



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 176 OF 2012**

**NAWAL ABDULRAHMAN ABDALLA.....PLAINTIFF**

**=VERSUS=**

**EVA KIMEA.....1<sup>ST</sup> DEFENDANT**

**JOSEPH KIMEU.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

**Introduction**

1. This matter was commenced by way of a Plaint dated 6<sup>th</sup> December, 2012.
2. In the Plaint, the Plaintiff averred that she is the registered proprietor of land known as plot number 9339, Malindi (the suit property). It is the Plaintiff's case that the Defendants have trespassed on the suit property and are interfering with her quiet enjoyment of the same.
3. The Plaintiff is seeking for a permanent injunction against the Defendants and for a declaration that she is the registered proprietor and owner of the suit property.
4. In the amended Defence and Counter-claim, the 1<sup>st</sup> Defendant averred that she is the lawful and rightful registered proprietor of Plot number 9339 which is part of plot number 244/82 Kijiwetanga, Malindi and that it is the Plaintiff who has encroached on her land.
5. The 1<sup>st</sup> Defendant further averred that after she purchased the suit property vide an agreement dated 10<sup>th</sup> July, 1997 jointly with the 2<sup>nd</sup> Defendant, she developed the section belonging to her and even buried her husband on a portion of the suit property.
6. The 1<sup>st</sup> Defendant's claim against the Plaintiff is for an order of cancellation of the illegal Deed Plan and Indenture because the Transfer document was not signed by the lawful administrators of the Estate of Eric Edward Barallon.
7. In his Defence and Counter-claim the 2<sup>nd</sup> Defendant stated that he is the lawful owner of a portion of Plot number 9339, Malindi with the 1<sup>st</sup> Defendant in equal shares having bought it vide an agreement dated 16<sup>th</sup> July, 1997 from Eric Edward Barallon; that he paid part of the purchase price to the original owner and the balance to the administrators of the Estate of Eric Edward Barallon and that the Plaintiff

fraudulently transferred the property to herself.

8. The 2<sup>nd</sup> Defendant is seeking for a declaration that the suit property belongs to him and the 1<sup>st</sup> Defendant in equal shares and for a declaration that the Indentures dated 13<sup>th</sup> September, 2012 and 5<sup>th</sup> November, 2012 are forgeries.

### **The Plaintiff's case:**

9. Mr. Rashid Karib Omar, Pw 1, informed the court that he had been mandated by the Plaintiff to testify in the matter on her behalf. Pw 1 produced the power of attorney dated 27<sup>th</sup> March, 2013 as PEXB1 and stated that he was the Plaintiff's husband.

10. It was the evidence of Pw 1 that on 26<sup>th</sup> October 2012, he received a call from a land broker who introduced him to Mr. Omar Barallon. The said Omar Barallon showed Pw 1 the suit property and the documents in respect of the same.

11. It was the evidence of Pw 1 that his advocate conducted a search and was satisfied with the details of the land known as Plot 9339 Malindi. On 5<sup>th</sup> November, 2012, Pw 1 took the Plaintiff to an advocate's office whereupon the transfer documents in respect of the suit property were signed.

12. According to Pw 1, the suit property was registered in favour of the Plaintiff on 7<sup>th</sup> November, 2012. He then had the suit property cleared and started putting up a perimeter wall.

13. Pw 1 produced in evidence the Indenture dated 13<sup>th</sup> September, 2012 as PEXB 2 which was in possession of Mr. Omar Barallon and the Indenture dated 5<sup>th</sup> November, 2012 as P EXB 3. Pw 1 also produced the official searches in respect of the suit property as PEXB 4a and 4b and the Deed Plan in respect of plot number 9339 as PEXB 5.

14. On the issue as to whether indeed the Deed Plan in respect of the suit property was ever lost as claimed by the Defendants, Pw 1 stated that the Defendants were relying on a forged affidavit which he produced as PEXB 7. According to Pw 1, the affidavit that the Defendants are relying on to show that the Deed Plan in respect to the suit property was lost as at the time they purchased it refers to deed plan number 189050 instead of 189054.

