



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 26 OF 2011

ABDULLATIF AHMED YUNUS.....PLAINTIFF

=VERSUS=

1. HUSSEIN MOHAMED ABDULKADIR

2. DISTRICT LAND REGISTRAR LAMU.....DEFENDANTS

J U D G M E N T

Introduction

1. The Plaintiff moved this court by way of a Plaint dated 1st April 2011 and filed on 7th April 2011.
2. In the Plaint, the Plaintiff has averred that at all material times to the suit, he was the registered owner of 4/15 shares on plot Lamu/Block 1/714 (the suit property); that by an agreement dated 28th June 1991, the Plaintiff agreed to sell to the Defendant his portion of the suit property for the agreed price of Kshs.300,000 which was to be paid by installments and that the Defendant did not pay the full purchase price.
3. The Plaintiff finally averred that he was surprised to find out that the Defendant had transferred the suit property to himself which act is fraudulent, null and void.
4. The 1st Defendant filed an amended Defence on 18th September 2012 and stated that he paid to the Plaintiff Kshs.285,000; that the only amount that is due and owing to the Plaintiff is Kshs.15,000 which he is willing to settle and that he is the lawful owner of the 4/15 shares in the suit property.

The Plaintiff's evidence

5. The Plaintiff, PW1, informed the court that the 1st Defendant was a fellow businessman who used to buy products from him. PW1 stated that he sold to the 1st Defendant part of his land on 26th May 1992. The Plaintiff produced a copy of the Title Deed as exhibit number 1 and stated that the original title deed was in Dubai.
6. According to PW1, he had bought the suit property from one Salim Abed before he sold it to the 1st Defendant. The Plaintiff produced as exhibit number 2 the transfer of undivided shares between himself and the person who sold to him the shares and a copy of the agreement between himself and the 1st Defendant as exhibit number 3.
7. It was the testimony of PW1 that he was to sell his shares in the suit property for Kshs.300,000 of which the 1st Defendant only paid him Kshs.50,000. After being paid the Kshs.50,000, he left for Dubai. PW1 stated that although the 1st Defendant did not pay him the balance of the purchase

- price and without his permission, he proceeded to put up a go down on the suit property.
8. According to PW1, he discovered that his land had been transferred to the 1st Defendant although he never signed the transfer documents.
 9. PW1 produced an official search, which shows the 1st Defendant as the registered proprietor of the suit property as exhibit number 5.
 10. It was the evidence of PW1 that the 1st Defendant all along knew that he was based in Dubai and that he was not aware of the gazette notice of 24th August 2001 which had reported that he could not be traced. PW1 stated that the Defendants colluded to have the suit property transferred to the 1st Defendant and consequently the suit property should revert to him.
 11. In cross examination, PW1 stated that Mohamed Sheikh Abdulkadir was the 1st Defendant's brother whom they used to do business with. However, he never transacted with the said Sheikh Mohamed Abdulkadir in respect to the plot. He denied knowledge of a receipt for Kshs.235,000 that he purportedly issued to one Sheikh Mohamed dated 2nd July 1991 in respect to the suit plot. PW1 maintained that he was only paid Kshs.50,000 for the land and insisted that he was only aware of the handwritten agreement which was drafted by Abdulkadir, the 1st Defendant's brother.
 12. PW1 denied knowledge of Miscellaneous Civil Case No. 2 of 2001, Lamu and stated that he was not sure if he was in Kenya when the suit was filed.
 13. In re-examination, the Plaintiff stated that he was not aware of the typed agreement that he had been shown by the defence and maintained that the agreement he entered into with the 1st defendant was the handwritten one.

The 1st Defendant's case

14. The 1st Defendant, DW1 informed the court that he used to do business with the Plaintiff and that he purchased the suit property from the Plaintiff vide an agreement dated 28th June 1991. DW1 produced the original handwritten agreement dated 28th June 1991 as defence exhibit number 1. The 1st Defendant also informed the court that there was another agreement between the Plaintiff and his brother Sheikh Mohamed Abdulkadir. That particular agreement was not produced as an exhibit because it was not one of the documents in the Defendant's list of documents that was filed in court and served upon the Plaintiff.
15. It was DW1 evidence that he paid the Plaintiff Kshs.285,000. He had initially paid Kshs.50,000 and then Kshs.235,000. The witness produced the receipt for Kshs.235,000 as exhibit number 2. The receipt was issued in favour of the 1st Defendant's brother on his behalf. DW1 stated that although the Plaintiff had bought a share of the property from Salim Abed Awadh who died on 20th December 1991, the said Abed Awadh had not transferred it to the Plaintiff by the time the Plaintiff was selling it to the 1st Defendant. The Defendant produced the certificate of death of Salim Abed Awadh as Defence exhibit number 3.
16. DW1 further stated that he was unable to pay the Plaintiff Kshs.15,000 because he had travelled to Dubai. However, the land was registered in his favour after he went to court in RMCC NO.2 of 2001, Lamu. The case in Lamu was between himself and the Plaintiff.
17. According to DW1, the court in Lamu cancelled the Plaintiff's name from the register and had him registered as the proprietor of the suit property. DW1 produced in evidence a copy of the court order as Defence exhibit number 4 and the Gazette Notice that was issued in respect to the suit property after the court in Lamu issued its order as exhibit number 5.
18. DW1 further stated that the original owner of the suit property signed the transfer of the suit property on 17th July 1991 which was produced as Defence exhibit number 8. He also produced the Memorandum of Registration as Defence exhibit number 9.
19. In cross examination, DW1 stated that the transfer of the suit property was done by the original owner of the land, Mr. Awadh, because the land had not been transferred to the Plaintiff. He however stated that he went to the Lamu court to have the Plaintiff's name cancelled from the register.
20. Sheikh Mohamed Abdulkadir, DW2, informed the court that he is the one who authored the agreement dated 28th June 1991. DW2 stated that they paid the Plaintiff a total of Kshs.285,000.

