



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ENVIRONMENT AND LAND COURT DIVISION

ELC CASE NO. 5 OF 2006

ANDREW KIPTONUI BIEGON.....1ST PLAINTIFF

FRANCIS KIPKORIR BIEGON.....2ND PLAINTIFF

VERSUS

THOMAS KIPLANGAT.....DEFENDANT

JUDGMENT

By a plaint dated 1st February 2006, the Plaintiffs filed suit against the defendant claiming that the defendant had fraudulently registered himself as owner of land parcel number KERICHO/AINAMOI/1063 (the suit land) and for an order that the defendant's name be struck out from the said title.

In his defence filed on 15th February 2006 the defendant denies that he was fraudulently registered as owner of the suit land and states that the registration was done lawfully after following the correct procedure.

When the suit came up for hearing both parties testified and called witnesses. The hearing commenced on 23rd November 2016 before Justice Sila Munyao who took the evidence of the plaintiffs and their witnesses after which I took over in March 2017 and continued with the case from where it had reached as agreed by the parties. At the close of the defendant's case the parties were given time to file their written submissions.

The plaintiffs are the sons of Alice Chepkoech Tabutany Nyige-Deceased while the defendant is their nephew and a grandson to their late mother. The plaintiffs' late mother was the registered owner of land parcel number KERICHO/ AINAMOI /198 which she sub-divided into four portions and gave a portion to each of her 3 surviving sons namely Malakwen Byegon, Andrea Byegon and Francis Byegon. She then remained with land parcel number KERICHO/AINAMOI/1007 which she further sub-divided into land parcel number KERICHO/AINAMOI/1063 and 1064. She gave parcel no. KERICHO/AINAMOI/1064 to the widow of her late son Wilson Byegon and remained with parcel number KERICHO/AINAMOI/1063, (the suit land herein) in her name. Before she passed away in 2005, at the age of 98 years, she had the defendant who is one of her grandsons registered as a joint owner of land parcel no. KERICHO/AINAMOI/1063.

In their evidence, the plaintiffs are challenging the manner in which the defendant was registered as a co-owner of land parcel number KERICHO/AINAMOI 1063. They accuse the defendant of having taken advantage of their late mother's advanced age and fraudulently had his name inserted on the title to the suit land. They testified that their late mother had more than 30 grandchildren and they do not understand how she could have given her remaining parcel of land to only one of them. They do not dispute the fact that their late mother obtained consent of the Land Control Board before she had the defendant registered as a joint owner although they stated that none of them was consulted. They stated that they only discovered that the suit land was jointly registered with the defendant when they wanted to apply for letters of administration in respect of their late mother's estate. However, in cross examination the 1st plaintiff admitted that he had placed a caution on the suit land in the year 2000 before their mother died but it was subsequently removed. They denied knowledge of the joint registration even though the 1st plaintiff said that he was summoned to the Lands Office regarding the caution he had placed over the suit land. The plaintiffs admitted that the defendant was very close to their late mother and he is the one who lived with her, assisted her with all her household chores and he would take her to hospital for treatment whenever she was sick.

PW2 who is one of the defendant's step brothers testified that his father had two wives and 15 children. The defendant is from the first house. He stated that the elders had said that the suit land should be earmarked for the second house since the first wife had been given her portion of land. He however admitted that his late father and each of his paternal uncles were given a portion of land by his late grandmother. He confirmed that the defendant was very close to their grandmother and that he would assist her with household chores and take her to hospital whenever she was sick.

The defendant testified that his grandmother who was the plaintiffs' mother decided to register her parcel of land –KERICHO/AINAMOI/1063 jointly with him as she appreciated him for taking care of her. She did this after ensuring that she had allocated a parcel of land to each of her sons. They went to the Land Control Board where she explained why she wanted the defendant's name inserted on the title and obtained the necessary consent. He denied that the transaction was fraudulent and testified that the plaintiffs knew about it before their mother died and lodged a caution but it was subsequently removed. He produced a copy of the title deed in respect of the suit land which is in the joint names of Tabutany Chepkoech Nyige and Thomas Kiplangat Chirchir as well as minutes of the Land Control Board showing that the transfer was approved. He testified that the plaintiffs sent him away from the suit land when his grandmother passed away in 2005.

