



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 117 OF 2006 O.S

DICKSON CHERUIYOT CHEPKWONY (Suing as

personal representative of the Estate

of Chemarus Chepkorir Maina).....APPLICANT

VERSUS

DANIEL KIPKOECH MARITIM.....1ST RESPONDENT

NATIONAL BANK OF KENYA.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. The Applicant herein approached the Court by way of Originating Summons dated 19th December 2006 (“O.S”). The O.S was supported by the affidavit of Dickson Cheruiyot Chepkwony sworn on 19th December 2006.

2. In the said Originating Summons, the Applicant seeks the following orders:-

(a) That the Honourable court do issue an order of injunction restraining the 2nd Respondent, his servant and/or agents from selling, and/or in any other manner dealing with the applicant’s land parcel number KERICHO/KEBENETI/276 pending the full hearing and determination of this suit.

(b) That the 1st Respondent be ordered to furnish sufficient security for the loan that he was advanced by the 2nd Respondent in place of the applicant’s property known as KERICHO/KEBENETI/276.

(c) That the applicant’s parcel number KERICHO/KEBENETI/276 be discharged by the 2nd Respondent and the same be reconveyed to the applicant herein.

(d) That this Honourable court gives such further and/or necessary directions as the circumstances may require to meet the ends of justice.

(e) The costs of this suit be provided for.

3. In the said affidavit, the Applicant deposes that he is the personal administrator of the estate of the deceased Chemarus Chepkorir Maina who was registered as the proprietor of all that parcel of land known as KERICHO/KEBENETI/276. He avers further that the said parcel was fraudulently registered in the names of the 1st Respondent.

4. The Applicant deposes that the property is currently charged to National Bank of Kenya to secure a loan from the said bank in favour of Daniel Kipkoech Maritim the 1st Respondent herein for a sum that is unknown to him.

5. He avers further that the 1st Respondent defaulted in the repayment of the said loan and that the said default entitles the 2nd Respondent to call in the entire balance of the said loan and also to realize the aforesaid security forthwith. It is his contention that the 1st Respondent despite being fully aware of the terms and conditions of the said loan has deliberately ignored, neglected and/or refused to repay both the principal and interest leading to the 2nd Respondent threatening to exercise its statutory power of sale against the property of his deceased father.

6. The Applicant deposes that the 1st Respondent is a man of means yet he has not repaid the loan. He avers that this default will result in him and his entire family members being rendered homeless as the suit property is the only family land.

7. He deposes further that the 1st Respondent fraudulently transferred the suit land into his own name and annexed proceedings in Criminal case No 3181 of 2004. It is noted that in his judgment in the said case dated 28th July 2006 the Hon A.G. Kibiru (Senior Resident Magistrate) found Daniel Kipkoech Maritim; the 1st Respondent herein guilty of fraudulently procuring the issuance of two title deeds of land parcels number KERICHO/KEBENETI/276 and 277 contrary to section 155 (a) of the Registered Land Act.

8. The Deponent therefore prays that his late mother's land Kericho/Kebeneti/276 be reconveyed to him as the administrator of the estate and that the 1st Respondent be ordered to furnish security in place of the suit land. He further prays that the suit land be discharged from the loan and that the 1st Respondent do pay all the outstanding principal sum plus interest and/or any other periodical repayment of the loan aforesaid.

BACKGROUND

9. A brief background on the matter will suffice. The property in dispute is known as KERICHO/KEBENETI/276 (the suit property). The Applicant alleges that the said parcel of land belonged to his deceased mother one Chemarus Chepkorir Maina and therefore forms part and parcel of her estate. It is alleged that Chemarus Chepkorir Maina had married one Esther Chemngetich Maina in a woman-woman marriage in line with Kipsigis customs and that the applicant herein is her son.

10. Esther contends that when her woman "husband" died on 4th May 1988, she left her in the suit property and therefore she ought to have inherited her property. It is alleged that the 1st Respondent who is a brother to the Applicant fraudulently procured the transfer of parcel number KERICHO/KEBENETI/276 to himself and later took a loan from the 2nd Respondent using the title deed as security.

