



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 76 OF 2012

KARL KNIGHT.....PLAINTIFF

=VERSUS=

- 1. MOHAMED BAKARI**
- 2. CARLA SERANTONI**
- 3. COMMISSIONER OF LANDS**
- 4. LAMU DISTRICT LAND REGISTRAR**

5. ATTORNEY GENERAL.....DEFENDANTS

J U D G M E N T

Introduction:

1. This suit was commenced by way of a Plaint dated 15th April 2012.
2. In the Plaint, the Plaintiff averred that on 16th April, 2009, he executed an Agreement of sale with the 1st Defendant for the purchase of parcel of land known as Lamu/Manda Island/46 which had been allocated to the 1st Defendant.
3. The Plaintiff averred in the Plaint that to facilitate the said transfer, he paid the outstanding land rates of Kshs.191,325 on behalf of the 1st Defendant and signed the Transfer document.
4. However, on 9th March 2011, the 2nd Defendant informed the Plaintiff that she had purchased the suit property had it registered in her name.
5. It is the Plaintiff's averment that by reasons of the fraud and misrepresentation by the 1st and 2nd Defendants, the purported agreement for sale and transfer to the 2nd Defendant are a nullity in law; that the 1st Defendant lacked capacity to transfer the suit property to the 2nd Defendant because he had already sold to him the same property and that he has suffered loss and damages as a result of the Defendants' illegal actions.
6. The Plaintiff is seeking for an order to rectify the register and have the suit property registered in his name and for a declaration that he is the legal proprietor of Lamu/Manda Island/46.
7. In his statement of Defence, the 2nd Defendant averred that she is the rightful owner of the suit property.
8. The 3rd, 4th and 5th Defendants filed a Defence in which they denied the Plaintiff's averments.

9. The 1st Defendant neither entered appearance nor filed a Defence.

The Plaintiff's case:

10. The Plaintiff, PW1, informed the court that he met the 1st Defendant in Lamu in the year 2004.
11. According to PW1, the 1st Defendant showed him the plot that he was selling whereafter he agreed to buy the land for Kshs.5.5 million after he conducted due diligence at the Ministry of Lands headquarters.
12. PW1 informed the court that at the time of the purchase, the 1st Defendant was in possession of a letter of allotment dated 7th December 1995.
13. The evidence of PW1 was that he first paid to the 1st Defendant Kshs.500,000 in December 2005 through his aunt, Dorcas Angwenyi. Before he left for the UK, the Plaintiff informed the court that he paid to the 1st Defendant a further sum of Kshs.400,000 for the purpose of clearing vegetation and fencing of the land and Kshs.150,000 for the purpose of processing the title document for the suit property.
14. PW1 stated that he deposited the balance of the purchase price of Kshs.4,600,000 in the account of Dorcas Angwenyi, the 1st Defendant's aunt.
15. When he came back from the UK in June, 2005, PW1 informed the court that the 1st Defendant informed him that the 2nd Defendant was claiming that the suit property belonged to her.
16. I was the evidence of PW1 that when he went to check on the position of the land at the Ministry of Lands, he still found the record showing that the land belongs to the 1st Defendant. However, according to PW1, the 1st Defendant had not processed the title document because he did not have a national identity card. It was not until the year 2009 that the 1st Defendant managed to obtain his identity card.
17. The evidence of PW1 was that he executed a sale agreement with the 1st Defendant in the year 2009 before an advocate and paid the 1st Defendant Kshs.500,00 in cash, being the balance of the purchase price.
18. PW1 informed the court that he paid the outstanding land rates and also signed the Transfer of Lease document before Omulele Advocate.
19. When his agent went to check if the Lease had been forwarded to Lamu, for registration, PW1 informed the court that he found a forged Certificate of Lease had been registered in favour of the 2nd Defendant. The issue of the fake Certificate of Lease in respect to the suit property was referred back to Nairobi.
20. PW1 stated that a fresh Lease was prepared in Nairobi in the year 2010 after his advocate made several inquiries.
21. PW1 informed the court that the 2nd Defendant took possession of the suit property on the basis of a fake Certificate of Lease which was subsequently cancelled by the Ministry.
22. According to PW1, the 2nd Defendant engaged the 1st Defendant to have him sell to her the suit property between January-February, 2011.
23. PW1 informed the court that when he requested the 1st Defendant to collect the Lease from the Ministry of Lands, the 1st Defendant informed him that the 2nd Defendant had forced him to sell the land to him. That was when the 1st Defendant was arrested and charged in criminal case number 40 of 2013.
24. PW1 stated that the 2nd Defendant intercepted the Lease and had the land registered in her name.
25. It was the evidence of PW1 that he paid a total of Kshs.6,361,325.00 for the land made up as follows: Kshs.5,500,00 being the purchase price, Kshs.191,325 being the land rent, Kshs.250,000 for processing the title, Kshs.400,000 for clearing the land and Kshs.20,000 to process the 1st Defendant's identity card.
26. In cross examination, PW1 stated that although he signed the transfer documents, the same was