In cross examination, the defendant denied that he had any ulterior motive when he was assisting the grandmother. Asked why he was the only one who was favoured by the grandmother, he stated that even though they are more than 30 grandchildren of the late Tabutany, all the others did not care much about her except the first Plaintiff's daughter known as Chepkorir who used to sleep in her house.

The defendant called three witnesses who were village elders. DW2 testified that he met the late Tabutany, (the plaintiffs' mother) when she was coming from the chief's office. She told him that she had gone to inform the chief that she wanted to give her land to the defendant. She gave her reasons as to why she wanted to give the land to the defendant. She said that the defendant was the one who was taking care of her.

DW3 who was also a village elder testified that he was at the D.O's office when the late Tabutany went to the office in the company of the defendant. She informed them that she had voluntarily decided to give her land to the defendant who was her grandson and that nobody should take it away from him. He stated that this was not the first time he was meeting the said Tabutany as he had met her earlier since she used to feed them when they were circumcised. He further testified that the said Tabutany sent for her and when he went to her home she explained to him the portion of land she wanted to give to the defendant and also showed him the title deed. He identified the title deed in respect of the suit land. Tabutany told him never to lie that the land did not belong to the defendant.

The last two defence witnesses DW4 and DW5 who were members of the council of elders gave similar testimony to DW3 regarding the fact that they were present at the D.O's office when Tabutany went to inform the D.O of her intention to register the defendant as a co-owner of her land. She also gave her reasons for doing so.

The following issues were framed for determination:

1. Whether the defendant fraudulently caused himself to be registered as a co-owner of land parcel number KERICHO/AINAMOI/1063
2. Whether the defendant's name entered on the title for land parcel number KERICHO/AINAMOI/1063 on 13.5.2003 should be cancelled
3. Who should bear the costs of this suit?

Regarding the allegation of fraud, the plaintiff alleges in paragraph 6 of his plaint that the defendant fraudulently and through misrepresentation registered himself and the plaintiff's late mother to be owners of land parcel number KERICHO/AINAMO/1063 effectively disinheriting the plaintiffs who by law are supposed to succeed the estate of Alice Chepkoech Tapubutany Nyige –Deceased.

The particulars of fraud are provided as follows:

- a) Misleading the plaintiff's mother who was already mentally infirm in old age.
- b) Registering himself as co-proprietor without the knowledge and consent of the plaintiffs
- c) Causing himself to be registered as co-proprietor of land parcel number KERICHO/AINAMOI/1063 through deceit.
- d) Causing himself to be registered as co-proprietor through coercion.

The courts have repeatedly held that allegations of fraud must be strictly proved. 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”

In the instant case no evidence was led by the plaintiff to demonstrate that the defendant misrepresented any facts or deceived the Land Registrar who is responsible for making entries on all Land Registers and issuing land titles. The evidence on record clearly shows that Tabutany went to the chief's office and D.O's office to express her intention to have the defendant registered as a co-owner of the suit land. She went as far as giving her reasons why she wanted this done. Granted that she was old, no evidence was tendered by the plaintiff to show that she was mentally confused and that she did not know what she was doing. It would appear that the plaintiffs were aware of her intentions and that is why they placed a caution over the suit land in 2000, but the same was subsequently removed.

DW2 testified that he was shown the title deed for the suit land by the late Tabutany when he went to her house after she had sent for him. This shows that she willingly had the defendant's name inserted on her title during her lifetime, therefore the question of her being misled

does not arise.

On the second issue as to whether the plaintiff's name should be struck off and the title to the suit land cancelled, it has been submitted by counsel for the defendant that there is no basis for doing so as the due process of the law was followed and no fraud has been established. From the evidence on record it is clear that late Tabutany ensured that each of her sons was provided for before she had the defendant registered as co-owner of the portion of land that remained in her name. Indeed, the plaintiffs in their evidence confirmed that each of them had been given a portion of land by their late mother and they each had their title deeds. Their claim that they would be disinherited if the title does not revert to the deceased's sole name is therefore unfounded.

I have carefully considered the pleadings and the evidence on record together with the submissions of learned counsel and the authorities cited to me. I have come to the conclusion that based on the facts and the law, the plaintiffs have not proved their case on a balance of probabilities. The plaintiffs' case is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 12th DAY OF OCTOBER 2017

J.M ONYANGO

JUDGE

In the presence of :

Miss Koech for the Plaintiff

No appearance for the Defendant

Court Assistant: Rotich