudulent as they have been on the land since 1975 doing business. He urged the Court to grant the orders sought because the 1st & 2nd defendants have never been on this land. That the President could not have given the 1st & 2nd defendants this land because it was private land.

8. On cross – examination by Mwaniki advocate for 1st & 2nd defendants he said there is a ruling which gave the 1st and 2nd defendants to be joined as interested parties and which ruling described the O.S as pending. He admitted that he has no title to the suit property nor does he have a power of attorney from Khadija. That the building on the suit land has been there for over 15 years. That the setting aside of the decree was done after they applied to be registered. On cross – examination by Mr Ngare the state counsel for 3rd defendant, the witness said it is his father who knows about the building plans of their business premises. That Order No 2 required the deputy registrar to sign the transfer. That he had a transfer prepared by the lawyer but it could not be registered. He used other parties to get the search and the search showed the property was mortgaged on 20.11.1947 while the decree is dated 27.11.1997.

9. PW 1 was also cross – examined by Mrs Kariuki appearing for the 4th defendant and he answered thus; I have not produced death certificate of my father. He does not know the 4th defendant and he cannot tell if the 4th defendant knew of the proceedings of 1997. That the 4th defendant is sued because his name is on the title. The C.I.D did not file any report and he has filed this case because he wants a title for the land. He was not aware if forgery proceedings have been brought against the 4th defendant. On cross – examination by Ratemo advocate for the 5th defendant, PW 1 said the 5th defendant’s restriction was in the encumbrance section. The search does not show if a title was issued. That they did not enjoin the 5th defendant in the earlier suit because the 5th defendant did not exist. That Pex 11 is the true and genuine green card and it has mortgage registered on the title. He was not aware if the 5th advertised the property for sale. He declined to comment whether he will pay the mortgage or not. With these evidence the plaintiffs closed their case.

10. The 1st, 2nd, 4th and 5th defendants closed their cases without calling any evidence. The 3rd defendant called Mr Hashim G. Sat as its witness. Mr Sat is a Land registrar at the Ministry of Lands & Housing Mombasa. He signed a witness statement dated 1st December 2014 and filed in Court on the same date and which he adopted as part of his evidence. DW 1 said that the suit property is freehold. That there are two green cards in respect of the property with one having the registered owner as Khadija Umedaly whose address is not indicated and a restriction registered against the title under section 136 (1) (c) and a memorandum of equitable mortgage dated 12.11.1947 in favour of Pioneer General Assurance Society Ltd (5th defendant). The second green was opened on 5th November 2002 and the first entry confirms one Hamisi Mohamed Mwawasaa & Fanuel Chamwona Wopokwo (1st & 2nd defendants) are registered as owners and title deed issued to them on the same date.

11. DW 1 continued that on 28th April 2006 a transfer was made in favour of the 4th defendant for a consideration of Kshs 2 Million and registered as entry number 3 on the title. The two cards were produced as Dex 1 & 2. Mr Maundu advocate for the plaintiff had no questions for this witness. Mr Mwaniki for the 1st & 2nd defendants asked two questions to which the witness stated that titles have been issued for each of the green cards. That the title to Khadija was issued on 12th May 1945 under Registration of Titles Act(repealed) while the 2nd title in favour of the 1st & 2nd defendants was issued on 5th November 2002 under the Registered Land Act(repealed). On cross – examination by Mrs Kariuki advocate for the 4th defendant, DW 1 said there is no record at the lands office on how the second green card was opened. The witness answered that the 4th defendant is a purchaser. Lastly questioned by Mr Ratemo appearing for 5th defendant, the witness confirmed that the charge in favour of the 5th defendant has not been discharged. That a transfer can only be done if it is subject to this charge. The 3rd defendant closed its case.

12. As at the time of writing this judgement, there is only on record the submissions of the 1st, 2nd and 3rd defendants. The 1st and 2nd defendants in their brief submissions stated that the plaintiff admitted in his defence that he has never been registered as the owner of the suit land. Further that the 1st and 2nd defendants held a valid title and that they were given this land by the retired President Daniel Moi who had unlimited powers to allocate individuals land. They urged the Court to make a finding that the plaintiffs are trespassers on the suit land.

13. The 3rd defendant also gave a summary of the evidence adduced. The 3rd defendant posed that the only question for determination is whether the plaintiff had any interest in the suit land and therefore a cause of action crystallised as against the 3rd defendant. He answered in the negative basing his answer on the provisions of section 25 of the Land Registration Act which gives rights to a registered proprietor. That by admitting that the vesting order was set aside the plaintiffs had never had any registrable interests in the suit property. The 3rd defendant therefore urged the Court to find that the plaintiffs have not proven any nexus between the suit property and themselves. That the Court should hold that it is the 5th defendant who has a registered interest in the nature of a mortgage over the suit property. He prayed that the plaintiffs' claim as against the 3rd defendant be dismissed with costs.