11. The 1st Respondent defaulted in repayment of the loan and consequently the bank sought to exercise its statutory power of sale. The property was advertised for sale by way of public auction to be conducted on 14th December 2006.

12. It is also noted that the 1st Respondent herein was charged with two offences of fraudulently procuring the issuance of a title deed contrary to section 155(2) (a) of the Registered Land Act in Kericho PM Criminal Case No. 3181 of 2004. The Hon. A.G. Kibiru (SRM) in his judgment dated 28th July 2006 found the 1st Respondent guilty of fraudulently procuring the issuance of 2 title deeds namely KERICHO/KEBENETI/276 and 277 and convicted him under section 215 of the Criminal Procedure Code.

13. It is against this background that the Applicant filed the instant suit seeking the orders set out above. The court vide an order issued on 19th December 2006 certified the matter as urgent and granted an interim injunction restraining the Respondents by themselves, their agents, servants and/or employees from dealing in any manner whatsoever with all that piece of land known as KERICHO/KIBENETI/276 pending the hearing and determination of this suit. The court also ordered that if the sale had taken place then no further transactions should take place pending the hearing of the case.

14. The 2nd Respondent entered appearance on 4th January 2007 through the firm of Kamunjo Kiburi & Co. Advocates. The 2nd Respondent filed a Replying Affidavit sworn by Samuel O. Odiyo on 5th January 2007 as well as Grounds of Opposition dated 4th January 2007.

15. In his Replying Affidavit Samuel Odiyo deposes that he is the 2nd Respondent's Nakuru branch manager. He avers that the 1st Respondent approached the bank in 1993 for a loan and gave his title number KERICHO/KIBENETI/276 as a security. He deposes that a charge dated 19th March 1993 was registered as against the title to secure the loan in the sum of Kshs. 200,000/-.

16. Mr. Odiyo deposes further that there have been several attempts to sell the property which have been unsuccessful. He avers that the bank had no knowledge of any defect in the security offered until the filing of this suit which he dismisses as a futile attempt at frustrating the bank's right to realize the security. He deposes further that the outstanding amount as at 23rd February 2006 was Kshs. 1,973,450.45/-.

17. The Applicant; Dickson Cheruiyot Chepkwony filed his Supplementary Affidavit sworn on 30th January 2007. In the said affidavit, he basically reiterates the contents of his earlier affidavit save for two issues. Firstly he annexes a temporary grant of letters of Administration ad litem.

18. He also avers that the estate of Chemarus Chepkorir Maina stands to suffer irreparable loss in case the suit land is auctioned by the 2nd Respondent given the fact that the dependants of the estate have no alternative source of income and the suit land constitutes their homestead. Mr. Cheruiyot avers that it is in the interests of justice and fairness that this court grants the orders sought.

19. It is also worth noting that the 2nd Respondent had filed an application seeking dismissal of the suit for want of prosecution. The Hon. Angawa J. vide Ruling dated 5th February 2009 dismissed the application for dismissal and directed that the applicant be given an opportunity to proceed with his own case.

The Applicant's Submissions

20. Learned counsel for the Applicant, Mr. Motanya, filed his submissions on behalf of the Applicant dated 22nd June 2012. In the said submissions, Mr. Motanya argues that the 1st Respondent admitted in the criminal case to having paid one Rono in the Land Registry, Kericho to convert the titles of land parcels no. KERICHO/KEBENETI/276 and 277 to his name without the consent of other family members and without following the requisite procedure. Counsel also submits that the 1st Respondent admitted to using the title of land parcel no. KERICHO/KEBENETI/276 as security to acquire a loan from the 2nd Respondent.

21. Mr Motanya submits that at no time did Chemarus Chepkorir Maina (deceased) apply for any loan from the 2nd Respondent and neither

did she charge the land as security for the loan of Kshs. 200,000/- or any other sum of money.

