



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CASE NO 54 OF 2015

1. AMINA MBARAK
2. IBRAHIM MBARAK
3. JUMA MBARAK
4. SALIM MASHA MBARAK
5. SULEIMAN MBARAK.....PLAINTIFFS

VERSUS

1. RASTO GWIYO MIKAYA
2. PENINA KIMERU.....DEFENDANTS

RULING

1. By a Plaintiff filed herein on 9th April 2015 and later amended on 12th October 2016, the 5 Plaintiffs pray for Judgment against the Defendants jointly and severally for :-
 - a. *An Order to the Kilifi Land Registrar to cancel the registration of the 1st Defendant and the 2nd Defendant as the Owner of Title No. Kilifi/Mtondia/903, Kilifi/Mtondia/904 and Kilifi/Mtondia/77 and cancelling the sub-division of Title No. Kilifi/Mtondia/77 into the two parcels of land known as Title No. Kilifi/Mtondia/903 and Kilifi/Mtondia/904 and registering the 1st Defendant as the owner of the Title No. Kilifi/Mtondia/77.*
 - b. *An Order of Vacant Possession of the said suit properties and the demolition of any structures or buildings erected by the Defendants on the said suit properties and their eviction therefrom.*
 - c. *Costs of this suit and interest thereon at Court rates.*
2. Upon being served with the Plaintiff and Summons to Enter Appearance, both the 1st and 2nd Defendants have filed Statements of Defence and Counterclaims against the Plaintiffs.
3. Subsequently on or about 8th December 2016, the Plaintiffs filed the Notice of Motion application before me for determination dated 8th October 2016. The application prays for Orders:-
 1. *That there be an inhibition against the registration of any dealing on the parcel of land known as Title No. Kilifi/Mtondia/903 and the parcel of land known as Kilifi/Mtondia/904 pending the hearing and determination of this case.*
 2. *That the costs of this application be in the cause.*

4. The Application is supported by the annexed affidavit of Amina Mbarak the 1st Plaintiff herein sworn on 8th October 2016 and is premised on a number of grounds set out on the face thereof as follows:-
 - i. *That the 1st and 4th Plaintiffs are the Administrators of the Estate of Charo Ruwa Mwagona, now deceased, who was the Original beneficial owner of the parcel of land known as Kilifi/Mtondia/77.*
 - ii. *That sometime in 1985, the 1st Defendant entered into the said parcel of land ostensibly as a lessee to graze his cows but subsequently in 1986, he demanded that the Plaintiffs demolish their houses and vacate the suitland on the basis that he had bought the same from the said Charo Ruwa Mwagona, now deceased.*
 - iii. *The plaintiffs then conducted a search at the Kilifi Land Registry only to discover that the 1st Defendant had indeed obtained a transfer of the land to himself and was issued with a Title Deed thereto on 12th July 1989.*
 - iv. *That when the Plaintiffs refused to vacate the land, the 1st Defendant instituted Mombasa High Court Civil Case No. 453 of 2000 against the Plaintiffs and the deceased Charo Ruwa Mwagona in which he claimed recovery of vacant possession of the parcel of land. The said case was dismissed on 11th November 2005.*
 - v. *That unknown to the Plaintiffs, sometime in the year 1999, the 1st Defendant proceeded to sub-divide the said parcel of land into two portions known as Kilifi/Mtondia/903 and Kilifi/Mtondia/904 and then sold to the 2nd Defendant parcel No. Kilifi/Mtondia/904. The 2nd Defendant has since been registered as the owner of the said parcel No. 904.*
 - vi. *That although the 1st Defendant's case was dismissed by the Court, the Defendants have failed to return the titles to the Land Registry for the purposes of rectification and instead they have continued to retain and hold the said Titles unlawfully.*
 - vii. *That the Plaintiffs have filed this suit seeking for the rectification of the register by way of cancellation of their registration as the owners of the properties in question as the same were obtained by means of fraud, mistake, misrepresentation and/or omission only to realise that the Defendants have since charged the two properties to two different financial institutions.*
 - viii. *The Plaintiffs are now apprehensive that the suit properties may be alienated or wrongfully sold to third parties either by the Defendants or by the Chargees before this case is heard and determined. It will be just and convenient to preserve the properties by inhibiting the registration of any dealings therewith pending the hearing and determination of this suit.*
5. Both Defendants are however opposed to the grant of the orders of inhibition. In a Replying Affidavit sworn on 8th February 2017, the 1st Defendant Rasto Gwiyo Mikaya refutes the averments by the Plaintiffs that he entered into land parcel Number Kilifi/Mtondia/77 as a lessee to graze cows for a period of one (1) year. On the contrary, he avers that he bought the parcel of land from the deceased Charo Ruwa on a willing –seller-willing buyer basis and the land was thereafter transferred to his name in 1989.
6. The 1st Defendant admits that he filed Mombasa High Court Civil Case No. 453 of 2000 which was dismissed by the High Court but adds that the Plaintiffs had also filed a counterclaim which was equally dismissed.
7. In regard to Parcel No. Kilifi/Mtondia/904, the 1st Defendant states that the sub-division leading to its creation was done transparently and the Plaintiffs raised no objection when the 2nd Defendant occupied and started developing the land. The 1st Defendant further states that the charges on the parcels of land were duly registered and there is no danger of the suit properties, particularly his own Kilifi/Mtondia/903 being alienated or sold to third parties.
8. The 2nd Defendant Penina Kimeru has equally sworn a Replying Affidavit on 21st February 2017 in which she refutes the Plaintiffs contentions and avers that Parcel No. Kilifi/Mtondia/904 was transparently sub-divided and that the Plaintiffs raised no objection when she occupied the land and started developing it. She admits that a charge is registered on the property but denies that it is in danger of any alienation to third parties.
9. In addition to the two Replying Affidavits, the Defendants have also filed a Preliminary Objection

