



**Maguta v Mukima (Environment & Land Case E027 of 2022)
[2024] KEELC 4158 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4158 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E027 OF 2022
FM NJOROGE, J
MAY 22, 2024**

BETWEEN

KIMANI MBUGUA MAGUTA PLAINTIFF

AND

FRANCIS M'TAARU MUKIMA DEFENDANT

JUDGMENT

Pleadings

Plaint

1. This suit was instituted by the Plaintiff by way of a plaint dated 21/4/2022 against the Defendant seeking the following reliefs: -
 - a. A declaration that the Plaintiff is the lawful owner of the suit property LR No. Plot No. 93 Watamu.
 - b. An order of demolition of the illegal construction ongoing on the suit property at the expense of the Defendant.
 - c. An order of eviction from the suit property.
 - d. An order for permanent injunction restraining the defendant by themselves, servants, agents and/or employees from interfering with the Plaintiff's quiet possession of the suit property.
 - e. The costs of this suit; and
 - f. Any other relief that the honourable court deems fit and just to grant.
2. The Plaintiff pleaded that he was at all material times the registered owner of the property identified as Plot No. 93 situate in Watamu township (hereinafter the 'suit property'). He claimed that he had all



along enjoyed vacant and quiet possession until when he was admitted in hospital for Covid-19 when the Defendant invaded the suit property; that the Defendant has since started construction thereon.

3. The Defendant filed a notice of preliminary objection dated 10/5/2022 and a statement of defence dated 3/4/2023. The preliminary objection was based on the grounds that the purported transfer of lease is irregular for lack of consent from the Commissioner of Lands; the Plaintiff has failed to comply with the special conditions of the grant, in that he did not submit any building plans to the local government and failed to pay the requisite fees for the transfer of grant; and that the defendant has acquired prescriptive rights over the suit property by dint of occupation and development.

Defence.

4. In his defence, the Defendant pleaded that he purchased the suit property on 3/3/2016 from one Salim Mohamed at a consideration of Kshs. 350,000/-. The said Salim had purchased the same from one Anderson Nyundo. He averred that the Plaintiff has never been in occupation of the suit property and he began construction in the year 2016, long before the Covid-19 pandemic. The Defendant further pleaded the suit is time barred by dint of section 7 of the Limitation of Actions Act.

Evidence

Plaintiff's Evidence

5. The Plaintiff (PW1) adopted his written statement dated 21/4/2022 as his evidence-in-chief. He equally adopted the bundle of documents in the list of documents dated 21/4/2022 as P. Exh 1-4. He testified that he purchased the suit property from one Charles Kabue Githaiga and a transfer registered in his favour on 21/3/2016. He narrated that the original owner of the suit property was one Christopher Kamondo, who was registered on 11/3/1981 before he transferred the same to Charles Githaiga on 7/12/1989. Upon purchasing the suit property, the Plaintiff claimed that he fenced the same as it was vacant. He added that he continued to pay the land rates which he stated were paid up to date. It was his testimony that as evidenced by a search he conducted on 3/11/2023 (P. Exh 5) the land records reveal that he is the registered owner of the suit property, with no registered encumbrance. The witness was shown a copy of written statement by one Catherine Thande. He asserted that the said Catherine did not have any authority to sell the suit property therefore she could not have passed good title to anyone else.
6. On cross-examination by Mr. Obaga, counsel for the Defendant, the Plaintiff told the court that when he took possession in 2016, the suit property was vacant and it had beacons. When he was referred to conditions 3 and 8 of the grant, the Plaintiff stated that he was not aware whether the original owner had complied with the said conditions. The Plaintiff added in re-examination that his lease to the suit property has never been revoked and that the government consented to the transfer in his favour.

Defendant's Evidence.

7. On his part, the Defendant (DW1) adopted his written statement filed on 3/4/2023 as his evidence-in-chief, and produced copies of documents in the list of documents dated 3/4/2023 as D. Exh 1-5. He narrated that he purchased the suit property from Salim Mohamed who had purchased the suit property in the year 2012. He asserted that he was seeing the Plaintiff for the first time in court as no one had ever contested his possession.
8. The Defendant told the court on cross-examination by Mr. Kilonzo for the Plaintiff, that he was never given any title deed when he purchased the suit property. He admitted that the building on the suit property is his but admitted he did not have any building approvals.



