



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CIVIL SUIT NO.18 OF 2012

**EMILY CHEPNGENO RUTO (Suing as legal representative of the estate of
DAVID KIPLANGAT RUTO)1ST PLAINTIFF**
RICHARD K. CHEPKWONY.....2ND PLAINTIFF
PETER K. CHEPKWONY.....3RD PLAINTIFF
EDWARD K. CHEPKWONY.....4TH PLAINTIFF
ERICK K. CHEPKWONY.....5TH PLAINTIFF
LEORNARD K. CHEPKWONY.....6TH PLAINTIFF
WILLY C. CHEPKWONY.....7TH PLAINTIFF

VERSUS

DAVID KIPRONO KOSKE.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiffs commenced this suit by a Complaint dated 7th March 2012. In the complaint, the plaintiffs claim that the defendant who is the registered proprietor of L.R NO. KERICHO/KAPSOIT/1671 is holding the suit property in trust for the 2nd to the 7th plaintiffs. The 1st Plaintiff claims to have purchased a portion of the suit property from the late Kipkosgei Tole. The suit property is a sub-division of L.R No. KERICHO/KAPSOIT/838 which was initially registered in the name of Kipkosgei Tole – deceased who was the father of the 2nd to 7th Plaintiffs. The Plaintiffs seek the following reliefs against the Defendant; -

- a. An order of declaration that L.R No. KERICHO/KAPSOIT/1671 registered in the name of the defendant is so registered in trust for the plaintiffs and accordingly the title thereof be cancelled and a new one therefore be issued in the names of the plaintiffs to the extent of their entitlement.
- b. Costs of the suit.
- c. Any other relief the court may deem fit and just to grant.

2. The Defendant filed a Defence on 16th April 2012 which was later amended on 20th December 2017. In the Amended Defence the Defendant admits that the suit land was registered in the name of the late Kipkosgei Tole but denies that the said Kipkosgei was the father of the 2nd to 7th Plaintiffs. He therefore denies that he holds the suit property in trust for the defendants. He further denies that the 1st Plaintiff purchased a portion of the suit property from the deceased.

3. The suit was set down for hearing on various dates between 24.10.2016 and 21.3.2019. The 1st and 2nd Plaintiffs testified and called three witnesses while the Defendant was the sole witness.

4. The 1st Plaintiff who testified as PW1 stated that she is the widow and administrator of the estate of the late David Kiplangat Ruto who died in 1999. Before his death, her husband purchased a portion of land parcel no. KERICHO/KAPSOIT/1671 measuring 2 acres from the family of Joshua Kipkosgei Tole at an agreed price of Kshs. 90,000. The money was used to offset a loan at AFC. She stated that her late husband entered into a second agreement with David Kiprono Kosgei, Jeremiah Koske, Samwel Koske and Nelson Koske for the sale of 9 acres of the suit property. The registered owner of the land died and when his family applied for letters of administration, they discovered that the land had been registered in the name of the Defendant. She said she was claiming 11 acres out of the suit property. She produced the following exhibits two sale agreements dated 20.2.1993 and 17.9.95, a letter from the Ministry of Lands dated 5.10.94, a chief's letter dated 18.7.2007, a Certificate of confirmation of Grant and a demand letter dated 24.2.2012.

5. PW2 and PW3 corroborated the 1st Plaintiff's evidence that her late husband had purchased land measuring a total of 11 acres from the family of Joshua Kosgei Arap Tole but he died before the transfer was effected.

6. The 2nd Plaintiff testified as PW4. He stated that the defendant was his brother. He was present when Jeremiah, Samuel, Nelson and the defendant each sold a portion of the suit land to the Plaintiff's late husband. He said they had not yet transferred the land to the 1st Plaintiff as they were unable to do succession owing to the disagreement among his family members.

7. PW5 testified that he was the nephew of the defendant's father. He stated that his uncle Kipkoskei arap Tole had two (2) wives and had subdivided his land among his family members but he did not have a title by the time he died. The first wife had a son and a daughter while the 2nd wife had 5 sons and 3 daughters. It was his evidence that under Kipsigis Customary Law a woman may be allowed to marry another woman if she is not able to bear a son with her husband. The 1st plaintiff does not live on the suit land. The 1st plaintiff claims a portion of the suit land as a purchaser from Sophia who is the 2nd wife of the late Kipkosgei arap Tole. The 2nd to 7th plaintiffs are the children of one Esther who was married to Obot Samoei (the 1st wife) in a woman to woman marriage. The defendant is the son of Sophia the 2nd wife.