never registered.

27. The Plaintiff's conveyancing advocate's clerk, PW2, informed the court that the Plaintiff visited the offices of Omulele and Co. Advocates and sought to have an agreement in respect to the suit property prepared by the said law firm.
28. According to PW2, an agreement between the Plaintiff and the 1st Defendant dated 16th April 2009 was prepared by the firm and was signed by the parties.
29. It was the evidence of PW2 that by the time the Plaintiff and the 1st Defendant were signing the agreement of sale, the 1st Defendant had received Kshs.5,000,000 from the Plaintiff and that the balance of Kshs.500,000 was paid to the 1st Defendant on the day the agreement of sale was signed.
30. PW2 stated that he was assigned the duty of following up on the processing of the Lease and paid on behalf of the Plaintiff the land rent.
31. According to PW2, while he was pursuing the issuance of the registration of the Lease, he was informed by the Plaintiff that the 2nd Defendant was in possession of the Certificate of Lease for the suit property notwithstanding the fact that he had been informed that there was an embargo on all land transactions in Lamu.
32. PW2 informed the court that when he confronted the 1st Defendant, he denied ever selling the suit property to the 2nd Defendant.
33. The 1st Defendant's friend, PW3, stated that he knew the 1st Defendant sold the suit property to the Plaintiff and that he used to sign his documents by way of a thumb print and not a pen.

The Defendant's case:

34. The 2nd Defendant, 2DW1, informed the court that she is the proprietor of the suit property.
35. According to 2DW1, the suit property was sold to her by the 1st Defendant vide a transfer dated 14th November 2011.
36. According to 2DW1, she was issued with the Certificate of Lease on 24th November 2011.
37. In cross examination, 2DW1 stated that initially, she had purchased the suit property from a Mr. Al Abdu Amana but later on realised that she had been conned. She surrendered the fake title document. When she was informed that the land had been allocated to the 1st Defendant, she looked for him and entered into an agreement with him.
38. It was the evidence of 2DW1 that when he inquired from the 1st Defendant about the agreement he had entered into with the Plaintiff, the 1st Defendant informed him that the "agreement had expired".
39. The Lamu Land Registrar, 3DW1, stated that on 11th May 2005, a Lease was received in his office in respect to Manda Island/146 (the suit property) from Nairobi.
40. 3DW1 stated that the Lease was in the name of Abdu Amana and a Certificate of Lease was issued in favour of the Lessee.
41. 3DW1 informed the court that subsequently, he received a transfer of lease in favour of the 2nd Defendant, on 26th May 2005. However, on 30th December 2010, he received a letter from Nairobi informing him to cancel the first Lease because it was a forgery.
42. After the Nairobi office informed 3DW1 that the legal owner of the suit property was the 1st Defendant, he received a transfer of lease in which the 1st Defendant was transferring the suit property to the 2nd Defendant dated 24th November 2011.

Submissions:

43. The Plaintiff's advocate submitted that before the 2nd Defendant had the suit property registered in her name, she knew the Plaintiff had an interest in the suit property.
44. Counsel submitted that the 2nd Defendant did not only fail to exercise due diligence but

intentionally involved herself in the attempted fraud that targeted the Plaintiff as the victim.

