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| Case Action: | Judgment |
| Judge: | Jane Muyoti Onyango |
| Citation: | Ben Nicodemus Omambia Mogaka v Barize Construction Limited & 2 others [2022] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Environment and Land |
| History Magistrates: | - |
| County: | Kisii |
| Docket Number: | - |
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| Case Outcome: | - |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 174 OF 2016

BEN NICODEMUS OMAMBIA MOGAKA.....PLAINTIFF

VERSUS

BARIZE CONSTRUCTION LIMITED.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

LAND REGISTRAR, KISII COUNTY.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff filed suit against the Defendants claiming that the 1st Defendant had with the help of the 2nd Defendant fraudulently got itself registered as the owner of L.R NO. KISII MUNICIPALITY/BLOCK1/592. The 1st Defendant then used the title for the suit property as security for a loan of Kshs. 8,000,000 from Kenya Commercial Bank Limited on 8th March 2016. The Plaintiff prayed for *inter alia* cancellation of the lease issued to the 1st Defendant.

2. Upon being served with the Plaint and Summons to enter appearance, the 1st Defendant filed a Defence and Counterclaim dated 20th September, 2016 denying the Plaintiff's claim and stated that it lawfully purchased the suit property from one Samwel Isaboke Mwambi who in turn transferred the same to the Plaintiff. The 1st Defendant thereafter took possession of the suit property and has constructed thereon a five storey building worth Kshs. 33,500,000. In the alternative the 1st Defendant averred that it was a *bona fide* purchaser for value without notice of any anomaly in the title.

3. In the Counterclaim, the 1st Defendant claimed that the Land Registrar who was sued as the 3rd Defendant was maintaining a parallel register which indicated that there was double registration in respect of the suit property. The 1st Defendant alleged that the acts of the 2nd and 3rd Defendants were contrary to the law, more specifically the Land Registration Act No. 3 of 2012 and the Registered Land Act, Cap 300 of the Laws of Kenya, now repealed. He thus prayed that the Plaintiff's suit be dismissed and for a declaration that the creation of double registration over land parcel number KISII MUNICIPALITY/BLOCK1/592 by the 2nd and 3rd Defendants was illegal, null and void. He also prayed for damages and costs.

4. The 3rd Defendant filed a Defence dated 30th June, 2016 denying the Plaintiff's claim and stating that if there was any such registration then the same was done lawfully.

5. However, the 2nd and 3rd Defendants did not file any Defence to the 1st Defendant's Counterclaim.

6. When the matter came up for mention on the 6th October 2016, learned counsel for the 1st Defendant pointed out that the Plaintiff's and 1st Defendant's parcels of land were separate and distinct, but they bore the same number. The court therefore directed the Land Registrar and County Surveyor to visit the two parcels of land bearing the number KISII MUNICIPALITY/BLOCK1/592 and registered in the names of the Plaintiff and 1st Defendant respectively and file a report incorporating a sketch plan showing the location and delineation of the two plots.

7. The Land Registrar and County Surveyor visited the suit property and established that the two parcels of land were separate and distinct. The Plaintiff therefore withdrew his claim against the 1st Defendant but the 1st Defendant opted to proceed with the Counterclaim against the 2nd and 3rd Defendants.

1ST DEFENDANT'S CASE

8. The 1st Defendant/ Counter claimer called one witness Zebedee Barongo Onteri who testified as the DW1. He introduced himself as the Director of the 1st Defendant Company. He relied on his witness statement dated 20th September, 2016. He stated that land parcel number KISII MUNICIPALITY/BLOCK1/592 was registered in the name of Barize Construction Company Limited (1st Defendant) and one Nicodemus Omambia Mogaka (Plaintiff). On the ground, the parcels belonging to the Plaintiff and the 1st Defendant are separate and distinct but the two parcels bear the same number.

9. He told the court that as result of the double registration, he was prejudiced as the company had charged its title to the bank to secure a loan. When the bank discovered that the title was also registered in the name of another person, they lost faith in him and requested him to furnish additional security for the loan. He stated that he was agonized and even though he had since repaid the loan, he could not use the title as security for loan any more. It was his testimony that he would not be able to dispose of the suit property as it had two registered owners. He therefore prayed that the Plaintiff's title be cancelled.

10. The 2nd and 3rd Defendants did not call any witnesses. After the close of the 1st Defendant's case, the parties were directed to file their written submissions but only the 1st Defendant filed his submissions.

ISSUES FOR DETERMINATION

11. The following issues emerge for determination:

(i) Whether the 2nd and 3rd Defendants fraudulently or illegally created double registration in respect of land parcel number KISII MUNICIPALITY/BLOCK1/592.

