



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO. 61 OF 2013

TAIB ALI TAIB.....PLAINTIFF

=VERSUS=

AHMED FUAD AMIR.....1ST DEFENDANT

OMARI SHARIFF AHMED.....2ND DEFENDANT

KASSIM ISMAIL JUMA.....3RD DEFENDANT

LEMMY K. MBOGORI.....4TH DEFENDANT

ABDULHAKIM AMIR.....5TH DEFENDANT

ABDULSHAKUR BADRUDIN.....6TH DEFENDANT

ABDULSHAKUR.....7TH DEFENDANT

JUDGMENT

Introduction:

1. The Plaintiff moved this court by way of a Complaint dated 25th March 2013 and filed on 10th April 2013.
2. In the Complaint, the Plaintiff has averred that he is the registered, legal and beneficial owner and entitled to all that portion of land known as portion number M.51 Malindi comprised in a certificate of ownership number 1062 measuring 44.75 acres and situated in North- West of Malindi (the suit property).
3. The Plaintiff further averred that he purchased the said property for good and valuable consideration; that he has not sold, leased, charged or dealt with the suit property so as to in anyway dispose of his ownership interest to either the Defendants or any other third party.
4. According to the Complaint, on diverse dates between the years 2004 to 2007, the 1st Defendant illegally and unlawfully issued and caused to be registered a forged and false Indenture dated 10th May 2005 in respect of the suit property falsely purporting the Indenture to have been entered into and executed between the Plaintiff and the 1st Defendant. The 1st Defendant then fraudulently caused the suit property sub-divided into various plots known as subdivisions numbers 11035 to 11062 to 11075 and had the same registered.

5. The sub-division's created and registered by the 1st Defendant were then transferred and registered in favour of the 2nd to the 6th Defendants without the knowledge of the Plaintiff.
6. The Plaintiff's claim in for a declaration that the Indenture dated 10th May, 2005 and the titles that were issued to the Defendants in respect to the suit property are fraudulent and thus illegal, *null* and *void ab initio*. The Plaintiff is also seeking for a permanent injunction to issue as against the Defendants and for the eviction of the Defendants from the suit property.
7. The 3rd Defendant filed his statement of defence, list of witnesses and documents on 20th May 2013. The 1st Defendant entered appearance through his advocate on 10th May 2013 but did not file a defence. The 6th Defendant's advocate filed a notice of Appointment but did not file a defence.
8. Although the 1st, 3rd and 6th Defendants' advocates were served with the hearing notice of 13th March, 2014, they were not in court when the matter came up for hearing. The matter proceeded for hearing in their absence.

The Plaintiff's case:

9. The Plaintiff, Pw1, adopted entirely the contents of his statement that was filed together with the Complaint and documents.
10. Pw1 informed the court that he purchased the suit property vide an Indenture dated 26th March 1999 which he produced in evidence. It was his evidence that the said Indenture shows that he purchased the land for good consideration from one Farid Abdulrazak Sheikh who signed the it. The signature of the vendor was duly witnessed by Swaleh Kenyeki advocate while the Plaintiff's signature was witnessed by Nabhan Swaleh advocate.
11. It was the evidence of Pw1 that the Indenture was duly registered in his favour. The Plaintiff produced in evidence a certificate of search of Portion number M.51 Malindi as on 23rd November 1999 which shows the Plaintiff as the registered owner.
12. According to Pw1, he has been faithfully paying the requisite land rates and rent to the Municipal Council of Malindi. However, by way of a letter dated 13th June 2007 addressed to him by the then town treasurer of the Municipal Council of Malindi, the Plaintiff was notified that he was paying property rates for the plot which had undergone sub-division and the resultant sub-divisions partly sold to the third parties. That is when Pw1 started investigating the claim and in February 2014, he established that the 1st Defendant falsely and illegally registered himself on 10th May 2005 as the owner of the suit property. It is the 1st Defendant who sub-divided the property and the resultant new numbers were numbered 11035/1 to 11062-75.
13. The Plaintiff finally stated that he has never sold the suit property and that the alleged transfer and sub-division of the suit property was illegal, unlawful and contrary to the law and without his knowledge. The Plaintiff produced as exhibits documents running from pages 5 to 117 in his bundle of documents.

The Defendant's case:

14. All the Defendants, except the 3rd Defendant, did not file their respective Defences. According to the 3rd Defendant's Defence, the Plaintiff sold and transferred all his interests in the suit property to the 1st Defendant on 10th May 2005. The 3rd Defendant then bought fifteen 15 acres by way of an agreement dated 17th September 2005.
15. The 3rd Defendant has averred in his Defence that he lawfully sub-divided the suit property and that he is the lawfully proprietor of the fifteen sub-division.
16. The 3rd Defendant did not give evidence on how he acquire the suit property from the 1st Defendant. The allegations in the Defence are therefore not supported by evidence.