15. In cross-examination Pw 1 stated that the person who sold to the Plaintiff the suit property, Mr. Omar, bought it from the administrator of the Estate of the late Eric Edward Barallon. According to Pw 1, the Indenture transferring the suit property to Mr. Omar has three signatures of the transferors together with their personal identification numbers.

16. Pw 1 stated that he was not aware that Mr. Omar was on the run. It was the evidence of Pw 1 that Mr. Ogembo, a magistrate, denied that he ever signed the affidavit which was relied upon by the Defendants to show that the Deed Plan in respect of the suit property was lost.

### **The 1<sup>st</sup> Defendant's case**

17. The 1<sup>st</sup> Defendant, Dw 1, informed the court that she bought the suit property in 1997 from the late Eric Barallon Edward together with the 2<sup>nd</sup> Defendant.

18. It was the evidence of Dw 1 that they purchased 2½ acres which they were to split into two equal portions. Each one of them was to get 1¼ of an acre.

19. Although the purchase price of her portion was Ksh.120,000, Dw 1 stated that the seller increased the purchase price to Ksh.150,000/- after she delayed in making the payments. It was her evidence that she paid the said purchase price in installments. Dw 1 produced the acknowledgements showing the

payments that she made which are dated 10<sup>th</sup> July, 1997 for Ksh.5,000, 27<sup>th</sup> January, 1998 for Ksh.30,000, 28<sup>th</sup> May, 1998 for Ksh.10,000. There were other acknowledgements of Ksh.10,000, Ksh.11,000 and again Ksh.11,000.

20. Dw 1 stated that she made further payments of Ksh.5,000 on 11<sup>th</sup> May, 1999 and another payment of Ksh.5,000 and 10,000 making a total of Ksh.112,000.

21. Dw 1 informed the court that on 17<sup>th</sup> July, 1999, she made another payment of Ksh.12,000 then Ksh.2,000 leaving a balance of Ksh.24,000/-.

22. On 7<sup>th</sup> September, 1999, Dw 1 stated that she paid to the original owner of the land Ksh.5,000. She again paid Ksh.14,000 on 14<sup>th</sup> October, 1999, then Ksh.1,000 and on 29<sup>th</sup> November, she paid Ksh.1,200 leaving a balance of Ksh.9,800 which was paid on 6<sup>th</sup> December, 1999. The 1<sup>st</sup> Defendant produced the acknowledgement slips as D EXB 1.

23. It was the evidence of Dw 1 that the original owner of the suit property was to transfer the suit property to her. However, according to Dw 1, the original suit property was yet to be sub-divided and the transfer could not be effected.

24. It was the evidence of Dw 1 that after she made the payment, she fenced the suit property, put up a structure for her worker and sunk a borehole. It was the evidence of Dw 1 that she buried her husband on a portion of the suit property in the year 2006.

25. Dw 1 further stated that the seller informed her that he could not process the title document because the deed plan was lost. It was her evidence that she went to court and an affidavit in respect of the lost deed plan was prepared and signed. It was her evidence that her, together with the seller appeared before a Magistrate and swore an affidavit explaining the loss of the deed plan which she took to the Ministry of Lands.

26. It was the testimony of Dw 1 that by the time they were swearing the affidavit, the whole property had been sub-divided and the suit property allocated plot number 9339. The affidavit was produced as D EXB 2.

27. Dw 1 finalised her evidence in chief by stating that the seller died before transferring the land to her and that the title documents in favour of the Plaintiff are a forgery because the eldest son of the deceased and Fatuma have never sold the suit property.

28. In cross-examination, Dw 1 stated that by the time she was making the payments, the whole property measuring 150 acres had not been sub-divided. However, she acknowledged that according to the deed plan that she was shown, the same had been prepared in 1994.

29. Dw 1 stated that most of the acknowledgement slips were witnessed by the original owner's son and some of them were not signed by the seller.

30. Eric Edward Barallon, Dw 2, informed the court that his father, the original owner of the suit property, died in the year 2007 and was the owner of plot number 224 measuring 154Ha. It was his evidence that the land was sub-divided and sold to individuals.

31. It was the evidence of Dw 2 that his father signed some of the acknowledgement slips produced by Dw 1 while others were signed by his step mother.

