



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO.216 OF 2015

MOHAMED DAUDI YUSUF.....PLAINTIFF

VERSUS

1. RUKIA ISMAIL TORA

2. THE COUNTY LAND REGISTRAR, LAMU COUNTY

3. THE NATIONAL LAND COMMISSION

4. THE ATTORNEY GENERALDEFENDANTS

JUDGMENT

By an Amended Plaint dated 20th January 2017, the Plaintiff herein sued the Defendants jointly and severally seeking the following orders:

a. A permanent injunction restraining the Defendants first by themselves, their agents, assigns and/or employees or anyone claiming under in or through them or otherwise however from subdividing, entering into, remaining in or any other manner interfering with the Plaintiff's ownership and quiet possession and enjoyment of the said property known as plot No. 827 measuring 2 acres.

b. A declaration that the suit land originally known as Plot No. 827 measuring 2 acres belongs to the Plaintiff.

c. An order for cancellation of land title known as or referred to as Title Deed Reference No. Lamu/Pate/1401 issued to the 1st Defendant.

d. An order compelling the County Land Registrar Lamu to rectify the Title Deed Reference No. Lamu/Pate/827 to include the remaining 1 acre as per the survey that was conducted and the same to measure approximately 2 acres.

e. Costs of an incidental to this suit.

f. Interests thereon at court rates.

g. Any other or further relief that the court may deem to grant.

PLANTIFF'S CASE

PW1 adopted his statement and testified that on 23rd October 1997 he purchased unsurveyed land parcel now identified as Lamu/Pate/1401 and Lamu/Pate/827 each measuring approximately 0.48 Hectares, from the 1st Defendant at a consideration of Kshs 6000/- and that the two parcels were later identified as Plot No. 827. It was his evidence that he was surprised to learn that the suit land had been subdivided into two portions namely Lamu/Pate/1401 and Lamu/Pate/827 and titles issued in favour of the 1st Defendant and Plaintiff respectively in 2012.

PW1 further stated that he has lived and cultivated the suit land since 1997 until around the year 2011 when the 1st Defendant started demanding for a portion of the suit land which led to a dispute before the area land committee which resolved the same in favour of the PW1.

PW1 stated that after payment of the purchase price he took possession of the 2 acres and that later the area was declared an adjudication section whereby the adjudication committee identified PW1 as the one on the ground and was allocated the land which was then surveyed professionally.

It was further PW1's testimony that the suit land was identified as LAMU/PATE/827 as per the copy of the Original survey map produced as an exhibit. That the process was done in the presence of the adjudication committee and other land owners including the 1st Defendant.

It was PW1's further evidence that the 1st Defendant went for help from the then District Commissioner who issued a letter directing the District Land Adjudication officer to subdivide the Plaintiff's parcel of land known as LAMU/PATE/827 measuring approximately 2 acres and allocate 1 acre to the 1st Defendant, but when the letter was placed before the Area Adjudication Committee who upon perusal, investigation and deliberations made a decision on 4th June 2012 that the 1st defendant Rukia Ismael had no land hence the suit land belonged to PW1. That despite the Committee's decision the 1st defendant went ahead and subdivided the land and got title in her name.

DEFENCE CASE

DW1 gave evidence and stated that she had sold 1 acre of the suit land to the Plaintiff at a consideration of Kshs. 3,000/- of which the Plaintiff only paid Kshs. 1500/ leaving a balance of Kshs. 1500/. It was her evidence that they were both present during the survey and each portion was given a number hence no complaint was raised about the process at the time.

On cross examination by Ms. Thuku, counsel for the Plaintiff, DW1 could not recognize the sale agreement dated 23rd October 1997. She testified that she sold the portion of the suit land to the Plaintiff but there was no written agreement.

PLAINTIFF'S SUBMISSIONS

Counsel reiterated the Plaintiff's evidence and submitted that this being a dispute that emanated from an adjudication process, the 1st Defendant ought to have followed the laid down procedures and mechanisms in dispute resolutions in accordance with the Land Adjudication Act, particularly sections 26, 26A, 27 and 29.

Sections **26, 26A, 27 and 29** stipulate as follows: -

26. Objection to adjudication register

1. Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

2. The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

26A. No Objection Register

When the time for objection under section 26(1) has expired, the adjudication officer shall prepare a No Objection Register in respect of any land not subject to an objection, and deliver the same to the Director of Land Adjudication who shall—

- a. certify thereon and on the duplicate adjudication register that the adjudication of the land set out therein has become final; and**
- b. forward the No Objection Register together with a copy of the duplicate adjudication register to the Chief Land Registrar for the purpose of registration under section 28. (2) The provisions of this section shall apply to all adjudication registers not yet finalized before its commencement. [Act No. 7 of 2007, Sch.]**

27. Finalization of adjudication register, subject to appeals

1. The adjudication officer shall from time to time alter the adjudication register to conform with any determinations of objections under section 26 of this Act.

2. If the adjudication officer considers that to alter the adjudication register would incur unreasonable expense, delay or inconvenience, he may, instead, recommend to the Minister that compensation be paid and the Minister may make such payment of compensation out of moneys provided by Parliament as he thinks fit.

3. When all objections have been determined and the time for appeal under section 29 of this Act has expired, the adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall—

- a. Alter the duplicate adjudication register accordingly; and then**
- b. Certify on the adjudication register and on the duplicate adjudication register that it has become final subject to the outstanding appeals; and**
- c. Forward the adjudication register to the Chief Land Registrar together with a list of the appeals.**

29. Appeal

1. Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by: -

- a. Delivering to the Minister an appeal in writing specifying the grounds of appeal; and**
- b. Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the orders shall be final.**

2. The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

3. When the appeals have been determined, the Director of Land Adjudication shall—

- a. Alter the duplicate adjudication register to conform with the determinations; and**
- b. certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and**

a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

4. Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap. 2) or any other written law, the Minister may delegate, by notice in the Gazette, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.