8. The Defendant testified that he did not know the 1st Plaintiff but he knows the 2nd-7th Plaintiffs. He denied knowledge of any sale of land and in particular the sale agreements – exhibits 2(a) and 2(b). He testified that his father had two wives- The 1st wife Obot Samoei had a daughter and a son namely; Grace Koech and Samoei arap Koskei. The 2nd wife was Sophia who was his mother had five children namely; Jeremiah Koske, Samwel Koske Benjamin Koske and himself.

9. He denied that one Esther, the mother of the 2nd to 7th plaintiffs was married to his father and said that she was the house- girl of the 1st wife. The said Esther resides in part of a portion of land which was hived from the original title and transferred to Norwegian Pentecostal church by the father. Upon the transfer of plot No. 1672 to the Norwegian Pentecostal Church, his father transferred the suit property to him to hold the same in trust for his family.

10. He testified that sometime in the 90's his brothers wanted to sell part of the suit land but he refused and notified the District Officer –see exhibit D3. his brothers accused him of fraud and reported the matter to C.I.D but he was exonerated. He denied that he had sold any land to the 1st Plaintiff's late husband. He said that if his brothers sold any land to him, they should sort it out with the 1st Plaintiff.

11. He stated that he was holding the land in trust for the two houses of his father. He said that the land was supposed to be shared equally between the two houses and the first house was entitled to 25 acres. He said the 2-7th Plaintiffs were staying on the suit property as the children of the first house. They were recognized as the first wife's children though they cannot bear the defendant's father's name. He stated that they were entitled to inherit his late father's property. He said he had no problem transferring the land belonging to the first house but he was opposed to the 1st Plaintiff's claim.

Issues for determination

12. Having considered the pleadings, evidence and rival submissions, the following issues fall for determination:

- i. Did the defendant fraudulently register himself the proprietor of the suit property?
- ii. Does the 1st plaintiff have a valid claim against the defendant over a portion of the suit land?
- iii. Is the Defendant holding suit of land in trust for the 2nd to 7th plaintiffs to the extent of their entitlement?
- iv. Are the Plaintiffs entitled to the reliefs sought in the Plaintiff?

Analysis and Determination

13. With regard to the first issue, it is trite law that fraud must be pleaded, particularized and proved to a standard that is higher than a balance of probabilities. The Court of Appeal in the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** in considering the issue of fraud observed as follows:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:**

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and

though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308*).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221*). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett (1878) 7 ch.D. 473 at 489*). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice".

14. Furthermore, in the case of **Koinange & 13 Others V. Charles Karuga Koinange 1986 KLR** at page 23 Justice Amin citing the case of **Ratilal Patel Makanji (1957) EA 314** observed as follows:

"When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required"

15. At paragraph 6 of the Plaintiff that Plaintiffs have alleged that the defendant's registration as the proprietor of the suit property was actuated by malice with intent to defraud the plaintiffs. They have set out the particulars of fraud. According to the green card produced by the 1st Plaintiff, the defendant was registered as the proprietor of the suit property on 18.7. 1987. By this time, the first registered owner, Kipkoske arap Tole was still alive. Out of the defendant's six brothers who have sued him, only the 2nd Plaintiff testified. Apart from stating that they had been unable to do succession due to family squabbles, he did not implicate the defendant in any fraud.

16. The Defendant testified that the deceased transferred the land to him to hold it in trust for the family of Kipkoske arap Tole. He stated that he was willing to divide the suit property into two between his father's two houses. He stated that sometime in the 90s his brothers reported him to the police alleging that he had fraudulently had the land transferred to him but he was exonerated. The evidence on record does not paint the picture of a fraudster.

17. From the foregoing, I am unable to make a finding that the Defendant fraudulently transferred the suit property to himself.

18. On the second issue, the 1st Plaintiff claims that her late husband purchased an aggregate of 11 acres from the defendant, his mother and brothers. The two sale agreements produced by the 1st Plaintiff are dated 20.2.1993 and 17.9.95. By this time Kipkoske Tole had died (in 1990) and the land was already in the name of the defendant. In the sale agreement dated 17.9.95, it is indicated that the Defendant sold 2.35 acres to the late David Kiplangat Ruto. Although the sale agreement has a signature against his name, the defendant denies having signed it. PW2, PW3 and PW5 testified that they were present when the 1st Plaintiff's husband entered into sale agreements with the defendant, mother and brothers. There is no evidence that the 1st Plaintiff ever took possession of the portion allegedly sold to her late husband nor was consent of the Land Control Board obtained. Had the 1st Plaintiff taken possession of portion of land that her late husband bought from the Defendant and his family members, the court would have been able to infer a constructive trust even in the absence of Land Control Board consent but under the prevailing circumstances, there is no basis for making such a presumption.