32. According to Dw 2, his father swore an affidavit indicating that he had lost the deed plan in respect to the suit property and that Mr. Omar, the person who sold the suit property to the Plaintiff, was his step brother.

33. Although the Indenture transferring the suit property to Mr. Omar shows his photograph and PIN, Dw 2 denied that he ever signed the said Indenture neither did his sister Fatma who is said to have been in Italy on 5<sup>th</sup> September, 2012 when the alleged Indenture is purported to have been signed by herself.

34. In cross-examination, Dw 2 stated that he had not produced any evidence to show that his sister Fatma was in Italy when she is alleged to have signed the Indenture. Dw 2 further stated that he never witnessed the signing of any of the acknowledgement slips in respect to the purchase price that was paid by the 1<sup>st</sup> Defendant.

35. The 2<sup>nd</sup> Defendant, Dw 3, stated that he bought part of the suit property in 1996 from the late Eric Edward Barallon together with the 1<sup>st</sup> Defendant.

36. It was the evidence of Dw 3 that the purchase price for his share of 1¼ acres was Ksh.150,000 which he paid in lump sum. After the death of Eric Edward, he paid to his son a further sum of Ksh.50,000.

37. Dw 3 stated that he entered into a sale agreement dated 16<sup>th</sup> June, 1997 with the late Barallon. It was his evidence that by the time the sale agreement was drafted, the deed plan in respect to the suit property was lost and that is why the plot number was not reflected in the agreement of sale. The agreement of 16<sup>th</sup> June, 1997 was produced as D EXB 3 and the acknowledgement slips were produced as DEXB 4.

38. In cross-examination Dw 2 denied having signed the statement that was filed in court in pursuant to the provisions of the Civil Procedure Rules, the witness also denied that he signed the verifying affidavit annexed on the Counter-claim.

39. Dw 3 admitted that by the time he was purchasing the suit property, the whole land had already been sub-divided and that he did not take any steps to have the suit property registered in his favour since 1996 when he bought it.

### **Submissions**

40. The Plaintiff's advocate submitted that the Plaintiff purchased the suit property from the sole registered owner, Omar Edward Barallon, who had obtained ownership of the said land from the administrators of the Estate of Eric Edward Barallon. Consequently, it was submitted, the Plaintiff obtained her title lawfully and that she is a bona fide purchaser for value without notice of any defect of the title.

41. Counsel submitted that the Defendants have not proved that the Plaintiff acquired the suit property fraudulently as alleged in their respective defences. According to counsel, the suit property was not registered in the name of Eric Barallon as at the time the Plaintiff purchased it.

42. The Plaintiff's counsel submitted that the Defendants did not prove that the Deed Plan in possession of the Plaintiff was a forgery and that the alleged affidavit by Erick Barallon in respect of the loss of the Deed Plan relates to a totally different deed plan from the one purchased by the Plaintiff.

43. The Plaintiff's counsel relied on the cases of **Moya Draft Farm-vs-Theuri (1973) EA 11, Bruce Joseph Bockle -vs-Coguero Limited (2014)e KLR and Okere -vs-Kiiyukia & Others(2007), EA 370** to buttress his arguments.

44. The Plaintiff's counsel finally submitted that the 2<sup>nd</sup> Defendant, Dw 3, denied ever signing the verifying affidavit in support of his counter-claim. Consequently, it was submitted, the said counter-claim should fail for failure to comply with the provisions of Order 7 Rule 5 of the Civil Procedure Rules.

45. Counsel submitted that the 2<sup>nd</sup> Defendant also denied having signed the supporting affidavit in support of the Application seeking leave to enjoin him in these proceedings. Consequently, the 2<sup>nd</sup>

Defendant's Defence should also be struck out on that basis.

46. On the other hand, the Defendants' counsel submitted that the Indenture that was produced by the Plaintiff was a forgery; that either Omar Barallon forged the Indentures without the knowledge of the Plaintiff or they both colluded to commit the fraud and that Omar Barallon could not have passed any interest of land to the Plaintiff.