9. Catherine Thande (DW2) equally adopted her written statement dated 17/7/2023 as her evidence-in-chief. She stated that she is a resident at Watamu and that the suit property was vacant when she first saw it. She testified that she constructed on the suit property in 2012 and that there was no claim or objection from anyone. In her written statement it is stated that her daughter and son-in-law purchased the suit land in 2012 from one Anderson Nyundo; that the suit land was then bushy and they cleared it; they later sold the suit land to one Francis Mukiyama in 2016 with both agreements being witnessed by the area Chief. Later on her son in law sold the same land to the defendant herein. She stated that has never seen the plaintiff on the suit premises, and that the defendant built the storeyed house on the land without any demur on the part of the plaintiff or any other person. She also owns a neighbouring plot on which she has resided since 2012.
10. On cross-examination, DW2 produced a copy of her national identity card with the name “Aterina Thirindi Julius”. She told the court that she is not “Catherine Thande”. She added that it was her daughter and son-in-law who purchased the suit property and that they went to the area chief for the same. On re-examination, the witness stated that the purchase at the chief’s office was in relation to Plot No. 20.
11. DW2’s testimony marked the close of the hearing. Parties were directed to file closing written submissions which they did.

Submissions

Plaintiff’s Submissions

12. Mr. Kilonzo submitted that there is a certificate of lease indicating that the Plaintiff is the registered owner of the property and that by virtue of Sections 24, 25 and 26 of the *Land Registration Act*, the Plaintiff’s title, in the absence of evidence of fraud or misrepresentation, is indefeasible. He relied on the case of *Shadrack Kuria Kimani v Stephen Gitau Ng’ang’a & another* [2017] eKLR and *Abmed Ibrahim Suleiman & another v Noor Khamisi Surur* [2013] eKLR.
13. Counsel further submitted that the Defendant’s claim over the suit property which is based on an alleged sale and transfer officiated by the area chief, could not stand, since a chief has no such authority. As such, so he argued, any act or result thereof was null and void. He cited the cases of *Mcfoy v United Africa Co. Ltd* [1961] TALL ER 1169 and *Henry Muthee Kathurima v Commissioner of Lands & another* [2015] eKLR.
14. Mr. Kilonzo added that the Defendant’s building within the suit property is illegal for lack of the relevant building approvals in line with Section 57 (1) and 59 (4) of the Physical Planning and Land Use Act, and should be demolished. He further urged the court to strike off the record the testimony of DW2 whom he referred to as an imposter.
15. Further citing the case of *Samuel Kamere v Land Registrar* [2015] eKLR, Mr. Kilonzo submitted that the Defendant cannot claim to be a bona fide purchaser since there is no evidence that he conducted due diligence before allegedly purchasing the suit property.

Defendant’s Submissions

16. According to Mr. Katsoleh, the original grantee failed to comply with the special conditions on the grant therefore the grant became absolute. He added that the Plaintiff’s title is under challenge for failure to comply with the said special conditions therefore, the transfer to his name was null and void. He quoted the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR.



17. He submitted that the Plaintiff has never been in possession of the suit property and had he done due diligence as was remarked by Makori J in Malindi ELC JR No. 2 of 2022, he would have discovered early enough that the suit property was already occupied. According to Mr. Katsoleh, the Plaintiff is not entitled to the reliefs sought.
18. I have considered the pleadings, the evidence and the submissions filed herein and I frame the issues for determination as follows: -
- i. Whether the preliminary objection raised by the Defendant is merited;
 - ii. Who is the rightful owner of the suit property?
 - iii. Whether an order for permanent injunction restraining the defendant from dealing with the suit property should be given;
 - iv. Who should meet the costs of this litigation?

Analysis and Determination

Issue (i)

19. According to the *Black's Law Dictionary* a Preliminary Objection is defined as: -

“In a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary...”