on a Point of Law dated 2nd February 2017 in which they state as follows:-

“ TAKE NOTICE that the Defendants will raise a Preliminary Objection of (sic) a Point of Law that the suit herein is an abuse of the Court process in that it is filed out of time contrary to the mandatory provisions of Section 7 of the Limitation of Actions Act.

10. I have considered the Application and the respective responses thereto. I have equally considered the Submissions and Authorities placed before me by Mr. Odhiambo, Learned Counsel for the Defendants. The Plaintiffs did not file any submissions despite being given a chance to do so.
11. One of the main grounds upon which this application and the entire suit is premised is the fact that the 1st Defendant had previously instituted Mombasa High Court Civil Case No. 453 of 2000 against the current Plaintiffs for vacant possession. According to the Plaintiffs, even though the 1st Defendant's said case was dismissed by the Court on 11th November 2005, the Defendants have failed to return the titles to the Land Registry for the purposes of rectification and instead they continued to retain and hold the same unlawfully.
12. The Plaintiffs were accordingly forced to move to this Court to have the register rectified by cancelling the Defendants' names as the owners thereof since they had obtained the same by means of fraud, mistake, misrepresentation and/or omission.

13. In their respective Statements of Defence and Replying Affidavits, the Defendants confirm that indeed there was such a suit filed before the High Court in Mombasa. While admitting that the said suit was dismissed, the 1st Defendant contends that the Plaintiffs had also filed a Counterclaim in Mombasa High Court Civil Case No. 453 of 2000 which counterclaim was equally dismissed and that the Court did not make any order requiring him to surrender the title for the original suitland being Kilifi/Mtondia/77. It is indeed the 1st Defendant's contention that the High Court in Mombasa found that he was not in illegal occupation of the land and further that the Plaintiffs' suit is bad in law and an abuse of the Court process.

