



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL SUIT NO.10 OF 2008

KENYA AIRWAYS LIMITED.....PLAINTIFF

VERSUS

JAPHET NOTI CHARO SHUTU.....DEFENDANT

JUDGMENT

BACKGRROUND

1. By a Plaint dated 5th March 2008 and filed herein on 6th March 2008, Kenya Airways Ltd instituted the suit herein against the Defendant Japhet Notice Charo Shutu seeking:-

- a) A declaration that the Plaintiff is the owner of all that parcel of land known as LR No. 5785 situate in Malindi District;*
- b) An order of eviction against Japhet Noti Charo Shutu from all that parcel of land known as LR No. 5785-situate in Malindi District and an order that Court Bailiffs do restore possession of LR No. 5785 to the Plaintiff, Kenya Airways Ltd;*
- c) A permanent injunction restraining the Defendant or his agents and servant from entering upon or trespassing on all that parcel of land known as LR No. 5785- situate in Malindi District or from construction or from interfering in any manner whatsoever with the Plaintiff's legal right to quietly possess and use the said premises;*
- d) Costs of the suit, and*
- e) Any other relief that the Court may deem fit to grant.*

2. Upon being served, the Defendant entered appearance and proceeded to file a Defence and Counterclaim on 16th May 2008. The Defendant denies the Plaintiff's claim and avers that he has lived with his family on the suit property from time immemorial before the same was lawfully allotted to him as an unsurveyed residential Plot "D" Malindi in 1998.

3. In his Counterclaim, the Defendant accuses the Plaintiff of colluding with officers in the Ministry of Lands to fraudulently cause the Plaintiff to be registered as the proprietor of the suit property. The Defendant accordingly prays that the Plaintiff's suit be dismissed and the title in the Plaintiff's name be cancelled and rectified by inserting the Defendant's names therein.

THE PLAINTIFF'S CASE

4. The trial herein commenced before the Honourable Lady Justice Hellen Omondi on 15th June 2010. On the said date, the Plaintiff's sole witness Edwin Chepkilot (PW1) told the Court that he was a security officer employed by the Plaintiff. It was his evidence that LR No. 5785 was allocated to the Plaintiff when they applied for the land and were issued with a Letter of Allotment dated 6th May 1991. The Plaintiff accepted the offer and made the necessary payments.

5. PW1 testified that subsequent to the acceptance and payment of necessary charges, the Commissioner of Lands wrote to the Registrar of Titles a letter dated 6th July 1994 in which he forwarded a copy of the Grant for the suit property to be registered in the Plaintiff's name.

6. It was PW1's testimony that they did not collude in anyway with the Commissioner of Lands who went ahead to issue them with a title deed for the land.

THE DEFENCE CASE

7. The Defendant testified as his sole witness in these proceedings before the Honourable Justice Oscar Angote on 11th October 2016. He told the Court that he has lived on Plot No. 5785 with his family since the colonial days. The Defendant told the Court that when he learnt of the Plaintiff's claim and that title had been issued in the Plaintiff's name, he conducted an investigation to find out how that had happened.

8. According to the Defendant, there were no records at the Lands Registry in evidence of the Plaintiff's title. He told the Court that while the Plaintiff's Deed Plan showed that it was prepared on 21st April 1992, payment of rent had commenced in 1991. The Defendant testified that he had the original title and deed plan clearly showing that he was the registered proprietor of the said parcel of land. He was issued with a title deed for the land on 12th April 2011.

9. I have perused and considered the pleadings filed by the parties. I have also considered the testimonies of the witnesses, the evidence placed before this Court as well as the Written Submissions placed before me by the Learned Advocates for the parties.

10. According to the Plaintiff company, it was by a Letter of Allotment dated 6th May 1991 from the Commissioner of Lands allocated a Plot of land identified on the said letter as Reference No. TP47/1/VIII/59 measuring approximately 1.20 Ha situated within the then Malindi Municipality, Malindi. The Plaintiff further avers that it paid the premium, land rent and other charges amounting to Kshs 122,500/- as required under the Letter of Allotment to the Commissioner of Lands.