20. The above position has been made clear in the case of *Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Ltd.* [1969] EA 698 where Lord Charles Newbold held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

21. It is trite therefore that a preliminary objection must consist of a pure point of law. Looking at the objection as raised, it is evident that the same is not on pure points of law. To determine whether the certificate of lease is irregular or otherwise, and whether he complied with the special conditions on the grant, this court will have to exercise some interrogation of facts or evidence. Further, it would be irregular for such an issue to be raised by a party other than a lessor and in forfeiture proceedings. Thus the defendant appears to clutch at every straw in his attempts to retain the suit land. As such the Preliminary Objection fails.

Issue (ii) & (iii)

22. Among the documents produced by the Plaintiff was a copy of the grant to the suit property. It shows that the Plaintiff is the registered proprietor having been registered on 31/3/2016. There is also a certificate of postal search dated 23/2/2022 and 3/11/2023 buttressing the same.



23. Section 24 of the *Land Registration Act*, 2012 provides as follows: -

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

24. Section 25 (1) of the said *Act* further provides that: -

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this *Act*, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

25. Additionally, Section 26 of the same *Act* provides that: -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

- a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or
- b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

26. Section 26 above establishes that a certificate of title is to be taken as prima facie evidence that the person named therein is the proprietor of the land. The plaintiff has produced a copy of the certificate of title and it is unchallenged. This court takes it to be the prima facie evidence of the plaintiff's ownership of the land in accordance with the law.

27. Sections 24 and 25 of the *Act* provide that it is the title holder who is entitled to enjoy the proprietary rights over the land, in this case the suit property. Section 26 further provides that such a title can only be challenged on grounds of fraud, misrepresentation and where it is established that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. Again, as I have stated herein before that I find no challenge to the plaintiff's title on the basis of illegality, an unprocedural process, or corrupt scheme. In brief, the Defendant did not challenge the Plaintiff's title on any of the above grounds. Besides, the evidence of his claim to the land that he presented was weak. The evidence of DW2 rather than strengthen his defence totally destroyed it, for she not only openly lied to the court as to her true identity and thus blemished her character, but also gave inconsistent evidence that the plot had been sold by her son in law twice to different persons. That kind of evidence is utterly unacceptable. As a deterrent, I also recommend that a report be made to the police regarding her conduct before this court for further investigation and/ or prosecution.

28. It is therefore my finding that in the present litigation and as between the parties, the plaintiff is the absolute proprietor of the suit land. In any event, the Defendant relied on some two hand written sale agreements to claim that he purchased the suit property from one Salim Mohamed. A cursory perusal of the first agreement dated 8/5/2012 reveals that the subject property therein was Plot No. 20 and not the suit property herein. Similarly, the subject property in the second agreement dated 3/3/2016



is identified as 'room 2 na duka zangu mbili, Watamu sokoni'. Besides the fact that the agreements do not relate to the suit land, the name of that alleged seller does not feature anywhere in the title document. It is possible that the defendant failed to exercise due diligence and fell to the wiles of a fraudster purporting to own the suit land.

29. In the premises and as between the parties in this case, I find that the Plaintiff is the rightful owner of the suit property herein. The Defendant did not deny that the house constructed on the suit property belongs to him. Having found that the Plaintiff is the absolute proprietor of the suit property, there is no valid reason to deny him the enjoyment of his proprietary rights to the suit property.
30. The outcome is that the reliefs sought in the Plaint are merited. Judgment is therefore entered for the plaintiff against the defendant as prayed in the plaint. For the avoidance of doubt the final orders that I issue are as follows:
- a. A declaration is hereby made, declaring that the Plaintiff is the lawful owner of the suit property known as LR No. Plot No. 93-Watamu;
 - b. The defendant shall demolish the illegal structure or structures on the suit property and remove all resultant debris at his own expense within 60 days from the date of this judgment;
 - c. The defendant shall remove himself from the suit property within 60 days from the date of this judgment and in default he shall be forcibly evicted therefrom at the plaintiff's instance;
 - d. An order for permanent injunction is hereby issued, restraining the defendant by himself, servants, agents and/or employees from interfering with the Plaintiff's quiet possession of the suit property;
 - e. The defendant shall bear the costs of the present suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 22ND DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