14. The Judgment of the Honourable Justice J.W. Mwera (as he then was) delivered on 11th November 2005 in the said Mombasa High Court Civil Case No. 453 of 2000 is attached to the Supporting Affidavit of Amina Mbarak, the 1st Plaintiff herein and marked Exhibit No. 2. A perusal thereof reveals that the 1st Defendant herein as the sole Plaintiff had sued the 5 Plaintiffs herein as Defendants in the said suit together with the said Charo Ruwa Mwangona who later passed on during the pendency of the said proceedings. At page 8 of the decision, the Learned Judge put forth three broad issues for his consideration. These were:-

- i. *The ownership/registration of Plot No. 77;*
- ii. *The validity of the contract of sale between the said Charo Ruwa Mwangona and the 1st Defendant herein; and*
- iii. *Whether the property in Plot No. 77 passed to the 1st Defendant herein.*

15. The Learned Judge went on to find that the Sale Agreement between the 1st Defendant herein and the deceased Charo Ruwa Mwangona dated 12th November 1988 was valid save that it appeared subject to the sanction of the Director of Settlement under the Settlement Fund Trustee which did not appear to have been obtained. The Court further found that this being Agricultural Land, it was subject to Land Control Board Consent but the consent availed in Court was obtained 3 years prior to the sale transaction thereby casting doubt as to whether it could validate the sale transaction. At page 13 of the decision, the Learned Judge summed up his decision in the following manner:-

“In sum this suit is dismissed with costs. As to the counterclaim, it too is dismissed again with costs. It was not proved that the Plaintiff (the 1st Defendant herein) was in

illegal occupation of the subject property. It was also not proved here that the 1st Defendant's (the late Charo Ruwa Mwagona's) mental capacity was affected by age, drunkenness or bodily distress when he entered the "agreement" to sell the land. The Court would have gone ahead to grant the prayers on the suit if it had been proved that the SFT (Settlement Fund Trustees) finally sanctioned the sale between Rasto (1st Defendant herein) and Charo (now deceased).

16. In the suit before me, the five Plaintiffs who were previously the Defendants in the Mombasa case now state as follows at Paragraphs 3, 4, and 6 of the Plaint:-

"3. At all material times herein the Plaintiffs are the beneficial owners entitled to possession of all that parcel of land situated at Mtondia Settlement Scheme known as Title No. Kilifi/Mtondia/77 containing by measurement 12 acres or thereabouts which has since been subdivided into two parcels known as Title No. Kilifi/Mtondia/903 and Title No. Kilifi/Mtondia/904.

4. The suit property comprises of 12 acres of land and the 1st and 4th Plaintiffs bring this suit in their capacity as the Administrators of Charo Ruwa (herein after called the deceased) who was the original allottee and owner of Title No. Kilifi/Mtondia/77.

6. The Defendant has always stayed on the parcel of land illegally, since the sale agreement between the Defendant and the deceased was fraudulent.

17. Evidently, the issue that this Court is being invited to adjudicate upon are the very same issues which Mwera J (as he then was) had pronounced himself upon in his Judgment of 11th November 2005 in the Mombasa Case. Section 7 of the Civil Procedure Act provides as follows:-

"7. Res Judicata

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

18. As was stated by the Court of Appeal in ***John Florence Maritime Services Ltd & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others(2015) eKLR:-***

"The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same subject matter. Res judicata ensures the economic use of the Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law."

19. As I have said, it is clear to me that the issues being raised in the suit and application before me had already been adjudicated upon and were effectively and finally determined in Mombasa High Court Civil Case No. 453 of 2000. Even the Counterclaims raised by the Defendants revolve around the subject of the use and occupation of the original parcel of land No. Kilifi/Mtondia/77, a matter which the High Court had effectively pronounced itself on.

20. For the foregoing reasons I strike out both the Notice of Motion dated 8th October 2016 and the

Plaint as filed and Amended on 12th October 2016 with costs to the Defendants.
21. The two Counterclaims filed by the 1st and 2nd Defendants are equally struck out but with no order as to costs.

Dated, signed and delivered at Malindi this 15th day of November, 2017.

J.O. OLOLA

JUDGE