



**Safari v Kenya Commercial Bank Limited & another (Environment & Land
Case 28 of 2022) [2024] KEELC 6100 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6100 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 28 OF 2022
NA MATHEKA, J
SEPTEMBER 26, 2024**

BETWEEN

MARY MUKABADEGE SAFARI PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

SERAH KALUME KITSAUMBI 2ND DEFENDANT

JUDGMENT

1. Vide their plaint dated 14th March 2022, the plaintiff averred that she is the beneficial and legal owner of Subdivision No. 6938/III/MN (CR 60145) having acquired it through adverse possession. The plaintiff maintained that there existed a suit between herself and the 2nd defendant, Mombasa CMCC No. 136 of 2013 Serah Kalume Kitsaumbi v Kahindi Dickson Jefwa and Mary Safari. The plaintiff stated that on 18th December 2020 Hon Francis Kyambia Chief Magistrate entered judgment in favour of the plaintiff herein. The learned magistrate found that the 2nd defendant's claim to the suit property had been extinguished by operation of law and that the plaintiff herein was not a trespasser as her occupation was exclusive, continuous, and uninterrupted. The court held that the 2nd defendant had lost claim to the suit property and that the same belonged to the plaintiff herein by virtue of adverse possession. It was the plaintiff's case that during the pendency of the said suit, she discovered that the 2nd defendant had sold and transferred the suit property to the 1st defendant in total disregard of the plaintiff's rights and the said case. The plaintiff maintained that despite making the purchase, the 1st defendant is yet to gain vacant possession of the same as she still has possession of the suit property for over 35 years. The plaintiff claimed that the defendants in total contempt of her rights to the suit property have illegally entered the suit property causing her loss of property in an attempt to gain possession of the suit property.
2. The 1st defendant denied the plaintiff's claim to the suit property and averred that they were the registered proprietor of the suit property, Plot No. 6938 (original No.3861/2) Section III Mainland



North measuring 0.0555ha which was a creation of the subdivision of Plot No. 3861(original No.3889/22) Section III Mainland North by the 2nd defendant. The 1st defendant maintained that the 2nd defendant was the registered owner of Plot No. 3861 (original No. 3889/22) Section III Mainland North measuring 0.1162ha, and subdivided it into two parcels; Plot No. 6937 (original No.3861/1) Section III Mainland North which was sold to Shella Properties Limited and Plot No. 6938 (original No.3861/2) Section III Mainland North, the suit property. It is the 1st defendant's case that on 7th March 2012 they entered into an agreement of sale with the 2nd defendant for the sale of the suit property and on 12th June 2013 they were issued with a certificate of title. The 1st defendant rejected the plaintiff's claim to the suit property through adverse possession and argued the 2nd defendant's act of subdividing Plot No.3861/III/MN, into Plot No. 6938/III/MN and Plot No. 6937/III/MN indicated that she had not parted with the ownership of the suit property. The 1st defendant argued that they were not a party to Mombasa CMCC 136 of 2013, no orders were issued against the bank and hence could not be bound by the judgement rendered therein. The 1st defendant insisted that the plaintiff is neither in possession of the suit property nor the registered owner of the suit property and hence no loss can be suffered.