22. He argues that the 1st Respondent obtained a loan from the 2nd Respondent without the knowledge of the deceased and therefore the applicant cannot be held responsible for the illegal procurement of a loan. He submits that if the 2nd Respondent had been diligent enough he would have discovered that. He argues that any loss or damage as a result of the fraud cannot be imposed upon the applicant.

23. Counsel cites the case of **James Mwangi Gacheru v Hewan Investments Ltd and the Chief Land Registrar [2007] eKLR** where an injunction was issued, rectification of the register ordered and a sum of Kshs. 100,000/- paid to the plaintiffs as general damages.

24. The Respondents did not file any submissions.

ISSUES FOR DETERMINATION

25. Having considered the respective pleadings and the Applicant's submissions, only one issue arises for determination:-

(a) Whether the Applicant is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

Whether the Applicant is entitled to the reliefs sought

26. The Applicant's case is that the suit property belongs to the estate of the late Chemarus Chepkorir Maina and that the alleged transfer and issuance of a title deed to the 1st Respondent was fraudulent and illegal. I have perused the green card with respect to the suit property and the same indicates that the suit property was first registered in the name of Chemarus Arap Maina vide an entry dated 2/11/1977.

27. The next entry dated 15th September 1987 indicates that Daniel Kipkoech Maritim; the 1st Respondent herein was registered as the owner of the property. No evidence of Succession proceedings, a confirmed Grant, or transfer by transmission was tendered to explain how the property ended up in the 1st Respondent's name.

28. The Court in Criminal Case No. 3181 of 2004 also concluded as much. In his judgment dated 28th July 2006 the Hon A.G. Kibiru, Senior Resident Magistrate, found Daniel Kipkoech Maritim the 1st Respondent herein, guilty of fraudulently procuring the issuance of two title deeds for land parcels number KERICHO/KEBENETI/276 and 277 contrary to section 155 (a) of the Registered Land Act.

29. I have perused the judgment in the Criminal case. It is noteworthy that the 1st Respondent herein admitted that he paid one Rono at the Lands office in Kericho who assisted him to obtain a title deed in respect of parcel No. KERICHO/KEBENETI/276 which belonged to his in-laws in his favour. It is therefore crystal clear that the title deed in respect of the parcel of land known as KERICHO/KEBENETI/276 was obtained fraudulently.

30. The law is extremely protective of title and provides limited circumstances in which a title may be impeached. For this court to cancel a title, the conditions in section 26 of the Land Registration Act must have been fulfilled. The said section provides as follows:-

Section 26. (1) 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 the ground of fraud or misrepresentation 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.

31. In the case of **Elijah Makeri Nyangwra V Stephen Mungai Njuguna & Another [2013] eKLR** the learned Justice Sila Munyao in appreciating the sanctity of title stated as follows:-

“As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

32. The learned J. Sila Munyao in the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** in considering a similar issue of a title deed obtained fraudulently stated as follows:-

“In our case, there is no doubt that in so far as the title of the 1st respondent is concerned, it was procured by way of fraud or misrepresentation, and there is no way that the 1st respondent could have procured title without his own involvement in the fraud or misrepresentation. The title of the 1st respondent is clearly impeachable by dint of the provisions of Section 26 (1) (a). It cannot be allowed to stand and must be cancelled. If it is cancelled then it follows that any subsequent transactions have to be cancelled as well, for they were entered into by a party who had no capacity to do so, he not having a title in the first place.

The position that a fraudulent title cannot be allowed to stand has been affirmed in a number of other cases. They are several

and it is not necessary to set them out here. I will only mention one where the point was clearly made, that is the Court of Appeal decision in the case of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR. This is a case where certain crooks fraudulently acquired title to land and later sold the same to other parties. The Environment and Land Court at Nairobi, cancelled all titles and ordered the land to revert back to the original owner. The decision was upheld by the Court of Appeal.”