47. Counsel submitted that after investigations, the Registrar of Titles directed the Plaintiff to surrender the Indenture in her possession for cancellation and that the Principal Secretary later on directed the Land Registrar to write the letter dated 12<sup>th</sup> November, 2013. Counsel submitted that pursuant to the provisions of section 26 of the Land Registration Act, 2012, a title can be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through corrupt schemes. Counsel relied on the cases of **Research Internatinal E.A Ltd -vs- Julius Avisi & 213 Others, Civil Appeal No. 321 of 2003** and **JAMES Maina Njenga vs Joseph Wathaka Wambui & Another NRB HCCC NO.159 of 2012.**

48. On the issue of the 2<sup>nd</sup> Defendant having not signed the Verifying Affidavit accompanying the Counter-claim, counsel submitted that there is a valid Defence on behalf of the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant is a co-defendant to the 1<sup>st</sup> Defendant and is not required to verify the averment in the pleading. Counsel relied on the case of **Investments Ltd vs David Njuguna & 2 Others Nairobi HCCC No. 1067 of 2002** to support his case.

### **Analysis and findings**

49. The issues for determination in this matter are as follows;-

**(a) Is the Plaintiff a bona fide purchaser of the suit property.**

**(b) Is the Plaintiff entitled to the suit property.**

**(c) Did the Defendants validly purchase the suit property.**

**(d) Who between the Plaintiff and the Defendants is entitled to the suit property?**

50. The Plaintiff's case is that she purchased land known as Plot number 9339 after due diligence.

51. It was the evidence of Pw 1 that the Plaintiff purchased the suit property from Omar Edward Barallon, the then registered proprietor, after conducting a search. Pw 1 produced in evidence the Indenture dated 5<sup>th</sup> November, 2012 which was entered between Omar Edward Barallon and the Plaintiff.

52. According to the said Indenture, the parcel of land that the Plaintiff purchased was portion number 9339 (Original number 8622/27) Malindi. The Indenture was signed by the vendor and the Plaintiff in the presence of A.O.Abed advocate and was duly registered on 7<sup>th</sup> November, 2012.

53. Pw 1 also produced as PEXB 2 an Indenture dated 13<sup>th</sup> September, 2012 between the vendor, Omar Edward Barallon and the legal representatives of the administrators of the Estate of Eric Edward Barallon in respect to the suit.

54. It would appear from the Indenture dated 13<sup>th</sup> September, 2012 that Omar Edward Barallon was one of the three administrators of the Estate of Eric. He however had the suit property transferred to him by the other two administrators, namely Rene Edward Barallon and Fatma Eric Edward on 18<sup>th</sup> September, 2012.

55. It is on the basis of the said transfer that Omar Edward Barallon had the suit property registered in his favour whereafter he sold it to the Plaintiff for Kshs.1,000,000/.

56. The Defendants' case is that they purchased the property measuring  $2\frac{1}{4}$  acres from the late Eric Edward Barallon. According to the evidence that was adduced in this court, the late Eric Edward Barallon was the owner of land known as 244/82 Kijiwetanga, Malindi measuring approximately 154 acres. This land was later sub-divided and sold off to individuals.

57. The 1<sup>st</sup> Defendant produced in evidence handwritten slips showing the acknowledgement by the late Eric of the payments that she made in respect of land that she says she purchased from him. The first acknowledgement slip that was produced by the 1<sup>st</sup> Defendant is dated 10<sup>th</sup> July, 1997. The slip shows that Eric Edward Barallon received Ksh.5,000 from the 1<sup>st</sup> Defendant in respect of the sale of one(1) acre plot at a cost of Ksh.120,000/-. The acknowledgement slip goes further to state as follows;-

**“The plot is situated at Kijiwetanga on plot no. 244. Sale agreement will be signed by both of us once the plot is demarcated.”**

58. Although the acknowledgement slip shows that Eric Edward and the 1<sup>st</sup> Defendant signed it, the two signatures were not witnessed at all.

59. Another acknowledgement slip in the same format as the first one for Ksh.30,000/- and dated 27<sup>th</sup> January, 1998 was also produced by the 1<sup>st</sup> Defendant.