3. The plaintiff's claim to the suit property is premised upon the judgment of Hon Kyambia in Mombasa CMCC No. 136 of 2013 Serah Kalume Kitsaumbi v Kahindi Dickson Jefwa and Mary Safari delivered on 18th December 2020. The said suit was instituted by the 2nd defendant herein vide a plaint dated 24th January 2013, where she sought inter alia the eviction of the plaintiff herein from the suit property as well as damages for trespass. The plaintiff herein filed a defence and counterclaim to the suit on 3rd October 2013, where she sought inter alia for a declaration that the demolition was illegal. The learned magistrate proceeded to determine on the issue of whether the 2nd defendant's suit was time-barred and whether the plaintiff herein had acquired the suit premises by virtue of adverse possession. The learned magistrate found that the 2nd defendant herein had acquired the suit property in 2000 and filed the suit in 2013, which was long after the plaintiff herein had occupied and possessed the suit property and there was no evidence that her possession was by permission from the 2nd defendant herein or that it was interrupted. He went ahead to find that the plaintiff herein had acquired title to the suit property by way of adverse possession. The plaintiff herein was able to extract a decree from the said judgment on 18th December 2020 but has been unable to execute it since the 1st defendant has been registered as the proprietor.
4. Serah Kalume Kitsaumbi, the 2nd defendant herein was registered as the proprietor of Plot No. 3861(original No.3889/22) Section III Mainland North on 9th August 2000. On 31st May 2011, she subdivided it into two parcels of land, Plot No. 6938/III/MN and Plot No. 6937/III/MN. While Plot No. 6937/III/MN was transferred to Shella Properties Limited, Plot No. 6938/III/MN was sold and transferred to Kenya Commercial Bank on 12th June 2013. The suit property was formed out of Land Parcel No. 3861/III/MN and its Deed Plan No. 323970 created by the Director of Survey on 14th April 2011. From the certificate of title, it is clearly shown that the suit property was created as a subdivision following the approval by the County Government of Kilifi on 31st May 2011.
5. The 2nd defendant entered into an agreement of sale with the 1st defendant over the suit property on 7th March 2012 for a consideration of Kshs 22,000,000/=. The transfer of land was executed on 20th May 2013 and the 2nd defendant was registered as the proprietor on 12th June 2013. The 2nd defendant herein instituted Mombasa CMCC No. 136 of 2013 Serah Kalume Kitsaumbi v Kahindi Dickson Jefwa and Mary Safari vide a plaint dated 24th January 2013, while transacting with the 1st defendant over the suit property. The 2nd defendant initiated and prosecuted the suit at the magistrate's court while proceeding with the transfer and registration of the suit property into the 1st defendant's name. The 2nd defendant



- registered a transfer of the suit property in favor of the 1st defendant while knowing the title of the suit property was under litigation and subsequently effecting the registration of the 2nd defendant as the registered owner of the suit property.
6. The action of the 2nd defendant to transfer and effect registration of the suit property into the name of the 1st defendant, while litigating before a court of law seems to have been a calculated move meant to defeat the plaintiff's claim. The bank cannot be said to have carried out a conclusive investigation on the title when they failed to question the vendor whether there was an ongoing suit over the suit property before the same was transferred in their favor. The resulting title registered in the name of the 1st defendant is rooted and tainted with deception with the sole aim of denying the plaintiff title over the suit property. The 2nd defendant instituted the suit at the magistrate's court for the sole purpose of derailing the plaintiff from seeking justice while causing the suit property to be transferred and registered in the 2nd defendant's name.
 7. It is the finding of this court that the bank's title is tainted with nullity as the basis on which the title to the suit property was anchored was to defeat the plaintiff's claim. A title founded on fraud is null and void of no consequence and cannot be protected by the sanctity of the indefeasibility of title. Section 80 of the *Land Registration Act* is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 2nd defendant is tainted with fraud, deceit, and nullity and fits the description of a title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the acts of the 2nd defendant of using the suit at the magistrate's court to defeat the plaintiff's claim.
 8. It is paramount to state that the 2nd defendant did not file an appeal against the judgment of Hon. Kyambia neither did the 1st defendant seek to be enjoined into the suit to enable to challenge the said judgment. Neither of the defendants has filed a counterclaim to the plaintiff's suit, therefore the hands of this court are limited and tied as its mandate is to consider only issues raised in the pleadings and evidence before this court. The court cannot be called to confer a relief or pronounce itself on issues not properly laid before it.
 9. The plaintiff has prayed for compensation for the damages caused by the demolition of the suit property, however, she failed to demonstrate to the court the exact value of the suit property before and after the demolition. Nevertheless, the plaintiff is entitled to be compensated for the denial of use of the suit property since the judgment was entered in her favor on 18th December 2020. I award the plaintiff damages of Kshs 500,000/= on account of nominal general damages with interest at court rates from the date of this judgment until payment in full.
 10. Consequently, this court finds that the plaintiff has proved her case on a balance of probabilities. The court proceeds to make these final orders:
 - a. An order is hereby issued compelling the Land Registrar, Kilifi to cancel entry No. 6 on the Certificate of Title No. CR 60145 L.R. 6938/III/MN dated 12th June 2013 in the name of Kenya Commercial Bank Limited.
 - b. An order is hereby issued compelling the Land Registrar, Kilifi to register Mary Mukabadege Safari as the registered proprietor of Land Parcel No L.R. 6938/III/MN CR 60145.
 - c. A permanent injunction against the defendants, either by themselves, their servants, agents, employees or anyone authorized by them from continuing to occupy L.R. 6938/III/MN CR 60145.



- d. The plaintiff is awarded Kshs. 500,000/= as general damages plus interest at court rates from the date of judgment until payment in full.
- e. Costs of the suit are awarded to the plaintiff to be borne by the defendants jointly and severally.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