11. It is the Plaintiff's case that upon meeting all conditions of the allotment, title documents were processed in its favour and the property which was unsurveyed at the time of allocation came to be registered as LR No. 5785(the suit property). Subsequently, the Plaintiff was issued with a Grant Number CR 25914 on 4th July 1994 to hold for a term of 99 years with effect from 1st May, 1991.

12. The Plaintiff's sole witness testified that as the registered owner of the suit property, they commenced payment of land rates to the then Municipal Council of Malindi until some time in the year 2006 when the Defendant entered into the suit property claiming it to be his own. On or about 11th February 2008, the Defendant started some construction work on the suit property without the Plaintiff's consent or authority thereby occasioning this suit.

13. On his part, the Defendant told this Court that the property described as LR No. 5785 was irregularly and illegally allocated to the Plaintiff. According to him, the property in issue is part of Plot No. M5 which was actually part of the Defendant's property long before and was therefore not available for allocation by the Commissioner of Lands.

14. It is the Defendant's case that in any case as at the time the Plaintiff paid for the allocation, the offer from the Commissioner had expired and it was wrong for the Department of Lands to proceed to process documents in favour of the Plaintiff.

15. The Defendant testified that in view of the fact that the Plaintiff did not have any proper documents in support of any payments made for the allocation, the Commissioner of Lands proceeded to allocate the land to him and three other people in the year 2001. It is the Defendant's case that as at the time of the said allocation to himself in 2001, the Plaintiff had neither fenced the Plot nor taken possession thereof and there was therefore no way in which the Defendant could have taken note of the Plaintiff's interests thereon.

16. The Defendant further told the Court that he has since completed construction of a residential house which he inhabits on the suit property and the balance of convenience tilts in his favour as he is likely to suffer prejudice if the orders sought by the Plaintiff are granted.

17. From the material placed before me, the property allocated to the Plaintiff as per the Letter of Allotment dated 6th May 1991 is described as an unsurveyed Residential Site-Malindi Municipality measuring approximately 1.2 Ha. The said letter shows that the Stand Premium and other fees required to be paid to the Commissioner of Lands upon acceptance of the offer in writing was Kshs 122,520/-

18. According to PW1, that offer was accepted by the Plaintiff as per their letter dated 10th June 1991 in which they enclosed a cheque of Kshs 260,040/- to the Commissioner of Lands. The said letter produced as an exhibit herein reads in part as follows:-

“We refer to our letter reference 35/M.6/158 of 24th May 1991(copy attached) on the matter of Letters of Allotment for three Plots in Malindi received from the Kilifi District Development Committee. We enclose herein a cheque in the sum of Kshs 260,040/- for the three Plots made up as follows:-

1) Plot Reference Number TP47/I/VIII/59

Total Charges-Kshs 122,500/-

2) Plot Reference Number TP47/I/VIII/57

Total Charges Kshs 74,730/-

3) Plot Reference Number TP47/I/VIII/58

Total Charges-Kshs 62,790/-

Kindly acknowledge safe receipt of this cheque and we look forward to hearing from you end the earliest (sic)

19. Arising from the foregoing, it is apparent that the cheque amount in the letter sent to the Commissioner of Lands was inclusive of payments for two other Plots of land both of which were also situated in Kilifi. In his letter dated 3rd March 1993, the Commissioner of Lands indeed acknowledged receipt of the Plaintiff's letter and the cheque for Kshs 260,040/-. It is apparent from the Commissioner's letter that the delay in the response was occasioned by the failure on his part to trace copies of the Letters of Allotment issued to the Plaintiff. By this time, the cheque for Kshs 260,040/- had gone stale and the Commissioner was by the said letter dated 3rd March 1993 requesting for copies of the Letters of Allotment and a fresh cheque for the same amount.

20. From the correspondence availed herein, there appears to have been some confusion and delay in completing this process. After a series of correspondence involving the Plaintiff, the Commissioner of Lands and the Ministry of Lands, the Plaintiff wrote as follows to the Commissioner of Lands vide their letter dated 26th May 1994:

MALINDI PLOTS

You now have original deed plans No. 162084, 162085, 162086 for Malindi Plots Nos 5785, 5786 and 5787. You also have copies of the respective Letters of Allotment.

The purpose of this letter is now to re-submit our cheque for 260,040/- which was returned under cover of the Permanent Secretary's Letter No. MLS/20/002 TPY/23 of 25th August 1993 for our retention until we were in a position to produce copies of those Letters of Allotment and Originals of Deed Plans.