(ii) Whether the Plaintiff's title ought to be cancelled

(iii) Whether the 1st Defendant is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

12. It is not in dispute that the Plaintiff and 1st Defendant are both registered as the owners of L.R No. KISII MUNICIPALITY/BLOCK1/592. Granted that the said registration relates to two parcels of land which on the ground are separate and distinct, the double registration has created confusion and anxiety on the part of the 1st Defendant. In his evidence, the 1st Defendant stated that he had charged his title as security for a loan of Kshs. 8,000,000 but when the bank discovered that the title was also registered in the name of the Plaintiff, they asked the 1st Defendant to furnish an additional security. He testified that even though the 1st Defendant has since repaid the loan, it cannot use the said title as security nor can it dispose of the suit property.

13. The 2nd and 3rd Defendants did not file any Defence to the 1st Defendant's Counterclaim. However, after visiting the suit property pursuant to the court's directions, the Land Registrar (3rd Defendant) established that the Plaintiff's plot and the 1st Defendant's plot were in different locations though they bear the same number.

14. It has been submitted on behalf of the 1st Defendant that the actions of the 3rd Defendant in creating double registration amounts to interference with the 1st Defendant's right to property by a public servant which is unconstitutional. Learned counsel for the 1st Defendant referred to sections 24, 25 and 26 of the Land Registration Act which provide as follows:

Section 24 of the Land Registration Act 2012

a) *"The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging and appurtenant thereto and*

b) The registration of a person as the proprietor of a lease shall vest in the person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease

Section 25 (1) of the said Act further provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject

a) to the lease charge s and other encumbrances and to other conditions if any shown in the register

b) to such liabilities, rights and interests as affect the same and are declared by section 28 to require noting on the register, unless the contrary is expressed in the register

15. Furthermore, section 26(1) of the land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or

b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

16. It is clear from the above provisions that registration of a person as the owner of leasehold interest in land guarantees protection of the said title. This protection is brought into question when two different titles bear the same registration number. The 3rd Defendant having realized the anomaly ought to have corrected it immediately, but they failed to do so thus forcing the 1st Defendant to proceed with his Counterclaim. In the circumstances, the 1st Defendant has proved that the 3rd Defendant illegally created double registration in respect of land parcel number KISII MUNICIPALITY/BLOCK1/592.

17. The next issue for determination is whether the 1st Defendant is entitled to the reliefs sought. In its Counterclaim, the 1st defendant has prayed for cancellation of the Plaintiff’s title as well as damages. Counsel for the 1st Defendant has submitted that this is a proper case where the court should award exemplary damages. He has relied on the case of **Rookes v Barnard (1994) All ER 367** where the court held that;

“exemplary damages may be awarded in two classes of cases, first, where there is oppressive arbitrary or unconstitutional action by the servants of the government and secondly, where the defendants conduct was calculated to procure him some benefit, not necessarily financial at the expense of the Plaintiff”

18. In the case of **Obongo v Municipal Council of Kisumu 1071E.A 91** the Court of Appeal cited the case of **Rookes v Barnard (supra)** and held as follows:

“As regards the actual award the Plaintiff must have suffered as a result of the punishable behavior; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the defendant’s conduct is taken into account. It will be seen that the House took the firm view that exemplary damages are penal not consolatory as had sometimes been suggested”

19. As has correctly been submitted by counsel, the 1st Defendant’s proprietary rights have been violated by the acts of a public servant as the 1st Defendant’s title has been brought into question and he cannot fully utilize it to secure financial facilities. It is therefore my finding that the 1st Defendant is entitled to exemplary damages which I assess at Kshs. 1,000,000. I do not think that the 1st Defendant is entitled to general damages over and above the exemplary damages as this is not a case of trespass.

20. The upshot is that the 1st Defendant has proved his Counterclaim on a balance of probabilities. I therefore enter judgment for the 1st Defendant against the 3rd Defendant and make the following final orders:

a) A declaration is hereby issued that the 1st Defendant is the rightful owner of land parcel number KISII MUNICIPALITY/BLOCK1/592.

b) A declaration is hereby issued that the creation of double registration over land parcel number KISII MUNICIPALITY/BLOCK1/592 by the 2nd and 3rd Defendants in the Counterclaim was illegal, null and void.

c) The Land Registrar Kisii is directed to rectify the register by cancelling the title in respect of land parcel number KISII MUNICIPALITY/BLOCK1/592 in the name of the Plaintiff and allocate the Plaintiff's title a different number.

d) The 1st Defendant is awarded the sum of Kshs. 1,000,000 exemplary damages.

e) The costs of the Counterclaim shall be borne by the 3rd Defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF MARCH, 2022.

J.M ONYANGO

JUDGE



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