



**Charo v Bandari (Environment & Land Case 194 of 2018)
[2023] KEELC 775 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 194 OF 2018
MAO ODENY, J
FEBRUARY 15, 2023**

BETWEEN

RACHAEL ANZAZI CHARO PLAINTIFF

AND

ALBERT BANDARI DEFENDANT

JUDGMENT

1. By a plaint dated October 17, 2018 the plaintiff herein sued the defendant seeking the following orders;
 - a. A permanent injunction restraining the defendant either by himself, through his agents, legal representatives, servants or any one claiming interest through it from entering, remaining and/or dealing with the suit premises in any manner whatsoever.
 - b. Costs of and incidentals to this suit.
 - c. Any further or other relief as the honourable court may deem necessary to grant.
2. The defendant entered appearance and filed his defence on the November 20, 2018.

Plaintiff's Case

3. Pw1 Rachael Anzazi Charo adopted her witness statement dated February 25, 2020 and told the court that she bought the suit plot Kilifi/ Mabrikani/13 at a consideration of Kshs. 1,1 million from Jezani Mwedenge vide an agreement dated June 13, 2017 which she produced as an exhibit before the court.
4. PW1 further stated that she paid the purchase price vide a Bank Transfer she produced as exhibit 2. It was her testimony that the said Jezani was living on the land and after the sale, he removed his house and PW1 fenced off the land. She further told the court that when she came to build, she found someone else building some structures on the suit land necessitating the filing of this suit.



5. PW1 also produced a receipt of Kshs. 15,000/ paid into the bank account of Mabirikani Residents' Committee on account of the plot sold by Jezani and photos showing the fence that she constructed on the suit land.
6. On cross examination by Mr Nyachiro, she stated that Jezani was living on the land with his tenants and not his brothers or his mother. She further stated that she later found the Defendant constructing on the land and that he did not tell her whether he had bought the land or not.
7. PW1 also stated that she the Defendant later told her that she had bought the land from Jezani's brother named Hesbon. It was further her evidence that she went to the Land Committee Mabirikani and established that the property was in Jezani's name.
8. PW1 told the court that she involved the Mabirikani Committee in the sale and that she was not aware whether the Defendant produced any agreement before the CID and that Hesbon and Jezani were later arrested and arraigned at Kilifi Law Court and charged with the offence of obtaining money by false pretense.
9. PW1 further stated that she later withdrew the case because she had forgiven them. And that it was not true that they agreed that the Defendant was to refund her the money.
10. On re-examination, she confirmed that the plot was registered in Jezani's name with the Mabirikani Committee hence was the owner of the suit land.
11. PW2 Jezani Mwandenge adopted his witness statement and stated that he knew the Plaintiff when they entered into a sale agreement for sale of the suit land whereby he was paid in full. He also testified that he became the owner of the suit land when he paid Kshs 15,000/- to Mabirikani Committee and his name entered into the register.
12. PW2 stated that he has been in exclusive occupation and possession of the suit property with proper boundaries and demarcation hence it is not true that the property belongs to the Defendant. That before he sold the suit property to the Plaintiff he was the one in possession and not the Defendant.
13. On cross examination, by counsel for the defendant, PW2 told the court that after payment his name was entered into the Register of Committee members confirming that the plot belonged to him. That he had lived there together with his wife and children and further that on August 23, 2016 they went to the chief about a different plot which was neighboring his.
14. He testified that they sold the land to the Plaintiff in the presence of the Chairman Mabirikani Residence Committee and that the sale was done in the presence of his mother.

Defendant's Case

15. DW 1 Albert Bandari adopted his statement and list of documents dated October 9, 2020 and stated that he entered into a sale agreement with Hesbon Nzala Mwandenge in respect of Plot No. 13 who was to represent the family in the transaction. It was his evidence that the sale agreement was drafted by the Chief and was signed by all the parties whereby he was to pay Kshs 500,000/- and the balance of Kshs 300,000/- to be paid the next day. He stated that the money was paid to Hesbon and his younger brother Baraka on behalf of the family.
16. DW1 further told the court that they later proceeded to Mabirikani Residence Committee offices where he paid Kshs 10,000/- for transfer and Kshs 15,000/- for the beacon certificate and he was later granted vacant possession of the property.