45. The 2nd Defendant's advocate submitted that her client was an innocent purchaser of value without notice; that no evidence was laid before the court to portray the 2nd Defendant as having engaged in fraud and that the agreement between the Plaintiff and the 1st Defendant only operated as an agreement inter partes and did not bind third parties.
46. The 3rd, 4th and 5th Defendants' advocate submitted that the Plaintiff failed to establish to the required standards the settled elements of a claim for fraud; that the Plaintiff failed to put a restriction on the suit property after executing the sale agreement and that the Land Officer was not present when the two transactions were done.

Analysis and findings:

47. It is not in dispute that parcel of land number Lamu/Manda/Island/46 (the suit property) is currently registered in the name of Carla Serantonia, the 2nd Defendant.
48. The Plaintiff is seeking for an order to cancel the transfer registered on 24th November, 2011 in favour of the 2nd Defendant and for the rectification of the register to have the Plaintiff's name appear in the register as the proprietor of the suit property.
49. The Plaintiff was amended on 14th March, 2014 to include a prayer for the payment of Kshs.6,661,325 by the Defendants and for an order of vacant possession.
50. The issues for determination in this matter are two fold: Whether the 2nd Defendant is a bonafide purchaser for value without notice as to defect in title and whether the Plaintiff is entitled to the suit property.
51. The evidence produced in this court shows that on 7th December, 1995, the 1st Defendant was issued with a letter of allotment for an unsurveyed residential plot number 53-Manda Island. After the said plot was surveyed, it became parcel of land number Lamu/Manda Island/46 (the suit property).
52. It was the evidence of the Plaintiff, PW1, that he entered into an informal agreement, albeit orally, with the 1st Defendant to purchase the suit property whose lease had not been prepared and issued in the year 2005.
53. According to PW1, he paid to the 1st Defendant, through his aunt Dorcas Hokhojo Agweni, Kshs.500,000, as a down payment after agreeing to purchase the land at a price of Kshs.5,500,000.
54. PW1 informed the court that a further sum of Kshs.400,000 was paid to the 1st Defendant, through his aunt, for the purpose of clearing the vegetation on the suit property.
55. PW1 informed the court that he also made a deposit of Kshs.4,600,000 in the bank account of Dorcas Hokhojo Angweni on 22nd June 2005 and paid to the 1st Defendant Kshs.500,000 in cash when they signed a formal agreement on 16th April 2009.
56. Indeed, in the agreement of 16th April 2009, the 1st Defendant acknowledged receipt of the purchase price amounting to Kshs.5,500,000.
57. PW1 produced in evidence "an advice of debit" from his bank showing the deposit of Kshs.4,600,000 and Kshs.400,000 in the bank account of Dorcas Hokhojo Agweni.
58. After signing the agreement of sale of 16th April, 2009, PW1 informed the court that he paid the outstanding land rent together with the requisite stamp duty to facilitate the transfer of the land from the 1st Defendant to himself.
59. According to the Land Rent invoice that was produced in this court, the accumulated arrears of the rent was Kshs.191,325 as at 28th April, 2009.
60. PW1 produced in evidence receipts showing that the 1st Defendant paid Kshs.191,822 on 20th July 2009 to clear the outstanding land rent in respect to the suit property.
61. To enable the process of transfer to move forward, PW1 informed the court that they signed the Transfer document on 17th September 2009 and even proceeded to value the property for the

purpose of paying stamp duty.