Counsel submitted that the above process was not followed and an explanation has not been offered by the 1st Defendant on how the initial surveyed plot No. 827 measuring 2 acres was further subdivided and the map altered hence this was fraudulent and any resultant title was issued unprocedurally.

Counsel therefore urged the court to allow the Plaintiff's claim as prayed in the plaint with costs and the Defendant's title be cancelled on grounds of fraud and illegality.

1ST DEFENDANT'S SUBMISSIONS

Counsel submitted that the 1st Defendant disputed the claim by the Plaintiff that he entered into an agreement with the Defendant dated 23rd October 1997 which was not specific on the property being sold and it indicated that size as "*Kamba Mbili*". It was counsel's submission that even if the agreement was valid, the court would not be able to enforce it on account of the ambiguities pointed out.

Counsel also submitted that it is evident on record that the disputed property was subject of an adjudication exercise which is an elaborated process under the Land Adjudication Act. Further that the Plaintiff did not produce the minutes of the Land Adjudication Committee that supposedly declared him the owner of 2 acres of land and that there is no evidence that the Plaintiff made any objection appeal respectively to the Adjudication Officer and Minister on being aggrieved by the discovery that he only got 1 acre instead of 2 acres.

Further that the Plaintiff has not proved the allegation of fraud to the required standard and urged the court to dismiss the plaintiff's case with costs.

ANALYSIS AND DETERMINATION

The issues for determination in this case are as to whether the plaintiff and the 1st defendant entered into a valid agreement for the sale of the suit land, whether the sale was for one or two acres, whether the Defendant fraudulently subdivided the suit land into two and got a title in her name and whether the Plaintiff has proved fraud.

This matter was initially filed in the Principal Magistrate's Court in Lamu, whereby the 1st Defendant raised an issue questioning the authenticity of the agreement and stated that she did not enter into an agreement for sale with the Plaintiff. By an order dated 18th November 2014, the court ordered that the agreement dated 23rd October 1997 be referred to DCIO Lamu to investigate the genuineness of the agreement and if it was signed by the 1st Defendant Rukia Ismail Tora and file a report on 25th November 2014.

The D.C.I.O Lamu West conducted his investigation and made a report to the court on 9th December, 2014 as seen in the proceedings of 9/12/2014 confirming that Rukia Ismael (the Defendant) had actually signed the sale agreement she was disputing and acknowledged the payment of the purchase price. It is therefore evident that the 1st Defendant and the Plaintiff entered into a sale agreement dated 23rd October 1997.

The second issue is whether the sale was for one or two acres. The Plaintiff claimed that the sale was for two acres while the 1st Defendant initially stated that she did not enter into any agreement with the Plaintiff but later admitted that she had sold one acre to the Plaintiff. The agreement which was produced indicates that the 1st Defendant sold "*Kamba mbili*" which is a local parlance of the parties. What is the measurement in standard measurements" This measurement is ambiguous and cannot be two acres as the Plaintiff claims. This court is not in a position to ascertain the exact acreage from this statement as there was no supporting evidence on the actual size of the "*kamba*" used during the purchase. It can only be left to speculation.

The Plaintiff further averred that the suit land was later surveyed as Plot No. 827, measuring approximately 2 acres. In an attempt to prove the said survey, the Plaintiff relied on a copy of what he referred to as the original map in his further list of documents dated 23rd January 2019. Notably, the alleged original map is just a copy with no any form of certification that the same is indeed a map of the disputed area in Lamu. It is therefore difficult for this court to conclude with certainty that the same is indeed a true depiction of the disputed area.

Besides, the Plaintiff averred that the present map that was used to issue the two titles herein was forged to favour the 1st Defendant. It was incumbent upon the Plaintiff to produce evidence to prove such fraud.

It is settled law that fraud must be specifically pleaded and proved as was held in the case of **JOSEPH KARISA MUTSONGA vs JOHNSON NYATI [1984] eKLR** it was held;

“The next issue is whether or not the defendant had the parcel registered in his name fraudulently” Charges of fraud should not be lightly made or considered. Mason v Clarker (1955) AC 778, 794: Bradford Building Society v Borders (1941) 2 All ER 205. They must be strictly proved and although the standard of proof may not be so heavy as to require beyond reasonable doubt something more than a mere balance of probabilities is required,”

It was incumbent upon the Plaintiff to prove that the 1st Defendant participated in the fraud in registering the title in her name. The burden of proof lies on he/she who alleges as per Section 107 of the Evidence Act. The Plaintiff failed to discharge this burden. With no evidence to prove fraud in the entire exercise, I am inclined to believe that the acreage purchased by the Plaintiff was as per the land records. In this case, the survey map and the subsequent titles.

The 1st Defendant was categorical that she sold one acre and not two acres. It is not disputed that this land went through adjudication process which is very elaborate. The Plaintiff also confirmed that he was on the ground when the adjudication process and survey done. If the Plaintiff was not satisfied with the process, then he should have followed the laid down procedures as per the land Adjudication Act.

The Defendant’s title is also protected under Sections 24, 25 and 26(1) of the Land Registration which only allows impeachment of a title on grounds that it was procured fraudulently, illegally or unprocedurally. There was no evidence of fraud on the acquisition of the Defendant’s title hence she is an absolute proprietor.

The upshot is that the Plaintiff has failed to prove his case on a balance of probabilities and the case is therefore dismissed with costs to the 1st Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF APRIL, 2022

M.A. 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.



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