



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.147 OF 2014

KURSHED BEGUM MIRZA.....PLAINTIFF

VERSUS

JACKSON KAIBUNGA.....DEFENDANT

J U D G M E N T

1. The Plaintiff has averred in her Complaint dated 24th July, 2014 that the Estate of Mirza Shah Mazar Bilachi, where she is the Administrator, is the registered owner of the subdivided shares of parcel of land known as plot number 21 Watamu being 4/48 shares while she is the owner of 7/48 shares.
2. It is the Plaintiff's averment that when she sold her 7/48 shares to Roberto Menganelli, the Defendant stopped him from developing the land claiming that it was his.
3. The Plaintiff's claim is for a declaration that the Defendant's action of invading the suit property is unlawful; a mandatory injunction compelling the Defendant to pull down the structure already constructed on the suit property and for a permanent injunction restraining the Defendant from trespassing on the suit property. The Plaintiff is also seeking for damages.
4. In his Defence, the Defendant averred that he is the registered proprietor of plot number 670 (original number 21/8) Watamu and plot number 809 (original 21/20 Watamu), which plots were borne out of the undivided share of plot number 21; that plot number 21 Watamu was owned by several people in indefinite undivided shares and that his shares were clearly surveyed and registered as plot numbers 670 and 809 Watamu, and entered as entry numbers 21, 35 and 40 in the mother title.
5. It is the Defendant's Defence that when the Plaintiff attempted to sell plot numbers 670 and 809, she was charged in court and convicted for obtaining money by false pretence in criminal case number 593 of 2010.

The Plaintiff's case:

6. The Plaintiff, PW1, relied on her written statement filed in court on 24th July 2014.
7. According to PW1, her late husband acquired 4/48 shares from the original registered owner in 1980 but passed away before the said shares were registered against the mother title while she bought 7/48 shares from Mohamed Suleiman Ali and Ali Suleiman Ali which were registered against the mother title as entry number 68.
8. The Plaintiff produced in evidence the documents in support of her case, which included a copy of the mother title for plot number 21 Watamu measuring 12.17 acres, the Certificate of Postal Search in respect of 7/48 shares in her name and the Transfer documents between her late husband and Sheikh Oman Dhaman El-Amudy for 1/48 share and Suleiman Ali Suleiman for 1/48 share.
9. In cross examination, PW1 informed the court that her husband was processing the title document

- for his share before he died. It was the evidence of PW1 that they never engaged the services of a surveyor for the purpose of excising their portion of land.
10. It was the evidence of PW1 that once one identified his share on plot no. 21 and built on it, the land became his.
 11. PW1 informed the court that the suit properties had structures which have since been demolished by the Defendant.
 12. PW2 is the son of the late Suleiman Bin Ali who sold one of the shares to the Plaintiff's late husband.
 13. According to PW2, when their father and the Plaintiff's husband died, the Plaintiff approached them and offered to clear the balance of the purchase price in respect of the shares that had been purchased by her husband.
 14. According to PW2, the Defendant does not want to confine himself to his shares.
 15. The Village Elder, Ali Abdalla Twaha, informed the court that the late Mirza Shah is the owner of the suit property where he had makuti shades and a cinema hall called Doovie Cinema and a bar called Happy Night.

The Defendant's case:

16. The Defendant, DW1, informed the court that he is the registered proprietor of plot number 670 and 809 Watamu.
17. It was the evidence of DW1 that in the year 1996, he, together with other people, including the Plaintiff's late husband acquired plot number 21 Watamu for valuable consideration; that the plot was owned in terms of undivided shares; that his undivided shares in plot number 21 were excised after subdivision and surveying culminating to plot number 670 and 809 Watamu and that the said ownership was confirmed in entry number 21, 35 and 40 in the mother title of plot number 21, Watamu.
18. It was the evidence of DW1 that the Plaintiff's late husband's share and the Plaintiffs' shares are undefined and undivided.
19. According to DW1, in 1996, a dispute arose between him and the Plaintiff's late husband in respect of plot number 809 and that he sued him in Malindi PMCC NO. 71 of 1996 in which case the Plaintiff's husband was restrained from carrying out any developments on plot number 809 Watamu.
20. DW1 produced in evidence the title documents in respect of plot 670 and 809 together with the Certificates of Postal Searches for the two plots.