62. The evidence produced in this court shows that the Plaintiff's advocate paid to the Commissioner of Domestic Tax stamp duty of Kshs.120,110 on 24th September 2009.
63. The Plaintiff's advocate, according to the letters produced in court, commenced the process of having the Lease registered in favour of the 1st Defendant for the purpose of registering the Transfer document.
64. According to the Plaintiff's advocate letter dated 18th November 2009, after the payment of the land rent and stamp duty, the file in respect of the suit property "disappeared" from the registry.
65. Numerous letters by the Plaintiff's advocate and the Plaintiff himself to the Commissioner of Lands and the Permanent Secretary did not elicit any response.
66. In the meantime, another person by the name of Abdu Amana had forged a letter of allotment and a Lease for the same land.
67. According to the records held by the Ministry of Lands, the forged Lease in the name of Abdu Amana was registered on 11th May 2005 and a Certificate of Lease issued on the same day.
68. The said Abdu Amana proceeded to sell to the 2nd Defendant the suit property using the forged Certificate of Lease.
69. In his letter dated 20th July 2011, the Chief Land Registrar advised the District Land Registrar that the Leases for parcel of land number Manda Island/45 and 46 had been forged and advised him to expunge them from the records.
70. The District Land Registrar proceeded to cancel the Lease and the Certificate of Lease that had been transferred to Carla Serantoni, the 2nd Defendant using forged documents..
71. The 2nd Defendant realised that he had been conned by Mr. Abdu who had sold to him the suit property in the year 2005 using the forged Lease and Certificate of Lease but was still determined to retain the land.
72. While the Plaintiff was making a follow-up on the Lease to be issued to the 1st Defendant for the purpose of having the same transferred to the Plaintiff, the 2nd Defendant was pursuing the 1st Defendant to have him sell to her the suit property.
73. The 2nd Defendant produced in court an agreement of sale that she entered into with the 1st Defendant dated 3rd July, 2011 for Kshs.4,500,000. According to the evidence by the 2nd Defendant, when she inquired from the 1st Defendant about his agreement with the Plaintiff, he informed her that there agreement had "expired".
74. The 1st Defendant is purported to have signed the Transfer in favour of the 2nd Defendant on 14th November 2011.
75. The documents produced by the 2nd Defendant shows that while the Plaintiff and his advocate were cropping in darkness as to the whereabouts of the file in respect of the suit property, the 2nd Defendant was aware of the position of the file because after signing the agreement on 3rd July 2011, the Lease in favour of the 1st Defendant was registered on 25th July 2011 and the transfer of the land in favour of the 2nd Defendant was registered on 24th November 2011. The 2nd Defendant was then issued with a Certificate of Lease on the same date, that is 24th November, 2011.
76. Even before the 2nd Defendant's forged Certificate of Lease was canceled in the year 2011, the 2nd Defendant was aware that the Plaintiff was laying a claim on the suit property as early as the year 2007.
77. In her email dated 17th December 2010, to a Mr. Sam, the 2nd Defendant wrote as follows:

"The German came shouting to me in 2007 and I could not get a hint of what he was talking about.....i disliked him very much for his horrible approach, and I showed him a certificate of official search.....which confirms upto now my ownership..... I will ask Mukoma (the 1st Defendant) about the sale of the plot, but it seems impossible to me that the plot was sold in 2004 and I could buy it in 2005"

78. In her email of 16th December 2010 to the same man, the 2nd Defendant wrote as follows:-

“A couple of years ago, “crazy” Muhoma (1st Defendant) turns up with a very aggressive German guy, saying that the plot belongs to him. He does not have a single piece of paper to show me, and of course, I have lots of what I believe to be legal papers, official searches etc. So I thought this was another dream of the old guy, and so did everybody else here... Now I will try to talk to him, but as the guy is quite slow and does not speak any English, I will have to involve people from the village, the chief and the local politicians, a whole bunch of crooks, ready to take advantage of anything that happens....”

79. The above e-mails confirm that the 2nd Defendant was well aware that the 1st Defendant had sold the suit property to the Plaintiff and she went ahead to talk to the 1st Defendant so that she could purchase the suit property from him. The 2nd Defendant went ahead and entered into an agreement of sale with the 1st Defendant on 3rd July, 2011.

80. As I have indicated above, the Chief Land Registrar and the Commissioner of Lands were well aware that the Plaintiff had purchased the suit property from the 1st Defendant and even paid the Land Rates and Stamp Duty.

81. Indeed, when the Plaintiff's advocate indicated to the Chief Land Registrar that the Plaintiff will file a suit if the Lease Document is not released to them for the purpose of transferring the land to the Plaintiff, the Commissioner of Lands vide his letter dated 9th June, 2011, responded as follows:-

“...Until the embargo issued by the Minister for Lands is lifted there should be no cause for alarm. Kindly advised your client to remain calm as the Minister will soon lift the embargo.”