DW2 stated that he is the one who paid the Plaintiff Kshs.235,000 while the 1st Defendant paid Kshs.50,000.

21. It was the testimony of DW2 that DW1 was his brother and partner in business. According to the witness, it is Salim Abed Awadh, the original owner of the land who transferred the land to the 1st Defendant. It was upon signing of the transfer by Salim Abed Awadh that they paid the Plaintiff Kshs.235,000. When they presented the transfer document to the land office for registration, they were informed that they needed the consent of the other shareholders. That is when they decided to go to court to have the suit property registered in favour of the Plaintiff.
22. However it was testified, the lands office insisted that they must issue a gazette notice before the transfer of the suit property could be transferred in favour of the 1st Defendant.
23. In cross examination, DW2 stated that he used to do business with the Plaintiff. He however insisted that the Kshs.235,000 he paid the Plaintiff was for the suit property and not for any other business.

Submissions:

24. The parties filed written submissions. The Plaintiff's advocate submitted that it is not in dispute that the plaintiff was paid by the Defendant kshs.50,000 and that the balance of Kshs.250,000 was to be paid in installments, which never happened.
25. The Plaintiff's advocate submitted that the alleged payment of Kshs.235,000 by the Defendant is a forgery considering that it was purported to have been paid on the 4th day after execution of the agreement.
26. The Plaintiff's counsel further submitted that if indeed the transfer between the 1st Defendant and the Original owner of the suit property was genuine, then the 1st Defendant would not have filed Lamu RMCC No. 2 of 2001; that the vesting orders lie with the High Court and not subordinate courts and that the Plaintiff was never served with the Application in Lamu RMCC No. 2 of 2001.
27. The 1st Defendant's counsel submitted that the Plaintiff fraudulently caused the suit property to be registered in his name on 26th May 1992 after the demise of Salim Abed Awadh on 20th December 1991.
28. Counsel further submitted that the original owner of the suit property, Salim Abed Awadh had an oral agreement with the Plaintiff in which it had been agreed that the late Salim Abed Awadh was to sign the transfer documents in the event the Plaintiff sells the property, which he did in favour of the 1st Defendant.
29. The 1st Defendant's counsel finally submitted that the Plaintiff was served with the pleadings in SRM court at Lamu, Civil Miscellaneous Application Number 2 of 2001 but he never entered appearance; that the said suit proceeded ex-parte and a Ruling was delivered in favour of the 1st Defendant and that the Plaintiff has not taken any step to challenge the decision of the court.

Analysis and findings:

30. It is not in dispute that on 28th June 1991, the Plaintiff entered into an agreement with the 1st Defendant for the sale of the suit property, which 4/15 shares in LAMU/BLOCK/1/174. The issues for determination, in my view, are as follows:

- (a) Whether the 1st Defendant paid to the Plaintiff Kshs.285,000 being part of the purchase price.
- (b) Whether the suit property was fraudulently registered in favour of the Plaintiff on 26th May 1992.
- (c) Whether the suit property was fraudulently registered in favour of the 1st Defendant on 19th November 1992.
- (d) Who is entitled to the suit property.

