



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 66 OF 2014

SILAS TOWETT KAMUREN &

GRACE JERUTO KAMUREN (*Suing as the*

Administrators of the Estate of

DAVID YATICH KAMUREN (Deceased).....PLAINTIFFS

VERSUS

MOSES SIMATWA.....1ST DEFENDANT

PAUL KAMUREN.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 4th April, 2014 and filed in court on 9th April, 2018 and subsequently amended on 7th March, 2016, the plaintiffs sought the following orders against the defendants:-

- (a) Orders declaring the agreement dated 27th July, 2013 null and void and all subsequent instruments and nullity.
- (b) An eviction order against the 1st defendant from land parcel No. Kitale Municipality Block 15/Koitogos/152.
- (c) Exemplary damages against the 1st and 2nd defendant for fraud and illegal occupation of the land parcel.
- (d) In the alternative to prayer “b” mesne profits to be computed by a land economist.
- (e) Costs of the suit.
- (f) Any other relief the court may deem fit to grant.

The Plaintiffs’ Case

2. According to the plaintiffs, they are the children of the late **David Yatich Kamuren** who bring this suit as the administrators of his estate. The 2nd defendant is their brother. At the time of the institution of this suit their father was *non compos mentis* and later on he met his demise while the suit was pending. He was also the registered proprietor of **Kitale Municipality Block 15 (Koitogos)/152** measuring **10.59 ha**. The plaintiffs aver that notwithstanding objections from family members and registration of a caution over the title, the 2nd defendant fraudulently sold a half acre plot of land from **Kitale Municipality Block 15 (Koitogos)/152** to the 1st defendant. It is alleged that the 2nd defendant received the sale monies while fully aware that his father was *non compos mentis*, and that the 1st defendant imprinted the thumb print of a mentally ill person on the agreement and the transfer and further purported to have obtained consent of the land control board.

The Defendant’s Defence and Counterclaim

3. The defendants filed a defence and counterclaim dated 1/12/2014 on 2/12/2014. In that defence and counterclaim, they deny the claim and state that the 1st defendant lawfully bought the suit land without notice of the vendor’s mental status, that the vendor was David Kamuren Yatich and he was *compos mentis* at the time of the sale, that he executed the instruments of subdivision and transfer; that the suit is actuated by malice; that the orders granted in **Eldoret HCP 14 of 2013** was only limited to further dealings in the estate of David Kamuren. They

prayed that the plaintiff's suit be dismissed with costs and that they be enjoined from interfering with the suit property. They also sought damages, mesne profits and costs.

The Plaintiff's Evidence

4. The suit came up for hearing on **14/6/2018** when **PW1 Charles Kipteboi** testified and adopted his statement. He reiterated the matters set out in the plaint. He indicated that when he received information about the sale, he called the 2nd defendant and asked him about the same and the 2nd defendant denied the sale and alleged that he was merely fencing the land. However, PW1 went to the land and saw the demarcation of the suit land on the ground and reported the matter to the local chief. Later on, the 2nd defendant agreed that a sale had occurred but denied that he was the seller and averred that the seller was his father, which assertion did not go down well with the PW1 as he was aware of his father's ill mental health. PW1 thereafter caused a caution to be registered over the main title and initiated proceedings for the appointment of administrators over his father's estate. The court in the administration proceedings ordered the medical examination of his father to ascertain his mental health and this was done and a report from Moi Teaching and Referral Hospital Psychiatric Unit was obtained (**PEXh 4**). Thereafter the plaintiffs were appointed administrators and commenced this suit. A copy of the purported agreement between the deceased and the 1st defendant was produced as **PEXh 6**. The agreement states that the whole parcel of land had been bequeathed to the 2nd defendant. In the same breath the document appears to state that the deceased was at the time selling the suit land on behalf of the 2nd defendant who is named as the recipient of the proceeds of the sale. A copy of a replying affidavit in **Eldoret HCP 14 of 2013** was produced (**PEXh 7**). In it the 2nd defendant states that between **November 2012** and **February 2013** his father asked him to look for a buyer for a portion of the land because he needed money for farm needs and that at the said time his father was compos mentis, though he later developed mental ill health in **November 2013**. **PEXh 8** the transfer of land and **PEXh 6** bear the same date, **27/7/2013**. The application for consent of the land control board to transfer (**PEXh 9**) bears the same date and bears no land reference number. The consent of the land control board to subdivide the land was issued on **10/7/2013** whereas the application for consent to subdivide is dated **6/8/2013** days after the consent was purportedly issued. The witness alleged that his father never attended that land control board meeting.

