



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 47 OF 2013

HABIB ABU MOHAMED.....PLAINTIFF

=VERSUS=

STEPHEN OLUOCH.....DEFENDANT

J U D G M E N T

1. In his Complaint dated 26th March, 2013, the Plaintiff has averred that he is the registered owner of plot No. L. R. No12240 Malindi having purchased it vide an Indenture of 16th March, 2010.

2. The Plaintiff has averred that on diverse dates in the month of October, 2012, the Defendant encroached on his land. The Plaintiff is seeking for an order of vacant possession.

3. In his Defence, the Defendant averred that he purchased the suit property from Nurali Papat Hasham and Zerine Nurali Hasham (the Popats) and that he has occupied the suit property continuously since 11th December, 2006.

4. It is the Defendant's case that the Plaintiff ought to have sued the original owners of the suit property in these proceedings.

The Plaintiff's case:

5. The Plaintiff, PW1 informed the court that he bought the suit property from one Nurali Papat Hasham and Zarine Nurali Hasham vide an Indenture of 16th March, 2010.

6. It was the evidence of PW1 that after the said purchase and payment of Kshs.8,000,000, he fenced the land and that he has been paying for the land rates since then.

7. According to the Plaintiff, when he bought the suit property in the year 2010, the land had already been surveyed and that he signed the indenture dated 16th March, 2010 in respect to the surveyed land.

8. The Plaintiff produced in evidence the Indenture and the rates receipts.

9. It was the evidence of PW1 that he noticed the Defendant had started developing the suit property in the year 2012 and that the Defendant should be evicted from the suit property.

10. In cross examination, PW1 stated that Mr. Popat never informed him that he sold a portion of the suit

property to the Defendant and that the land is not agricultural land.

11. The Defendant, DW1, informed the court that he entered into a sale agreement with Mr. Nurali Popat and Zarine Nurali for the purchase of a portion of land then within unsubdivided portion number 244 measuring 154.38 acres.

12. It was the evidence of DW1 that the portion he purchased measured 0.3 Ha; that he paid Kshs.65,000 to the Popats after paying, Kshs.70,000 to the squatters who were on the land and that he was one of the first people to purchase the land.

13. DW1 informed the court that the vendor acknowledged that he was one of the first people on the suit property vide a signed memorandum dated 25th February, 2011.

14. It was the evidence of DW1 that he could not find the copies of the record at the Ministry of Lands showing that the Plaintiff is the owner of the land.

15. According to DW1, he has been living on the land since December, 2006, and that he has been pursuing the issuance of a Deed Plan for the land since 2009.

16. DW1 produced the sale Agreement together with a list of people who purchased the land from Mr. and Mrs Popat.

17. In cross examination, DW1 admitted that the list of the people who bought the land from the Popats shows that the Plaintiff purchased five acres; that he engaged a surveyor to survey his land although the documents were misplaced and that he has never paid the rates for the land in question.

18. The Plaintiff's advocate submitted that the Plaintiff has demonstrated how he acquired the suit land; that the Defendant has not proved any alleged fraud towards acquisition of the said land and that the Defendant is a trespasser.

19. The Defendant's advocate submitted that even if the Plaintiff acquired certain proprietary interests to the land, the said rights are subject to overriding interests under Section 28 of the Land Registration Act, 2012 and that he is a bona fide purchaser.

20. Both the Plaintiff and the Defendant are claiming to be the owners of land known as L.R. No.12240.

21. According to the Plaintiff, he purchased the land measuring 2.040 Ha which is described on Deed Plan number 288952.

22. The Plaintiff informed the court that he purchased the suit of land vide an Indenture dated 16th March, 2010 and that the said land had been surveyed by the vendors in the year 2008.

23. The Plaintiff produced in evidence the Indenture of 16th March, 2010 which was duly signed by Mr. Nureli Popat Hasham and Zerina Nurali Hasham before Mr. Kupalia advocate.

24. The Indenture that was produced in evidence was registered in the Mombasa land registry on 19th March, 2010. The Indenture has a Deed Plan which was created after the suit property was curved from land known as Plot 244 and measuring 154.38 acres.

25. It is trite that under the provisions of the Land Titles Act (repealed), once land is sub-divided, the Deed Plans for the respective sub-plots are prepared and annexed to an Indenture which is duly registered in the land registry. The registration of an Indenture confers legal interests to the purchaser and the Indenture becomes the title document.