Submissions:

21. The Plaintiff's advocate submitted that the evidence on record shows that the Plaintiff and her late husband moved into their portions of land long before the Defendant, developed the same and were running their businesses thereon.
22. Counsel submitted that the Defendant should not be allowed to escape with his action of attempting to take away the Plaintiff's portion of land by waving the two title documents.
23. The Defendant's counsel on the other hand submitted that the Plaintiff and her two witnesses have not proved that the Defendant had encroached on the Plaintiff's land.
24. Counsel submitted that according to the evidence on record, the Defendant has confined himself on his two plots.

Analysis and findings:

25. The evidence before this court shows that on 26th September 1980, the Plaintiff's late husband, Mirza Shah acquired 2/48 undivided shares in all that portion of land known as plot number 21 from Suleiman Bin Ali.
26. According to the Agreement between Suleiman Bin Ali and Mirza Shah dated 26th September 1980, the seller allowed the buyer to use his shares as he thought fit.
27. The Transfer in respect of the undivided shares that the Plaintiff's husband purchased were registered against the mother title of plot number 21 on 14th August 1980 as entry numbers 6 and

- 7.
28. After the demise of her husband, the Plaintiff purchased 7/48 undivided shares of Mohamed Suleiman Ali and Ali Suleiman vide a Transfer dated 6th November 2006. The said Transfer was registered against the mother title of plot no. 21 Watamu on 27th September 2007.
 29. According to the Plaintiff, the 2/48 shares that the Plaintiff's husband bought in 1980 and the 7/48 shares that the Plaintiff bought in the year 2006 are "contiguous, thus forming one complete portion on the ground."
 30. The Plaintiff, PW1, stated in evidence that the portions of land that her husband and herself bought have never been surveyed. Consequently the said portions of land do not have a distinct title document. However, according to the Plaintiff, her late husband put up a cinema hall known as Doovie which was later on converted into a night club known as Happy Night club on the portions of land that he bought.
 31. In support of the averment that her late husband put up a building on the suit property, the Plaintiff produced in evidence the approved development plan. The said plan was approved by the then Municipal Council of Malindi on 15th May 1987.
 32. The evidence of PW1, PW2 and PW3 was that the Defendant demolished the structures that were put up on the suit property by the Plaintiff's late husband.
 33. On the other hand, the Defendant has claimed that he also bought undivided shares in plot no. 21 Watamu.
 34. According to the mother title of plot number 21 Watamu, the Defendant's 1/48 shares were registered against the title as entry number 21 on 28th September 1987 and another share of 1/48 was registered as entry number 35 on 3rd March 1995.
 35. Entry number 40 shows that the Defendant was issued with Certificate of Titles for the shares that he purchased.
 36. The Defendant produced in evidence the copy of title for portion number 670 (original number 21/18) and 809 (original number 21/20)
 37. The Certificates of Postal Searches for the two plots were also produced in evidence together with the copies of the transfer of the undivided shares in plot No. 21 Watamu.
 38. The Deed Plans annexed on the two Certificates of Titles shows that the two properties were surveyed before January 1993.
 39. Whereas the Certificate of Title for plot number 670 was registered on 3rd June 1993, plot number 809 was registered in favour of the Defendant on 12th September 1995.
 40. The Defendant has also produced in evidence the approvals he obtained from the then Municipal Council before the two plots were excised and surveyed. The said approvals were given on condition that the plot owner had no objection to the proposed plan.
 41. There is no evidence placed before me to show that the owner of plot number 21 Watamu objected to the excision of the two plots by the Defendant as proposed in the sub-division plan.
 42. Indeed, there is no evidence to show that the shares the purchasers were buying from the owner of plot no. 21 were identifiable as at the time of the purchase.
 43. Although the denominator of all the shares was 48, there is no evidence before me to show that plot number 21 Watamu was formally subdivided into 48 plots before the said sub-divisions were sold. That explains why the shares that were registered against the title are referred to as undivided.
 44. It therefore follows that all the people who purchased the said undivided shares could settle on any part of the suit property until such a time that their shares were identifiable by way of beacons.
 45. Before an individual acquired a separate title document for his share, he only held such a share as a tenant in common.
 46. Until physically divided and a beacon certificate or a certificate of title is issued, the share of each tenant only existed in relation to the metaphysical abstract ownership of the land and not in the physical land itself.
 47. That is more so in this case because there was no sub-division scheme with identifiable numbers which could enable each tenant to lay a claim, with certainty, the piece of land that he had purchased from the owner of plot number 21.
 48. In the case of **Kuwanga Vs Ngumbao Kazungu & another, 2014, eKLR**, this court held as follows:

