



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

LAND CASE NO. 287 OF 2012

ALI HASSAN CHISONZO & 3 OTHERS.....PLAINTIFFS

-VERSUS-

JANE CIARUNJI CHESAINA & 4 OTHERS.....DEFENDANTS

JUDGEMENT

1. The Four (4) plaintiffs filed this suit against the Five defendants vide their plaint dated 7th December 2012 seeking the following reliefs:

(a) Cancellation of the Title Kwale/Diani/1955 – 1974 being Original plot No. Kwale/Diani/477 in the names of 1st, 2nd, and 3rd Defendants and the same be registered in the 1st – 4th plaintiffs' names as Plot No. Kwale/Diani/477.

(b) A declaration that the Registration was obtained through fraud on Kwale/Diani1955 – 1974 Original plot No. Kwale/Diani/477.

(c) Costs and interest of this suit.

(d) Any other relief the Court deem fit to grant.

2. The summons to enter appearance was served upon the 1st – 3rd defendants by advertisement in the Daily newspaper of 27th June 2014. These defendants did not file any appearance within the prescribed time or at all. The 4th & 5th defendants entered & filed a memo of appearance and defence on 31st August 2015. By their statement of defence, the 4th & 5th defendants pleaded that they were not privy to the particulars of the pleadings in paragraphs 6 – 9 of the plaint and put the plaintiffs to strict proof thereof. The 4th & 5th defendants also denied the particulars of fraud and pleaded further that the prayers sought are a nullity and unattainable.

3. The plaintiffs applied for and obtained interlocutory judgement against the 1st – 3rd defendants. The evidence to prove the plaintiffs claim was given by Ali Hassan Chisonzo – the 1st plaintiff on 10th November 2016. Mr Chisonzo in his testimony stated that he was born in 1946 and he lives on the suit plot Kwale/Diani/477. That he has lived on this plot for over 20 years. He did not have registration documents. PW 1 continued that he was surprised how the 1st – 3rd defendants acquired title. He adopted his statement made on 3.7.2012 and filed in Court.

4. PW 1 continued further that he does not know the 1st – 3rd defendants. The 2nd - 4th plaintiffs are his neighbours. He urged the Court to grant their prayers contained in the plaint. The witness was not asked any questions by Miss Luta the state counsel appearing for the 4th & 5th defendants.

5. In his written statement, PW 1 said that the suit plot is their ancestral land and he has lived on it with his parents since birth. That sometimes in 2008, they saw a group of people who started digging holes for fixing of poles for fencing on this land. They tried to chase them and instead they were arrested and taken to Kwale Law Courts where they were charged with criminal offence of forcible detainer contrary to section 91 of the Penal Code. The case was heard and they were acquitted as per the judgement delivered on 24th September 2010. PW 1 stated that while the case in Kwale was proceeding, the defendants proceeded to fence the suit plot. That they had complied with the adjudication requirements and were waiting to be issued with a title deed. He avers that the defendants' title was obtained in a fraudulent manner.

6. The plaintiffs filed a list of documents which included:

(i) Title deed in name of 1st defendant issued on 3rd October 1994 measuring 1.6 Ha.

(ii) Copy of charge sheet where they were charged with offence of forcible detainer.

(iii) Proceedings in Criminal Case No 949 of 2008

(iv) Judgement in Criminal Case No 949 of 2008

(v) Search for 477 showing the number was closed on sub division to new Nos. 1955 – 1974.

(v) Searches for plots Nos. 1955 – 1974 showing the joint names of 2nd & 3rd defendants as registered owners.

(vi) Photographs of some temporary structure.

7. This evidence presented by the plaintiffs has not been challenged. The plaintiffs in their submissions referred this Court to the cases of; **PAG (Bahati) & 2 others vs Peter Gathengu & 9 others (2011) eKLR and Alice Chemutai Too as Personal Representative of Kipkoech Tele vs Nikson Kipkurui & 2 others (2016) eKLR** urging the Court to invoke the provisions of section 26 and 28 of the Land Registration Act No 3 of 2012 to cancel the title deeds in names of the 2nd & 3rd defendants since the 1st defendant cannot pass a good title to them.

8. Section 28 provides that all registered land shall be subject to the overriding interests as may for the time being subsist and affect the same. The overriding interests are listed in this section and the ones I find of relevance to this case is under:

Section 28 (b) – trusts including customary trusts

(h) Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

(i) Any other rights provided under any written law.

9. The fact that the plaintiffs are in possession of the suit land is unchallenged. This is fortified by the charge sheet in which the offence they were facing in criminal case No 949 of 2008 is for forcible detainer. The particulars of the charge sheet read thus:

“(1) Salim Athumani (2) Juma Mohamed Kuriwa (3) Ali Hassan Chisonzo (4) Ali Swalehe Mwakusema (5) Salim Abdallahi Mwamanuko. On 9.7.2008 in Diani location within

Msambweni District jointly with others not before Court being in possession of land parcel No 477 of Kimulwon Bultutu Chesaina without colour of right held possession of such land in a manner likely to cause a breach of the peace...

10. The 1st defendant did not present any evidence to contradict the evidence of the plaintiff that this was their ancestral land. Therefore if she got herself registered as owner thereof, she did so in trust and for the benefit of these plaintiffs. She should not be allowed to dispossess the plaintiffs by passing ownership of the suit land to the 2nd and 3rd defendants. There is no evidence presented by the 1st defendant to this Court that when she acquired the title the plaintiffs were not on the suit or that she was unaware of the plaintiffs claim/interest over the land. This Court has powers to rectify the register under section 80 (1) of the Land Registration Act where it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

11. In the case before Court, I am satisfied that the plaintiffs have proved their case against the 1st defendant. I am also in agreement with the submissions that the 1st defendant's title having been questioned and no evidence to rebut the questions raised offered, she had no good title to pass to the 2nd and 3rd defendants. Further the 2nd - 3rd defendants did not bother to also come and explain to the Court how they got their title from the 1st defendant. Neither did the 4th defendant show any evidence that the title it issued to the 1st or 2nd & 3rd defendants was issued within the law.

12. The upshot of this is that the plaintiffs' case succeeds. Accordingly I enter judgement in terms that:

(a) A declaration be and is hereby made that the registration of parcel No 477 and the subsequent titles Nos 1955 – 1974 (inclusive) was irregularly obtained by the 1st – 3rd defendants

(b) That an order be and is hereby issued cancelling the registration of the 1st defendant as owners of title No Kwale/Diani/477 and the transfer to the 2nd & 3rd defendants of the subsequent titles Nos Kwale/Diani/1955 – 1974.

(c) An order be and is hereby issued directed at the 4th defendant to register the 1st – 4th plaintiffs as owners of suit titles Kwale/Diani/1955 – 1974 (all numbers inclusive).

(d) Costs of this suit awarded to the plaintiffs.

Dated and signed in Mombasa this 16th November 2017.

A. OMOLLO

JUDGE

Delivered at Mombasa this 17th day of November 2017 by

L. KOMINGOI

JUDGE