



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT 92 OF 2007

DANSON KIMANI GACINA.....PLAINTIFF

VERSUS

FREDRICK BAYA THOYA.....DEFENDANT

JUDGEMENT

Danson Kimani Gacina (the Plaintiff) filed this suit against Fredrick Baya Thoya (Defendant). The Plaintiff's claim is for the repossession of Plot No. Kilifi Madeteni/440 which was registered in the names of Danson Kimani Gacina and Cyrus Kariuki Waithaka in 1984 and a land certificate issued in 1986 as the first registered owners and have since owned it.

It is the Plaintiff's case that the Defendant caused his name to be registered in place of the Plaintiffs and a Title Deed was issued to him on 10/8/04 – without the Plaintiff's knowledge, permission or authority. He states that the said title Deed was obtained by defendant unprocedurally and is therefore null and void and might have been secured fraudulently without disclosing prior ownership by the Plaintiff and another.

Plaintiff's contention is that as the first registered owners of title, it became absolute and could not be defeated and the Registrar could not remove the names from the register without a court order. Plaintiff does not know the Defendant and has never sold to him the said plot nor is he aware of any case where the Court ordered rectification of Title to have the names cancelled.

Plaintiff now prays that judgement be entered in his favour against the Defendant for;-

(a) A declaration that Plaintiff's title being the first registration cannot be cancelled in the manner done in this case.

(b) An order directing the rectification, of the register by canceling the Defendants name and replacing it with the names of Danson Kimani Gacina and Cyrus Kariuki Waithaka as rightful owners of Plot No.Kilifi/Madeteni/440.

The matter proceeded ex parte Defendant having failed to enter appearance and file defence and service was affected by way of substituted service through a Newspaper Advertisement. The Pleadings refer to two persons as being registered owner of the plot in issue yet only one plaintiff has sued. He

does not state that this is a representative suit, there is a replying affidavit sworn by the Plaintiff alone yet he wants two names to be entered in the rectified register. That verifying affidavit does not refer to Cyrus Kariuki Waithaka, nor is there any document of authority confirming that Cyrus has authorized Danson to file this suit on his behalf. Order 1 Rule 1 deals with the issue of who may be joined as Plaintiffs –

“All persons may be joined in one suit as Plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction.....whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law on fact would arise”

That situation obtaining refers to Cyrus Kariuki Waithaka who has not been joined as a Plaintiff has there been any order or reason to warrant separate trial" None is on the court record and Plaintiff Danso, seeks to pursue reliefs in his behalf and on behalf of an individual who is not a party to this suit - what would be more embarrassing than a situation where it turns out that Cyrus Waithaka who has not been a Plaintiff in this suit is perhaps the one who had disposed of the suit property to the Defendant" That is all the more reason why it was desirable to have him joined in this suit, more so because the relief sought here is a joint relief of entry of names into the register to replace defendants names.

In this situation if the Plaintiff is indeed representing the interests of Cyrus Waithaka, then he has not complied with the provision of order 1 rule 12 (1) and (2) and in the light of the earlier fears expressed by the court there can be no justification no making presumptions. There is even no way the court can grant part of the relief separately to the Plaintiff when the role of the other purported joint owner has not been established. In consequence of the foregoing then this claim cannot succeed and is dismissed with costs to Plaintiff.

Delivered and dated this 25th day of November 2008 at Malindi

H.A OMONDI

JUDGE

Mr Odiaga for Plaintiff present

25/11/08

Before Omondi J

c/c-Randu

Mr Odiaga for Plaintiff

Mr Odiaga;- I apply for certified copies of proceedings and ruling.

H A OMONDI

JUDGE

20/11/08

ORDER;- Counsel be supplied with the certified copies of proceedings and ruling.

H A OMONDI

JUDGE

20/11/08



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