“As discussed by Sweet & Maxwell's (Supra), the undivided nature of the shares and inability to demarcate the land physically flows from the fact that unity of possession remains a necessary equipment of a tenancy in common thus entitling a tenant in common to possess every part of the land. The consequences of this doctrine of unity of possession entitles every tenant to possession of the whole of the land as tenant in common notwithstanding his shareholding.”

49. Because of the doctrine of unity of possession that applies to a property owned by tenants in common, every shareholder is entitled to possession of a part of the land until the land is physically sub-divided and each tenant identifies his or her portion either by way of a number or beacons.
50. Although the Defendant had what he believed were his portions surveyed in 1993 and 1995 respectively, the Plaintiff's husband did not do so.
51. Indeed, the Defendant sued the Plaintiff's late husband in Malindi PMCC NO. 71 of 1996 in which he sought for a permanent injunction to restrain the Plaintiff's husband from trespassing in land known as sub-division number 809.
52. On 3rd April 1996, the court ordered both parties to refrain from carrying out any further developments on the said piece of land. Due to the demise of the Plaintiff's husband, the suit abated.
53. The Plaintiff in this matter has not informed the court why she did not take out letters of administration with a view of defending PMCC No. 71 of 1996 but instead of filed the present suit. The Defendant did not also inform the court if she ever filed a Defence and Counter claim in the said suit.
54. Suffice to say that the Defendant has title documents for plot numbers 670 and 809. The Deed Plans on the said title documents clearly identify the said two portions.
55. On the other hand, the Plaintiff does not have any document to identify with precision the 2/48 shares belonging to her late husband. The Plaintiff's allegation that her late husband had commercial structures which have since been demolished by the Defendant cannot in itself override the sanctity of the titles being held by the Defendant.
56. The Certificates of Titles in respect of plot number 670 and 809 held by the Defendant are protected by the provisions of Section 23 of the Registration of Titles Act and Article 40 (1) of the Constitution.
57. Section 23 of the Registration of Titles Act (repealed) provides that the Certificate of Title issued by the registrar to a purchaser of land upon a transfer by the proprietor shall be taken by the court as conclusive evidence that the person named therein as proprietor therein is the absolute and indefeasible owner. Such a title is not subject to challenge except on the ground of fraud or misrepresentation to which the proprietor is proved to be a party.
58. The Plaintiff has neither alleged nor proved that the Defendant was issued with the Certificate of Title for portion 670 and 809 Watamu fraudulently or by misrepresentation. In fact, the Plaintiff has not sought in her Plaint for an order canceling the two Certificate of Titles neither has she alleged that the Defendant acquired the said titles fraudulently.
59. Consequently, I find and hold that the Plaintiff has not proved her case on a balance of probabilities.
60. For those reasons, I dismiss the Plaintiff's Plaint dated 24th July 2014 with costs.

Dated and delivered in Malindi this 2nd day of **October** 2015.

O. A. Angote

Judge