



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 16 OF 2012

CAPUCHINI FRANCISCAN FATHERS

(KENYA) REGISTERED TRUSTEES.....PLAINTIFF

=VERSUS=

MONICA SYOMBUA MUTUA.....DEFENDANT

J U D G M E N T

Introduction:

1. In its Complaint dated 13th February 2012, the Plaintiff is claiming for an order directing the District Land Registrar, Lamu District Land Registry to cancel and or revoke the title deed for Lamu/Lake Kenyatta 1/89 (the suit property) issued on 28th August 2006 to the Defendant.
2. In the Complaint, the Plaintiff averred that it entered into a sale agreement with the Defendant on 18th August 2004 in respect to the suit property; that both parties signed the Application for the consent of the Board and the Transfer document and that thereafter the Plaintiff paid to the Defendant the full purchase price.
3. However, when the suit property was discharged by the Settlement Fund Trustees, the Title Deed was issued to the Defendant who has refused to transfer it to the Plaintiff.
4. In her Defence, the Defendant has denied that she sold the suit property to the Plaintiff. The Defendant has averred that the Sale Agreement alluded to in the Complaint is a forgery and that she never received the purchase price as alleged.
5. The Defendant has averred in the said Defence that sometimes in 1994, the Plaintiff, through Father Andrew Mwaura, took sponsorship of her granddaughter, Ann Msande Toti after her parents died and promised to assist her; that she was given 100,000 by father Andrew being the school fees for her granddaughter and that the Plaintiff is taking advantage of her illiteracy to acquire the suit property.

The Plaintiff's case:

6. The evidence of PW1 was that he met the Defendant in the year 2004 when she offered to the Plaintiff the suit property. According to PW1, the Defendant informed him that she did not have dependants and confirmed that position in writing to the Chief for the area.
7. It was the evidence of PW1 that the Defendant also gave to him the receipts showing the payments she had made to the Settlement Fund Trustee (SFT) in respect to the suit property and the Charge document whereafter they agreed on the purchase price of the suit property. It was his evidence

- that, they went to the offices of the Land Settlement Office and the transfer documents and the application for the consent of the Board was prepared and executed.
8. PW1 informed the court that after executing the Transfer and the Application for the consent of the Board, he went with the Defendant to the Board and the Defendant informed the members of the Board that she was selling her land to the Plaintiff.
 9. According to PW1, an agreement of sale was signed before a magistrate whereafter the Defendant opened a bank account to facilitate the transfer of the purchase price. After the agreement was executed, PW1 stated that the Board issued him with the consent and thereafter the Plaintiff remitted to to the Defendant's KCB account Kshs.465,000 on 29th March, 2005.
 10. After paying the Defendant the purchase price, it was the evidence of PW1 that the Plaintiff paid Kshs.9,080 for stamp duty and that he was then given a discharge of charge by the SFT after paying Kshs.5,090.
 11. However, when the Title Deed was issued, it was the evidence of PW1 that it was issued in the name of the Defendant who has since refused to release it to the Plaintiff.
 12. The Settlement Office, PW2, informed the court that he is the one filled the Application form for the consent of the Board for the Defendant and the Plaintiff which they both signed.
 13. PW2 produced in evidence the letter of allotment which was issued to the Defendant, the Charge document and the entire file from the District Land Adjudication and Settlement Office, Lamu.
 14. According to the witness, the Defendant signed the Application for the consent of he board in his presence and that by the time the Defendant was selling the suit property, the Title Deed for the suit property had not been issued by the government.
 15. PW2 informed the court that the Land Control Board issued the consent for the Transfer of the suit property to the Plaintiff and that the Plaintiff paid the requisite stamp duty.
 16. However, after a presidential directive, it was the evidence of PW2 that the titles in the area were issued to the original allottees en-masse and that is how the title deed for the suit property was issued to the Defendant and not the Plaintiff.
 17. The Defendant neither testified nor called a witness to testify in this matter.
 18. The Plaintiff's advocate filed her submissions and reiterated the evidence by the Plaintiff.
 19. The Plaintiff's advocate submitted that the Plaintiff had proved that the Title Deed in respect to the suit property was obtained by the Defendant by misrepresentation.

Analysis and findings:

20. The only issue for determination is whether an order of specific performance can issue in the instant case.
21. The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract between the parties. An order of specific performance is issued by the court to compel a previously established transaction, and is one of the most effective remedy in protecting the expectations of a party to a contract.
22. The evidence before me shows that by a letter dated 24th February 2004, the Defendant expressed her willingness to sell the suit property to the Plaintiff. The Plaintiff produced an agreement which was signed before the Senior Resident Magistrate, Lamu on 18th August 2004.
23. According to the evidence of PW1, he signed the said agreement and his signature was witnessed by the Magistrate, and so was the Defendant's signature.
24. The signature of the Defendant on the agreement is similar to the signature that appears on the letter dated 24th February 2004 and the Application for the consent of the Land Control Board.
25. The evidence before this court shows that the Defendant applied to the Lamu Land Control Board for the consent to transfer the suit property at a consideration of Kshs.450,000. The Board gave its consent on the 18th August 2004.
26. PW2 also produced in evidence the Transfer document that was signed by the Defendant in his presence on 16th July 2004. The Plaintiff's signature on the Transfer document is similar to the signature of the other documents that I have already mentioned.
27. The Plaintiff's bank statement was also produced in evidence. The said statement shows that on 29th March 2005, Kshs.465,000 was debited from the Plaintiff's account.
28. Although the Plaintiff paid to the SFT Ksh.5,090 and the suit property was discharged, and

- although the SFT signed the Transfer document in favour of the Plaintiff, on 22nd April 2010, the Title Deed in respect to the suit property was issued to the Defendant by mistake.
- 29.Indeed, the official search shows that by the time the SFT was transferring the suit property to the Plaintiff, the Title Deed had already been prepared in favour of the Defendant.
- 30.I am satisfied that the Defendant in this matter signed the Agreement of sale before the Magistrate and Transfer document in respect of the suit property before PW2.
- 31.In the circumstances, and on the basis of the evidence before me, I am satisfied that the Plaintiff has proved its case on a balance of probability. The Title Deed for Lamu/Lake Kenyatta 1/89 was erroneously issued to the Defendant, the Defendant having sold it for valuable consideration to the Plaintiff. The register should therefore be amended to show that it is the Plaintiff who is the proprietor of the suit property.
- 32.I am also satisfied that she applied to the Lamu Control Board for the consent to transfer the suit property which consent was given whereafter the SFT signed the Transfer documents transferring the suit property to the Plaintiff.
- 33.For the reason I allow the Plaintiff's Plaint dated 13th February 2012 as prayed.

Dated and delivered in Malindi this **15th** day of **May**, 2015.

O. A. Angote

Judge