31. The Plaintiff, the 1st Defendant and the late Salim Abed Awadh were residents of Lamu at all

- material times. The Plaintiff, PW1 and the 1st Defendant, DW1, are in agreement that the late Salim Abed Awadh was the owner of 4/15 shares in LAMU/BLOCK 1/714, the suit property. However, he was indebted to the Plaintiff and consequently surrendered the suit property to the Plaintiff. According to the Plaintiff, the said Salim Abed Awadh signed the transfer document in respect to the suit property before he died. The Plaintiff produced as exhibit 2 a copy of the Transfer of undivided 4/15 shares of LAMU/BLOCK 1/714. The said transfer was signed by the transferor, Salim Abed Awadh on 21st May 1992 before the then Chief. The said transfer was registered at the Land Registry Mombasa on 20th March 1992 and a title deed was issued in favour of the Plaintiff on 26th May 1992. However, according to the Certificate of Death that was produced as defence exhibit number 3, the original owner of the land, Mr. Salim Abed Awadh died on 20th December 1991. It is not clear how the transfer document was signed by Salim Abed after his death.
32. It would appear, at least from the exhibits which were produced in evidence, that the Plaintiff entered into an agreement of sale on 28th June 1991 before the transfer of the suit property was effected in favour of the Plaintiff.
 33. It is the 1st Defendant's case that although the late Salim Abed Awadh surrendered the suit property to the Plaintiff, Salim Abed Awadh was to sign the transfer documents in favour of the person the Plaintiff was to identify.
 34. The 1st Defendant produced in evidence the transfer of the suit property that was signed by the late Salim Abed Awadh as defence exhibit 8.
 35. The said Transfer was signed by the late Salim Abed Awadh on 4th September 1991, two months after the agreement between the Plaintiff and the 1st Defendant was entered into. The same was however never presented for registration.
 36. Although the Transfer document in favour of the 1st Defendant who claims he paid the Plaintiff Kshs.285,000 was signed by the owner of the property on 4th September 1991, it is the transfer document which was signed on 21st May 1992 in favour of the Plaintiff which was registered and a title deed issued. It is however improbable that the Transfer document that was produced by the Plaintiff as Plaintiff exhibit number 15 is a genuine document considering that by 21st May 1992 when it is purported to have been signed by Salim Abed Awadh, the said Salim Abed Awadh was already dead.
 37. Indeed, the late Salim Abed Awadh must have signed the Transfer document which was produced as Defence exhibit number 8 on 4th September 1991 after he was convinced that the Plaintiff had been paid the amount that he owed him (the Plaintiff). In any event, the Plaintiff has admitted that the 1st Defendant took possession of the suit property upon the payment of Ksh.50,000/- which act must have convinced the late Salim Abed Awadh to sign the transfer document in favour of the 1st Defendant.
 38. The 1st Defendant could not complete the Transfer of the suit property considering that he was not in possession of the original Title Deed. However, the Plaintiff was able to complete the Transfer by lodging the transfer document together with the Original Title Deed which he had been given by the original owner. That explains why a title deed, Plaintiff's exhibit number 1, was issued in favour of the Plaintiff on 26th May 1992. However as I have stated above, the issuance of the said Title Deed in favour of the Plaintiff was unprocedural because the Transfer document that the Plaintiff presented for registration on 20th May 1992 was signed way after the transferor had died. A valid Transfer document was therefore never presented for registration. The title deed dated 26th May 1992 issued in favour of the Plaintiff is therefore a nullity and of no legal consequence.
 39. Although the 1st Defendant was in possession of a duly signed Transfer document, he could not proceed with the registration of the same because the Plaintiff was in possession of the original title deed and the Plaintiff had relocated to Dubai.
 40. I therefore agree with the 1st Defendant's evidence that for him to obtain a title for the suit property, and considering that the property had been subsequently registered in favour of the Plaintiff on 26th May 1992, he had to sue the Plaintiff for the cancellation of the said Title Deed and rectification of the register.

41. The 1st Defendant produced in evidence Defence exhibit number 4 the order of the court in SRMC Civil Misc. Application No. 2 of 2001. The effect of the order was to cancel the entry registered in favour of the Plaintiff in respect of the suit property and the said entry to be replaced with the 1st Defendant's name.
42. Indeed, the lower court, under section 150 of the repealed Registered Land Act, cap 300 had the power to order for cancellation of title and rectification of the register if the value of the property did not exceed Kshs.500,000/-.
43. The Plaintiff stated that he was not aware of the suit in the lower court, a very serious allegation for that matter. However, an order of the court always remains valid until is stayed varied or set aside. The Plaintiff should have filed a suit to set aside the order of the lower court on the basis that he was never served with the pleadings. He has not done that and this court cannot, in these proceedings, make any pronouncements in respect to that order. In fact the Plaintiff is not seeking to set or vary the order of the lower court. Consequently, the order of the lower court is valid and the Plaintiff's title deed of 26th May 1992 stands cancelled. This court cannot order the cancellation of the certificate of title that was subsequently issued to the 1st Defendant pursuant to the order of the lower court when the matter before it is not an appeal from the lower court's order of 11th April 2001.
44. In any event, I have already held and found that the Title Deed that was issued to the Plaintiff on 26th May 1992 was issued unprocedurally and the same is a nullity.
45. The gazette notice number 5724 of 24th August 2001 by the Land Registrar, Lamu was to inform the public about the order of the court canceling the Plaintiff's title deed. It was, in my view, just for information and not necessary. The District Land Registrar was under an obligation to effect the order of the court. If the Plaintiff was not aware of the proceedings in the lower court, he had an opportunity to challenge the said proceedings upon the publication of the said gazette notice. Every citizen of this country is presumed by law to be aware of what is published in the gazette notices. It is therefore not relevant whether the Plaintiff was in the country or not when the gazette notice was published.
46. For the reasons I have given above, I find that the Plaintiff has not proved his case on a balance of probabilities. I therefore dismiss the Plaintiff's Plaint with costs.

Dated and Delivered in Malindi this **28th** Day of **February 2014**

O. A. Angote

Judge