14. I have analysed the oral and documentary evidence adduced together with the submissions on record. The 1st and 2nd defendants have not presented to this Court any evidence on how they acquired the title suit property. It is trite law that every allegation of fact made must be proved by evidence. The burden of proving such facts lies on the person who alleges. This requirement is set out in sections 107, 108 and 109 of the Evidence Act Cap 80 of the Laws of Kenya. The plaintiffs testified that they have been using and living on the suit land for a period of over 40 years. This piece of evidence has not been challenged by any of the five (5) defendants. PW 1 testified that they made effort to obtain the title deed into their names by filing a suit against the registered owner Khadija Umedaly vide O. S No 473 of 1996. He stated that they obtained a decree in their favour in 1997 which they presented to the Land Registrar to effect but which the Land Registrar did not implement culminating into the filing of the suit.

15. The 1st and 2nd defendants applied to be joined in earlier suit(O.S.) and were indeed enjoined as interested parties vide a ruling delivered by Khaminwa J. (deceased). I have read the ruling. The relevant part of the ruling reads thus; ***“Upon perusing the record and the conflicting claims of each group, I am convinced that the dispute relating to title and occupation thereof should be heard and determined. I therefore grant order that the interested parties be joined in this suit as parties.”*** The Judge did not say that the decree earlier issued to the plaintiffs was set aside. Although the 1st and 2nd defendant did not testify, I have looked at their documents filed in Court on 2nd December 2014 and note that they only annexed a copy of a title deed and a green card.

16. The 1st and 2nd defendants did not touch on the validity of the decree referred to by the plaintiffs in their submissions. Other than a question put to the witness by Mr Mwaniki whether the O. S was still pending or not, there was no document presented to support that line of defence. The 3rd defendant therefore submitted on wrong fact by stating that the vesting order had been set aside when the only documents they presented to this Court was the certified copies of the records of the two titles. Consequently it is a misapprehension of the law for the 3rd defendant to submit that the plaintiffs did prove their interest in the land yet they have testified first that they are in occupation (which is not disputed by any of the defendants) and secondly that the Court granted them a decree to be registered under the doctrine of adverse possession.

17. Therefore if I proceed on the presumption that the statement of my senior learned sister the Late Khaminwa J. setting aside the decree in O. S No 473 of 1996 were set aside, the mere fact that the plaintiffs use and occupation of the land bestows on them a right to bring a claim as against the title holders. They have done this by urging the Court to find that the registration of the 1st and 2nd defendants was obtained fraudulently. The law allows them to so do under the provisions of section 28 and 143 of the Registered Land Act Cap 300 (repealed) whose import is now captured under section 26 of the Land Registration Act which provides thus ***“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts 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 that proprietor shall not be subject to challenge, except –***

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party;
or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

18. The 1st and 2nd defendants did not bring any evidence to explain how they acquired their title. They have only attempted to do so only in submissions by stating that the land was allocated to them by the retired President Moi. You cannot adduce evidence through submissions as it denies a party to test the veracity of such evidence through cross - examination. Further the evidence of DW 1 was that there was no record in their registry on how the green card held by the 1st & 2nd defendants was opened. This is amplified by the fact that the first green card produced as Pex 11 having been opened in May 1945, a second green card in law ought not to have been opened for the same parcel of land without cancellation of the previous records.

19. The 3rd defendant as the custodian of the land records has a duty to ensure integrity of those records. By saying they could not explain how the second green card was opened, this Court can only impute negligence on their part and or complicity to the fraud undertaken by the 1st and 2nd defendants. I am therefore satisfied that the plaintiffs have established there was fraud in the manner in which the 1st and 2nd defendants acquired their title. In any event the government can only allocate public land to private individuals where that land is established to be available for allocation. In this instance, the land was both private and was in use and occupation of the plaintiffs as at 2002 when the 1st and 2nd defendants were allocated if at all. Not to mention that the land was changed to the 5th defendant clearly it was not available for allocation. The mystery is worsened by the lack of correspondence on the part of the 1st & 2nd defendants requesting for such an allocation to be made to them.

20. Having found that the 1st and 2nd defendants acquired their title to the suit property fraudulently, they had nothing to transfer or title to pass to the 4th defendant whether for consideration or otherwise. Therefore the 4th defendant in the circumstances of this case have not acquired any valid title to the suit property if they have any claim which they have not made before this Court, such claim only lies as against the 1st, 2nd & 3rd defendants and not the plaintiffs. The last issue is the restriction registered in favour of the 5th defendant. The plaintiffs both in the original plaint and the amended plaint have not prayed for any orders as regards the removal of that restriction. I will therefore refrain myself from making a determination over the same as Courts can only grant what is prayed for in the pleadings or make appropriate orders as it deems fit if the same arises in the cause of a trial. In this instant nothing arose for me to exercise such discretion orders. Not even the 5th defendant sought for any orders except for dismissal of their suit.

21. In conclusion, it is my finding that the plaintiffs have proved their case within the standard provided in law. I do grant the prayers as sought in the amended plaint with costs to be paid by the 1st – 4th defendants jointly and severally.

Dated, signed & delivered at Mombasa this 10th day of October 2017

A. OMOLLO

JUDGE