82. The Plaintiff and his advocate did not remain calm because on 28th June, 2011, the Plaintiff's advocate did another letter to the Permanent Secretary, Ministry of Lands and copied it to the Commissioner of Lands and the officer who was dealing with land in the Coast Region, Mr. Kamiti.

83. In the letter, the Plaintiff's advocate requested the PS to give them a time-line within which they could get the title. The Plaintiff's advocate enclosed in the said letter all payment receipts in respect of rent, rates and stamp duty.

84. Neither the PS nor the Commissioner of Lands responded to that later. Instead, the Commissioner of Lands, through the Chief Land Registrar forwarded the Lease document to the District Lamu Registrar who registered it on 25th July, 2011 and had the land transferred to the 2nd Defendant on 24th November 2011.

85. The actions of the Defendants in transferring the suit property to the 2nd Defendant were done fraudulently considering that they were all aware that the Plaintiff had purchased the suit property, paid the requisite land rent and stamp duty, signed the Transfer document and was only awaiting for the 3rd and 4th Defendants' to transfer the land to him.

86. This matter is similar to **Civil Appeal No. 33 of 2008 (Nyeri) Epaphrus Muturi Kigoro Vs William Mukui Nyaga** in which the Court of Appeal held as follows:-

“The Land Registrar must have been aware of the Respondent's claim of beneficial interests over the suit land because the caution was received in the lands office on the 17th October 2001. While all that was happening the appellant was registered as proprietor of the suit land on 23rd May 2002. This is why the appellant cannot be described as an innocent purchaser for value without notice.....”

87. Indeed, as I have already stated, the correspondences that were exchanged between the

Commissioner of Lands and the Plaintiff shows that the Commissioner of Lands and the Chief Land Registrar were aware of the Plaintiff's beneficial interest in the suit property. The Plaintiff could not register a caution on the land because he had been told that there was an embargo on all portion of land in Lamu.

88. Just as in the **Epaphrus case (supra)**, the 2nd Defendant was also aware of the Plaintiff's interest in the suit property but went ahead to purchase it. She cannot therefore be said to be an innocent purchaser for value without notice. It would therefore be unjust and inequitable to allow the 2nd Defendant to keep the suit property given the evidence on record and the Plaintiff's interest in the property, which arose before the 2nd Defendant purported to purchase the same.
89. Indeed, what is even more vexing is the fact that it is the Plaintiff who paid the outstanding land rent and stamp duty.
90. The 2nd Defendant did not produce any evidence to show that she independently paid land rent and stamp duty before the suit property was transferred to her. The suit property must have been transferred in her favour on the basis of the land rent and stamp duty paid by the Plaintiff.
91. It is because of the reasons I have given above that I find and hold that the 2nd Defendant did not only fail to exercise due diligence as required in the circumstances but intentionally participated in the fraud perpetuated by herself and all the other Defendants to acquire the suit property. Her title to the suit property cannot therefore stand.
92. Consequently, I allow the Plaintiff's Plaint dated 5th April, 2012 in the following terms:

(a) A permanent injunction be and is hereby issued restraining the Defendants, whether by themselves, their agents successors or assigns from selling, transferring, entering or any other way offering parcel of land number Lamu/Manda Island/46 to any other person except by way of transfer to the Plaintiff.

(b) An order be and is hereby issued cancelling the Transfer registered on 24th November 2011 in favour of 2nd Defendant.

(c) An order of rectification of the register of parcel of land number Manda Island/46 be and is hereby issued directing the 4th Defendant to rectify the register for parcel of land number Lamu Manda Island/46 by cancelling the 2nd Defendant's name and substituting it with the Plaintiff's name.

(d) The 4th Defendant be and is hereby ordered to issue to the Plaintiff the Certificate of Lease for parcel of land number Manda Island/46.

(e) An order of eviction be and is hereby issued ordering the 2nd Defendant, her agents, servants or employees to give vacant possession of parcel of land number Manda Island/46 to the Plaintiff.

(f) The 1st and 2nd Defendants to pay to the Plaintiff the costs of the suit jointly and severally.

Dated and delivered in Malindi this 11th day of **March**, 2016

O. A. Angote

Judge



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