19. The third issue is whether the Defendant is holding the suit property in trust for the 2nd to 7th Plaintiffs. It is not in dispute that the 2nd to 7th Plaintiffs are the children of Esther who was the wife to Obot Samoei the 1st first wife of Kipkoske Tole through a woman to woman marriage. Counsel for the Plaintiff referred to "The History of Kipsigis (1998-2000) by Raja at page 78 where the author describes the woman to woman marriage as follows:

"a woman who has passed the age of child-bearing and who has no son may marry a wife, whether her husband is alive or not. The elder woman is called husband and the girl or woman who is married is called her wife. In practice the wife will not refer to the elder woman as "husband" but will address her as "mother". The girl usually chooses the father of her children but if possible he must be a man of the husband's clan or the clan of the elder woman's husband.

The author further explains the relationship between the parties. The children are not for the person who sired them and they have no duty towards him though they call him father. They do not take his name or inherit his property. The children take the name of the elder woman's husband and inherit their house's share of his property from him. It is the ceremony of tying the segutiet bracelet which constitutes a legally binding marriage and determines that the children of the union belong to the husband and inherit his property.

Furthermore, Eugene Cotran, a renowned author on the customs of various tribes in Kenya in his book "The law of Marriage and Divorce Vol 1 (London; Sweet & Maxwell, 1968) at P.117 says (Kitum Chitoloch) (Among the Nandi and Kipsigis). A woman past the age of child bearing and who has no sons may enter a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage and a man from the woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid the marriage consideration and her husband."

Woman-to-woman marriages are recognized among the Kipsigis and other communities in Kenya. The decision of **Ojwang J (as he then was) in Estate of Cherotich Kimong'ony (deceased)-Monica Katam vs Jackson Chepkwony & Another** stated that whether one agrees with the rationale behind the custom or not, that a woman with no children or with no sons should "marry" a woman to get sons for her, it is a custom that has been recognized and accepted in many communities and given legal protection in succession disputes.

20. The Defendant conceded that indeed the 2nd to 7th Plaintiffs are the children of Esther who is married to his step-mother. In the circumstances, they are entitled to inherit the property of the late Kipkoske Tole through his first wife. Since the Defendant expressly stated that he is holding the suit property in trust for his father's two houses and he was willing to transfer the property of the first house to them the 2nd to 7th Plaintiffs are entitled to a share of the 25 acres that is the entitlement of the first house.

21. Lastly, on whether the Plaintiffs are entitled to the reliefs sought, the Plaintiffs' main prayer is for a declaration that the Defendant holds the suit property in trust for the Plaintiffs and that the title held by the Defendant be cancelled and new titles be issued to the Plaintiffs to the extent of their entitlement. Apart from the 1st Plaintiff whose claims that her late husband purchased 11 acres from the family of Kipkoske Tole, the entitlement of the 2nd to 7th Plaintiffs is not stated anywhere in the Plaint nor did they lead any evidence on the same. However, since the Defendant is not opposed to transferring 25 acres to the first house where the 2nd to 7th Plaintiffs belong the same shall be transferred to the plaintiffs once the mode of distribution for each family members of the first house has been agreed upon.

22. The upshot is that the Plaintiffs' have proved their case on a balance of probabilities, save for the 1st Plaintiff whose claim has not been proved.

23. I therefore enter judgment for the 2nd to 7th Plaintiffs and make the following final orders:

- a. A declaration is hereby issued that the Defendant holds the land known as L.R NO. KERICHO/KAPSOIT/1671 in trust for the family of Kipkoske arap Tole –deceased.
- b. The said trust is hereby terminated and the Defendant shall transfer 25 acres out of the suit property to the first house so that the 2nd to 7th Plaintiffs and any remaining members of the first house gets an equal share.
- c. The Defendant shall divide the remaining 25 acres equally among the members of the second house.
- d. The District Land Registrar and District Surveyor Kericho are directed to visit the suit land for purposes of ascertaining the acreage and ensuring that it is sub-divided in equally between the two houses after which the Land Registrar shall issue separate titles accordingly.
- e. Each party shall bear their own costs.
- f. Parties are at liberty to apply.

Dated, signed and delivered at Kericho this day 21st day of June, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Sitati for the Plaintiff
2. Mr. Nyadimo for Mr. Koske for the Defendants
3. Court Assistant – Rotich