Analysis and findings:

17. According to the Indenture dated 27th August, 1998, Ahmed Fuad Amir transferred plot number

- M. 51 Malindi to Farid Abdulrazak Sheikh at a consideration of Kshs. 2,500,000/=. The said Indenture was registered on 28th August 1998. The certificate of postal search produced in evidence shows that the suit property was indeed registered in the name of Ahmed Fuad Amir as at 12th August 1998. However, as at 13th January 1999, the suit property had passed to Farid Abdulrazak Sheikh.
18. The evidence before the court further shows that Farid Abdulrazak Sheikh transferred the suit property to the Plaintiff by way of an Indenture dated 26th March 1999. The said Indenture was registered at the land registry Mombasa on 28th April 1999. The Plaintiff produced in evidence the said Indenture and a certificate of postal search which shows that as at 23rd November 1999, he was the registered proprietor of portion number M.51 Malindi measuring 44.75 acres. The Plaintiff also produced in evidence the Rate Clearance Certificates that he received from the Malindi Municipal Council for the year 2001 and the subsequent years.
19. However, on 13th June 2007, the Treasurer of the defunct Municipal Council of Malindi wrote to the Plaintiff informing him that the suit property had been sub-divided. The Council requested for documents from the Plaintiff to enable them update their records. It is upon the receipt of that letter that the Plaintiff realised that the suit property had been transferred to a third party.
20. The Plaintiff produced in evidence a bundle of correspondence that he exchanged with the Council in respect to the suit property after he was informed about the change of ownership. The Plaintiff also produced the certificate of search showing that as at 5th July 2005, the suit property belonged to the 1st Defendant.
21. The 1st Defendant did not file any defence to rebut the Plaintiff's averment that the suit property was fraudulently registered in his name. Indeed, the Plaintiff managed to get a copy of the Indenture dated 10th May 2005 showing that he had sold the suit property to the 1st Defendant. The said Indenture was registered at the Lands registry, Mombasa on 11th May 2005. The 1st Defendant, according to a copy of the sale agreement dated 17th September 2005 produced by the Plaintiff, purportedly sold 15 acres of the suit property to the 3rd Defendant for a consideration of Kshs. 5,000,000. The 3rd Defendant proceeded to sub-divide the suit property.
22. The Plaintiff's uncontroverted evidence is that he has never transferred the suit property to the 1st Defendant or at all. In the circumstances, the only conclusion that this court can arrive at is that the 1st Defendant fraudulently transferred the suit property to himself and had the property registered in his name without the knowledge of the Plaintiff.
23. The fraudulent transfer and registration of the suit property in favour of the 1st Defendant was *null* and *void ab initio*. And if the title to the 1st Defendant is *null* and *void ab initio*, it conferred no interest to the 1st Defendant. If the 1st Defendant did not acquire any interest in the land, then he had no interest to transfer to the Defendants or at all. In the case of MACFOY -Vs- UNITED AFRICA CO. LTD. (1961) 2 ALL ER 1169, Lord Denning held as follows at page 1172.
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”**
24. It therefore does not matter that when the 3rd Defendant purchased a portion of the suit property from the 1st Defendant, he believed, based on the certificate of search then obtaining at the lands registry, that the property belonged to the 1st Defendant. Indeed, that might have been the case.
25. However, the 3rd Defendants' titles cannot stand once the court finds that the 1st Defendant's title was *null* and *void ab initio*. The 3rd Defendant's recourse, in my view, is against the 1st Defendant and, if the circumstances permit it, the government.
26. In the circumstances, and for the reasons I have given above, I find that the Plaintiff has proved his case on a balance of probabilities. I allow the Plaintiff's Plaint in the following terms:

- a. A declaration be and is hereby issued that the Indenture dated 10th May, 2005 and or any other instrument of conveyance of the suit premises and titles issued to the Defendants or any other person and registered over portion number M. 51 Malindi comprised in a Certificate of Ownership number 1062 are fraudulent and thus illegal, *null and void ab initio*.
- b. An injunction be and is hereby issued to permanently restrain the Defendants and or any other third parties by themselves and or their servants and or agents and or employees and or howsoever from either entering upon, occupying constructing on or developing or selling, transferring, charging, mortgaging or in any other manner whatsoever and howsoever interring with portion number M 51 Malindi measuring 44.75 acres comprised in a certificate of ownership number 1062 and or in any other manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of all those pieces or parcels of land of portion number M.51 Malindi or by any other past or future number or description that may be accorded to them.
- c. An order do and is hereby issued directing the Commission of Lands and the Registrar of Titles to ensure that no other titles or transfers or sub-divisions in respect of the suit premises are registered and derogate from or subtract from or in any other manner whatsoever diminish or take away from or negate the title of the Plaintiff in the suit property or alters the status quo herein above described.
- d. An order be and is hereby issued directing the Commission of Lands or his replacement or equivalent and the Registrar of Lands and for their servants, agents and or employees to rectify the register by cancellation of all the entries relating to the issuance of the Indenture and or grants or titles and or conveyance and or proprietary interest complained of to each and every one of the Defendants in respect of all that portion of land measuring 44.75 acres and known as portion number M. 51 Malindi comprised in a certificate of ownership number 1062 registered in the said Registry in volume L.T. 33 (now L.T.38) Folio 319/13 File number 3759 and demarcated and delineated and bordered in Red on the land survey plan number 3514 and rectify the same in all manners required so as to ensure the intended objective and result of the Plaintiff's reinstatement and registration as the sole legal and beneficial owner thereof.
- e. An eviction order of all and of the defendants, their servants, agents, employees and or proxies and any other parties from the suit premises be and is hereby issued.
- f. An order directing the Defendants or any one of them and all of them to deliver up vacant possession of the suit property to the Plaintiff be and is hereby issued.
- g. The Defendants to pay the costs of the suit.

Dated and Delivered in Malindi this 9th day of May, 2014.

O.A. Angote

Judge