60. The third handwritten document that was produced by the 1<sup>st</sup> Defendant shows a list of the payments presumably made to the late Eric Barallon between 10<sup>th</sup> July, 1987 to 25<sup>th</sup> June, 1999 totaling to Ksh.112,000 and leaving a balance of Ksh.38,000. The same slip has a summary of the payments that were presumably made between 17<sup>th</sup> July, 1999 until 14<sup>th</sup> October, 1999, by which time the balance was shown to be Ksh.13,000/-.

61. The next handwritten document that was produced by the 1<sup>st</sup> Defendant shows the said Eric Barallon acknowledging receipt of the whole amount of Ksh.150,000 in respect of  $1\frac{1}{4}$  acre plot at Kijiwetanga. That document was not signed by Eric Barallon.

62. Although several acknowledgement slips were produced by the 1<sup>st</sup> Defendant in support of the claim that she paid to Eric Barallon Ksh.150,000 in respect of the suit property, none of those slips referred to plot number 9336 delineated in deed plan number 189054 and dated 26<sup>th</sup> August, 1994.

63. Although the document dated 10<sup>th</sup> July, 1997 purportedly signed by the 1<sup>st</sup> Defendant and late Eric Edward stated that an agreement would be signed upon payment of the full purchase, the 1<sup>st</sup> Defendant did not produce in evidence any agreement in that aspect.

64. It is not even clear from the evidence before me whether the 1<sup>st</sup> Defendant was purchasing one (1) acre of plot number 244 as shown in the acknowledgement slip of 10<sup>th</sup> July, 1997 or  $1\frac{1}{4}$  acre as stated by Dw 1 in her evidence.

65. In her evidence in chief, the 1<sup>st</sup> Defendant informed the court that the entire property had not been demarcated as at the time she was making the payments by installments. However, after paying the purchase price, she was informed that the deed plan for plot number 9339 was lost necessitating Edward Eric Barallon to swear an affidavit to that effect. The said affidavit is said to have been sworn on 14<sup>th</sup> June, 2002.

66. It may be true that the said Deed Plan was lost. However, there is no indication that after swearing the affidavit on 14<sup>th</sup> June, 2002, Edward Eric Barallon registered the said affidavit or lodged a caveat against the suit property. It is therefore not clear why he swore the affidavit and kept it to himself if indeed the Deed Plan in respect of portion number 9339 was lost. It is also not clear why Edward Eric Barallon never obtained a duplicate Deed Plan from the Department of Survey for the purpose of

transferring the suit property to the Defendants.

67. The documents that were placed before me do not show that the 1<sup>st</sup> Defendant purchased land known as 9339 delineated on Deed Plan number 189054 and currently registered in favour of the Plaintiff. That parcel of land was created in 1994 as indicated in the Deed Plan.

68. The Defendant did not produce any sale agreement in respect to that land neither did the acknowledgement slips refer to the land.

69. It is trite law that disposition in land is governed by certain formalities and the Law of Contract Act. These formalities are important because they have the effect of protecting third parties.

70. Section 3(3) of the Contract Act states that a memorandum of a disposition in land must be in writing signed by all parties thereto and the signature of each party must be witnessed. The 1<sup>st</sup> Defendant has not shown that she complied with this requirement in addition to the fact that she did not show that she was indeed purchased portion number 9339 and not any other sub-division of plot number 244. In fact, some of the acknowledgement slips were never signed by the purported seller.

71. In that respect, I do not agree with the 1<sup>st</sup> Defendant's contention that she purchased the suit property and that she is entitled to it. The 1<sup>st</sup> Defendant has also not proved that the Plaintiff fraudulently acquired the suit property in view of the fact that, firstly, she is not the registered owner of the same and secondly, she is not one of the legal representatives of the Estate of the late Erick Barallon to enable her challenge the transfer of the suit property from Mr. Omar to the Plaintiff.

72. The 2<sup>nd</sup> Defendant's case was that him, together with the 1<sup>st</sup> Defendant purchased a portion of the suit property vide an agreement dated 16<sup>th</sup> July, 1997 from Eric Edward Barallon.