I suppose you will now be able to process the title deeds.

Signed

Administration Director"

21. Subsequently the Commissioner of Lands by a letter dated 6th July 1994 forwarded the Grant in respect of Portion No. 5785 Malindi to the Registrar of Titles Mombasa for registration. The Commissioner confirms in the said letter that the registration fees of Kshs 100/- had been paid vide receipt No. 859075 of 6th June 1994. The Grant dated 4th July 1994 was registered as CR No. 25914 on 15th July 1994.

22. As it were the said Grant was issued under the Registration of Titles Act, Cap 281(now repealed). Section 2 of the said Act defines a proprietor to mean the person or corporation registered under this Act as the owner of the land or as a lessee from the Government. Accordingly, upon registration on 15th July 1994, the Plaintiff became proprietor of the said Portion 5785(CR 25914), Malindi.

23. Section 23(1) of the repealed Act provided as follows:

23(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."

24. That principle of indefeasibility of titles remains embodied in Sections 25 and 26 of the Land Registration Act despite the repeal of the Registration of Titles Act aforesaid. Explaining the said principle in ***Charles Karathe Kiarie & 2 Others –vs- Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others(2013) eKLR***, the Court of Appeal observed as follows:-

"The Registration of Titles Act is entirely a product of the Torrens system of registration. The word "Torrens" is derived from Sir Robert Torrens, the third Premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This is a system that emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government, as the keeper of the master record of all land and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of Government compensation."

25. The Learned Judges of Appeal went on to state:

"We have taken this long route in order to explain that it has always been the law under the Registration of Titles Act and based on the Torrens System, that the title of a bonafide purchaser for value and without notice of fraud could not be impeached."

26. In his Defence and Counterclaim herein the Defendant contends that the Plaintiff acting in collusion with officers in the Ministry of Lands fraudulently caused the Plaintiff to be registered as the proprietor of the suit property while it was within their knowledge that the property belonged to the Defendant. I have considered the particulars of fraud as listed under paragraph 11 of the Counterclaim.

27. I note however that during his cross-examination, the Defendant conceded that the suit property was allocated to him on 12th April 2001. He was therefore not the owner of the suit property when the same was allocated to the Plaintiff on 6th May 1991 as he purports in his

pleadings. In my view, once the property was allocated by the Commissioner of Lands and title was issued to the Plaintiff on 15th July 1994, the suit property was no longer available for allocation and could not be so allocated more than six years after the title therefor was issued.

28. At any rate because of the seriousness of the allegations of fraud, which is in itself a criminal act, the burden of proof is on the party who alleges it and the standard of proof thereof is more than a mere balance of probabilities. As it were, the Defendant did not show how the Plaintiff colluded with the unnamed officers from the Ministry of Lands to irregularly and illegally issue the Plaintiff with the title of the disputed property. While the process of allocation of the land to the Plaintiff was dogged by delays and some confusion at the initial stages, there was nothing to suggest that the Plaintiff and/or any other official for that matter had engaged in acts of fraud prior to the issuance of the Grant.

29. Indeed at the hearing hereof the Defendant produced another Letter of Allotment Ref TP47/XIV/49 dated 12th April 2001 for an unsurveyed Plot No. "D" said to measure approximately 2.52 Ha. During his cross-examination however, the Defendant conceded that the suit property was allocated to him after the same had been surveyed. I am therefore unprepared to accept given the evidence herein that the concerned parcel of land was an unsurveyed residential Plot as at 12th April 2001.

30. The upshot of all this is that I am satisfied that the Plaintiff has proved its case on a balance of probabilities. The Defendant has on the other hand failed to give a basis for his continued occupation of the Plaintiff's property. He must as a result suffer the consequences of being an illegal trespasser on the Plaintiff's property.

31. Accordingly, I hereby grant the Prayers sought by the Plaintiff per the Plaint dated 5th March 2008 and filed herein on 6th March 2008.

32. The Defendant's Counterclaim is dismissed.

33. The Plaintiff shall have both the costs of this suit and the counterclaim.

Dated, signed and delivered at Malindi this 14th day of March, 2019.

J.O. OLOLA

JUDGE