5. **PW2, Zipporah Kamuren** testified on the same date and adopted her statement. She stated that she is a lecturer at the school of medicine at a local university; that she had lived with the deceased all her life and that beginning **2011** he showed signs of disorientation and withdrawal aloofness, forgetfulness and general change of personality. This went on to the extent that he failed to participate in the wedding of his first born son, he got lost a number of times and on one occasion he was traced to Moi's Bridge in tattered clothes in **February 2013**, after which the witness was not able to hold any meaningful conversation with him. According to the witness, the purported sale agreement (**PEXh6**) was purported to have been made at a time when the deceased had been unwell, that is **July - August 2013**. According to the witness the deceased used to append a written signature to documents and had never spoken of dividing his land.

6. **PW3 Dr. Edwin Nyaora** testified on **1/11/2018**. He stated that he holds a Bachelor of Medicine & Surgery, Masters in Psychiatry and Public Health and that he is a Consultant at Jaramogi Oginga Odinga Hospital. Previously while at Moi Teaching and referral Hospital he was asked to undertake a mental assessment of the deceased which he did and compiled a report. His opinion was that the deceased had brain atrophy, a consequence of ageing; that he requested a confirmation from a Dr. Abuya for radiological confirmation and the examination confirmed the brain atrophy. He made his findings in a report that he produced as **PEXh 4(a)**. According to him the condition that the deceased had suffered has severe and adverse effect on his cognitive powers. In his opinion, such a condition makes a sufferer fail to recognize even his relatives or even time of the day.

The Defendants' Evidence

7. The defendants never called any evidence at the hearing of this suit.

Submissions

8. The plaintiff filed their submissions on **30/11/2018**. I have perused the court record and found no submissions filed on behalf of the defendants in this suit.

Determination

9. I have considered the pleadings of the parties and the evidence and submissions of the plaintiffs.

10. The defendants never called any evidence on their part. The evidence of the plaintiffs went unchallenged. Besides that I find the plaintiff's evidence to be quite cogent.

11. The discrepancies in the dates and contents of the land subdivision, land control board consents and applications and transfer documents as outlined in the analysis of the plaintiff's evidence hereinabove are evidence that the 1st and 2nd defendants were guilty of fraud in the subject transaction over the suit property.

12. There is no evidence from the defendants that the deceased, who according to evidence normally used a signature in execution of documents, signed the documents in the transaction by way of a thumbprint, that the thumbprint belonged to him, or that he executed the documents voluntarily or without coercion.

CONCLUSION

13. In my view the documents impugned in this suit were not executed by the deceased and they are forgeries.

What Orders should issue?

14. I therefore find that the plaintiffs have established their claim against the defendants on a balance of probabilities. Consequently, I enter judgment in favour of the plaintiffs against the defendants jointly and severally and I issue the following orders:

(a) **An order of declaration, declaring that the agreement dated 27th July, 2013 and all subsequent instruments are null and void.**

(b) **An order that the 1st defendant shall vacate the suit land in default of which he shall be forcefully evicted.**

(c) **An order that the defendants shall bear the costs of the suit.**

Dated, signed and delivered at Kitale on this 29th day of January 2019.

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bororio holding brief for Terer for the plaintiffs

N/A for the defendants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019