26. The Defendant's case is that he purchased a piece of land measuring 0.3 Ha from Mr. and Ms Popat,

the same people that sold to the Plaintiff the land.

27. The Defendant relied on the Agreement of sale dated 11th December 2006 which shows that he purchased a parcel of land comprising 1/8 of the land portion No. 244 for Kshs.65,000.

28. The Defendant informed the court that as at the time of the said purchase, the suit property had not been surveyed.

29. Indeed, paragraph 7 of the sale agreement shows that it was the responsibility of the Defendant to meet the expenses for subdivision, surveying and registration of the plot that he purchased.

30. Although the Defendant informed the court that he engaged a surveyor to survey the land that he bought, and that indeed the said survey was done but the survey documents were misplaced, no evidence was adduced to show that any survey work was done.

31. The Defendant did not call the surveyor who is said to have done the survey in respect of the land that he bought to enable the court ascertain his claim.

32. The Defendant has not denied that the Plaintiff also bought the land from the Popats.

33. In fact, it is the Defendant who produced in evidence a document showing that five people purchased land from the Popats, and that only 4 acres, out of the Popats portion of land measuring 19.2 acres remained unsold.

34. The list produced by the Defendant shows that the Defendant purchased 0.3 Ha while the Plaintiff purchased 5 acres, which tallies with the acreage shown on the Plaintiff's Indenture and Deed Plan.

35. The Defendant did not call a surveyor or any evidence to show that the land comprised in the Deed Plan annexed on the Plaintiff's Indenture falls somewhere else and not where the Defendant lives.

36. I have gone through the Defendant's Defence and I have not come across the particulars of fraud that the Plaintiff perpetrated in obtaining the Indenture.

37. Once a title document is produced by a party, it is prima facie evidence that the person with the title document is the owner of the land unless it is proved that he obtained the said title by mistake or fraud. It is the person who alleges that the said title was obtained fraudulently who has the burden to prove such an allegation.

38. While departing from its own decision in the case of **Munyu Maina Vs Hiram Gathime, Civil Appeal No. 239 of 2009**, the Court of Appeal in **Malindi Civil Appeal No. 29 of 2016, Peter Kamau Njau Vs Emmanuel Charo Tinga** held as follows:-

“The learned Judge was clearly misled by the statement of this court sitting at Nyeri in Munyu Maina (Supra) in the passage reproduced earlier, which, in effect erroneously suggests that a document of title is worthless without further supporting evidence. Due diligence expected of a purchaser does not extend beyond the title of the vendor and, so long as the vendor's name is contained in the certificate of title, Section 26 of the Land Registration Act enjoins all courts to take that certificate of title as prima facie evidence that he is the absolute and indefeasible owner, subject only to encumbrances and conditions endorsed on the certificate. In the absence of evidence in rebuttal, it was grave error for the learned Judge to impeach the appellant's title in the manner he did.”

39. The Defendant produced evidence to show that indeed the Plaintiff was one of the people who purchased land from the Popats. The Plaintiff went ahead to show that after purchasing 5 acres from the vendor, he obtained the Indenture and the Deed Plan which was duly registered.

40. In the absence of evidence by the Defendant to show that the Indenture and the Deed Plan were fraudulently obtained, or that the land captured in the Deed Plan is not the same land that he (the Defendant) is occupying, I find and hold that the Plaintiff has proved his case on a balance of probabilities.

41. For those reasons, I allow the Plaint dated 26th March, 2013 in the following terms:-

(a) A declaration be and is hereby issued that the suit property being L.R. No.12240 belongs to the Plaintiff.

(b) An eviction order be and is hereby issued against the Defendant, his servants, assigns and or representatives who have trespassed on L.R.No.12240.

(c) An order of permanent injunction be and is hereby issued restraining the Defendant, his assigns, servants, agents or representatives from trespassing on L.R.No.12240.

(d) The Court Bailiff do, with the assistance of the OCS, Watamu and the OCS Malindi evict the Defendant, his assigns, servants, agents or representatives from L.R. NO.12240 Malindi.

(e) The Defendant to pay the costs of the suit.

Dated, signed and delivered in Malindi this 14th day of November, 2016.

O. A. Angote

Judge