17. It was DW1's testimony that he later learnt that the plot had been sold to the Plaintiff and that the family had opted to refund him his money which he declined. That he thereafter embarked on construction on the suit property with the full knowledge of the Plaintiff and that he was only served with court papers long after he had started construction.
18. On cross examination by Mr. Obaga, he told the court that he bought the suit land from the family through a family member called Hesbon and that before they entered into the agreement the vendor showed him a letter from the chief and that there is a committee that deals with the sale of the plots in Mabirikani.
19. Dw2 Hesbon Mwandenge also adopted his statement and told the court that the whole family agreed to sell the land in the presence of the chief and that his mother gave him authority to sell the plot to the Defendant having paid the full purchase price.
20. Counsel filed their submission on behalf of the and reiterated the evidence of the parties. Counsel for the Defendant submitted that he who alleges must prove and that the Plaintiff did not prove that she is the owner of the suit land. That she did not call witnesses

Analysis And Determination.

21. The issues for determination is who is the rightful owner of the suit plot No. 13 and whether the Plaintiff has established her case against the Defendant to entitle her to an order of injunction.
22. The Plaintiff contends that she bought Plot No 13 (MRC) situate at Kilifi from one Jezani Mwandenge Nguwa via a Sale agreement dated June 13, 2017. The Defendant on the other hand also claims to have purchased Plot No 13 from one Nzingo Mwandenge and produced a Sale agreement dated May 2, 2017 and a bundle of receipts from Mabirikani residential Committee and a copy of Mabirikani Residents Committee Plot Ownership Transfer form.
23. It is also the Plaintiff's evidence that she conducted the transaction in the presence of the Mabirikani Residence Committee who are in charge of selling land in the area. The Plaintiff produced the sale agreement together with a cash deposit slip dated June 13, 2017 to a Cooperative Bank account in Kilifi for Mabirikani Resident's Committee on account of Jezani Mwandunge's plot No 13 which was certified by the Bank as a true copy of the original. The Mabirikani Resident's stamp was also affixed on the document
24. What is however not clear is to whom the suit land belongs to, though the Plaintiff testified and stated that she did enquire from the Committee and was informed that the land belonged to Jezani Mwandenge Nguwa. The Defendant on the other hand has presented before this court a receipt of transfer and change of name from Jezani Mwandenge Nguwa to himself though he stated that he bought the suit land from Hesbon Mwandenge on behalf of the family.
25. The Defendant also produced documents claiming to have bought the suit land from DW2 who had been given authority by the mother to sell the land for Kshs 800,000/ on behalf of the family. Further that the Plaintiff reported the matter to the CID and DW2 admitted that they had been arrested and charged in Kilifi Court but the Plaintiff later forgave them and withdrew the case.
26. From the evidence on record it shows that Jelani Mwandenge Nguwa was that the one who was the owner of the suit land going by the records of Mabirikani Residential Committee which confirms that the Plaintiff's purchase was from the rightful owner.



27. There was no evidence of DW2 Hesbon Mwandege as an owner of the suit land and further that if it is true that the mother had given him authority to act on behalf of the family then the register should have indicated the name of the mother as the owner and not Hesbon transferring the land to the Defendant.
28. The Plaintiff prayed for a permanent injunction restraining the Defendant from interfering with the suit land therefore the Plaintiff was under a duty to establish a *prima facie* case against the Defendant.
29. The Plaintiff took possession of the suit property and exhibited photos of the house under construction and a fence. This is a case where D2 purported to be the owner of the suit land and sold the same to the Defendant knowing that he did not have property to pass to the Defendant. The Defendant's remedy lies with DW2 who sold the non-available land to him.
30. I find that the plaintiff has proved her case against the Defendant and is hereby allowed as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF FEBRUARY, 2023.

MA. ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