73. According to the evidence of the 2<sup>nd</sup> Defendant, he is entitled to 1¼ acres of the suit property having paid to Eric Edward Bavallon Kshs.150,000/- and a further sum of Ksh.50,000 to the son of Mr. Eric. The 2<sup>nd</sup> Defendant produced the agreement of sale as D EXB 3.

74. The said agreement states that the 2<sup>nd</sup> Defendant was purchasing one (1) acre of land known as "dash" of plot 244 at an agreed price of Kshs.120,000 of which Kshs. 30,000 has been paid as deposit.

75. Contrary to what the 2<sup>nd</sup> Defendant stated in evidence, the agreement is in respect to one (1) acre and not 1¼ acres. The agreement does also not make a reference to the subdivision that was being sold to the Defendant neither does it state how the balance of the purchase price was to be paid.

76. The 2<sup>nd</sup> Defendant produced acknowledgement slips, some of which are said to have been signed by Eric Edward Barallon in respect to the monies he paid from 24<sup>th</sup> December, 1996 until 21<sup>st</sup> September, 2006. Not all the acknowledgement slips were signed by Eric Edward Barallon.

77. Indeed, neither the signature of the 2<sup>nd</sup> Defendant nor that of Eric Edward Barallon was witnessed on those slips contrary to the provisions of section 3(3) of the Law of Contract Act. The acknowledgement slips did not also make any reference to the suit property notwithstanding the fact that the Deed Plan in respect to the suit property had been issued by the Director of Surveys in 1994. The claim that the deed plan in respect to the suit property was lost and that's why it was never mentioned in the agreement of 1997 and the acknowledgement slips cannot pass because a copy would have been easily obtained from the Ministry of Lands.

78. Considering that parcel of land number 244, Kijiwetanga, had been sub-divided and deed plans issued by the time the 2<sup>nd</sup> Defendant entered into the agreement of 16<sup>th</sup> July, 1997, it was incumbent upon the 2<sup>nd</sup> Defendant to carry out a search at the land registry with a view of ascertaining the specific portion of land that he was purchasing. In the absence of the parcel number in the agreement and the

acknowledgement slips of the land that that he was purchasing, the 2<sup>nd</sup> Defendant cannot be heard to lay a claim on the suit property.

79. One of the administrators of the late Eric Edward Barallon, Dw 2, informed the court that he never signed the Indenture that purported to transfer the suit property from the Estate of Eric Edward Barallon to Mr. Omar (a co-administrator and step brother). Dw 2 also denied that the other co-administrator, who is his sister, ever signed the Indenture that purported to transfer the suit property to Mr. Omar, who subsequently transferred it to the Plaintiff.

80. Although Dw 2 claimed in his evidence that his signature was forged by his step-brother, Mr. Omar, no evidence from the document examiner was placed before the court to prove that allegation. There was also no explanation as to how Mr. Omar obtained his passport photograph and PIN which was affixed on the Indenture. There was also no explanation by Dw 2 why the administrators of the Estate of the late Erick Edward Barallon have never moved the court to challenge the Plaintiff's title on the ground that the same was fraudulently transferred to him by their co-administrator.

81. Although Dw 2 stated that the other co-administrator was in Italy when she is alleged to have signed the Indenture transferring the suit property to Mr. Omar, a copy of her passport was not availed to this court to support that assertion.

82. Where a party alleges fraud on the acquisition of title, then such a party has to prove that allegation to the required standards, that is, more than just on a balance of probabilities.

83. In the circumstances, I am not satisfied that Mr. Omar did not have the capacity to pass the title to the Plaintiff. In fact, no evidence has been produced by Dw 2 or the Defendants to show that Mr. Omar procured the title fraudulently to enable me hold that he never had the legal capacity to pass over the title in respect of the suit property to the Plaintiff or at all. The Plaintiff is the registered owner of the suit property and her title can not be defeated on mere allegations of fraud.

84. For the reasons I have stated above, I find that the Plaintiff has proved her case on a balance of probabilities and I allow the Plaint as prayed. The Defendants' Counter-claims are dismissed with costs.

Dated and delivered in Malindi this 5<sup>th</sup> day of **September, 2014**

**O. A. Angote**

**Judge**