33. The Honourable Judge proceeded to cancel the title as well as any subsequent entries that had been made thereon.

34. Similarly in the case of *Esther Ndegi Njiru & another v Leonard Gatei [2014] eKLR* the Learned Mutungi J proceeded to cancel a title that had been illegally obtained and stated as follows:-

“Under section 26(1) of the Land Registration Act the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

35. In this case the learned Mutungi J appreciated and quoted with approval the interpretation of section 26 (a) and (b) given by J. Munyao. He stated further as follows:-

“The Defendant/Plaintiff in the counterclaim referred the court to the case of Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows: -

-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

For the first limb, it appears to me that the title of the 1st defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1st defendant was a party to the fraud or misrepresentation. Indeed, to me the 1st defendant was an innocent purchaser for value. He was probably conned of his money by the 2nd Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2nd Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2nd defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).

Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.

The situation that Munyao, Judge faced in the above case is somewhat similar to the present case before me. I am in agreement with his interpretation and application of section 26 1(a) & (b) of the Land Registration Act.”

36. In the case at hand, the element of fraud was proved and indeed the Hon A.G. Kibiru, Senior Resident Magistrate found Daniel Kipkoech Maritim; the 1st Respondent herein guilty of fraudulently procuring the issuance of two title deeds for parcels number Kericho/Kebeneti/276 and 277 contrary to section 155 (a) of the Registered Land Act. The said decision still stands as the same has not been appealed against.

37. It is my finding that the conditions in sections 26(1) (a) of the Land Registration Act have been fulfilled. The section reads as follows:-

“....Such title may be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party”

38. It is not in dispute that the 1st Respondent was a party to the fraud leading to his obtaining the title. Indeed, he was very generous with the truth when he admitted in the criminal case to having paid off one Mr. Rono at the Kericho Lands Registry in order to obtain the title herein. This court being satisfied that fraud was committed by the 1st Respondent will not hesitate to cancel the said title as well as any further entries thereon.

39. Similarly in the case of *Paulina Chemutai Chirchir v Kipyegon Arap Sang & 3 others [2015] eKLR* Munyao J stated as follows: -

“It will be seen from the above that a title which has been acquired illegally, unprocedurally, or through a corrupt scheme may be cancelled. The parcels No. 2870, 2871, and 2872 were acquired illegally and/or unprocedurally, for the reason that the land parcel No. 822 could not be sub-divided, and parts thereof sold, without an order of court or before the distribution of the estate of the late Kipsang Chirchir.”

40. In view of the foregoing, it is my finding that the conditions in section 26 (1) (a) of the Land Registration Act have been fulfilled. The element of fraud was proved as per the decision of the criminal case which still stands. It follows therefore that the 1st Respondent did not have a proper title which he could charge to the 2nd Respondent or indeed any other party.

Accordingly, I find and hold that the Applicant has proved his case on a balance of probabilities. I enter judgment for the plaintiff and make the following final orders:

- (a) A permanent order of injunction be and is hereby issued restraining the 2nd Respondent, his servants and/or agents from selling, and/or in any other manner dealing with the applicant's land parcel number KERICHO/KEBENETI/276.
- (b) The 1st Respondent is hereby ordered to furnish sufficient security for the loan advanced to him by the 2nd Respondent in place of the applicant's property known as KERICHO/KEBENETI/276.
- (c) The 2nd Defendant is hereby ordered to discharge the charge in respect of parcel number KERICHO/KEBENETI/276.
- (d) A declaration is hereby issued that the registration of land parcel no. KERICHO/KEBENETI/276 in the name of the 1st defendant was fraudulent and unlawful and the said title is hereby cancelled. The title shall be restored to the name of the original owner, Chemarus Chepkorir Maina –Deceased for onward transmission to the lawful beneficiaries of the estate of the deceased.
- (e) A copy of this judgment shall be served upon the Land Registrar, Kericho to effect the necessary changes.
- (f) The costs of this suit shall be borne by the 1st defendant.

Dated, signed and delivered at Kericho this 22nd day of June 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Mugambi for Mr. Motanya for the Plaintiff
2. N/A for the Defendant
3. Court Assistant - Rotich