



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT

AT ELDORET

ELC NO. 549 OF 2012

KIPKEMEI CHEPKOCHOI TOO.....PLAINTIFF

VERSUS

PAUL KIPLETING CHEPKOCHOI.....DEFENDANT

JUDGMENT

By a plaint dated 27th July 2009 the plaintiff herein sued the defendant seeking for the following orders:

a. A declaration that the Defendant is holding 7.60 acres comprised in L.R No. Moi's Bridge/Ziwa Block 10(Cheukta)/124 in trust for the plaintiff and an order be issued compelling the Defendant to transfer/covey the said portion, in default this court do effect the transfer.

b. An order of permanent injunction restraining the Defendant from in any way dealing, trespassing onto or interfering with the Plaintiffs share of 7.60 acres comprised in the suit land.

PLAINTIFF'S CASE

PW1 adopted his witness statement and stated that the defendant is his elder brother and that the suit land belonged to their father who had given them the suit land to share equally whereby they were to get 35 acres each.

It was PW1's testimony that their father died before effecting transfer of his parcel of land to his sons as had been anticipated. Further that during demarcation of their father's farm at Cheukta, it was established that the same measured approximately 40 acres and not 44 acres as was to be represented by the share(s) he owned at Cheukta. It is PW1's evidence that the discrepancies in acreages were established during demarcation which they held would be rectified after demarcation was complete.

PW1 stated that their father's shares were amongst those were affected and the same was rectified after demarcation and was awarded additional portion known as Plot number 170 measuring approximately 3.8 acres to fill his entitlement as per the shares he held.

It was PW's testimony that the defendant being the eldest in the family was tasked to follow up the issue and that the defendant later registered the suit land in his name instead of jointly with the plaintiff.

PW1 stated that he owns 28.8 acres instead of 35 acres which he is entitled to and produced his father's death certificate, a letter dated 2nd May 1981, official search, minutes dated 15th February 2010 as exhibits before the court.

On cross examination PW1 maintained that he is entitled to the balance of 7.6 acres from the suit land and that the land belonged to their father and not the defendant.

PW2 was one Stephen Kimaiyo Too also testified and echoed the plaintiff's evidence that he is entitled to additional acres from the defendant. PW2 further stated that there was a family dispute over the suit parcel of land which was referred to elders for deliberations and that their late father decided to divide all his properties into two including livestock. PW2 testified that his late father divided his two parcels of land at Chepterit and Cheukta measuring collectively seventy (70) acres equally between the parties herein.

On cross-examination, PW2 reiterated his evidence in chief and confirmed that the land belonged to their late father. That was the close of the plaintiff's case.

DEFENCE CASE

DW1 adopted his statement and testified that the suit land belongs to him having bought the same from Cheukta farm in 1970s'. He produced several receipts as proof of purchase and demand notices from the County Council as exhibits. DW1 also produced a copy of a title deed to the suit land and stated that he acquired it legally vide purchase.

DW1 testified that there were 40 members who founded Cheukta Farm but other original members later on sold their respective portions to other people or subdivided their portions among family members, hence increase in the number of members.

DW1 also stated that he was a duly paid up member No. 124 in the group and that in 1992 surveyors visited the land and he was allocated Plot No. 124 measuring 16.0 Hectares, which is about 39.5 acres since a piece of it was used as an access road. That after the subdivision, there was an extra piece of land which remained and was later subdivided to each group member who had less acreage. DW1 stated that he was then given another plot No.170 measuring 3.8 acres later on on 25th October 1994 and was eventually issued with two title deeds for Moi's Bridge/Ziwa/B10ck 10 (Cheukta)/ 124 and Moi's Bridge/Ziwa/B10ck 10 (Cheukta)/ 170 in his name.

It was DW1's further evidence that the suit land never belonged to his father at any time and that it was not part of the late father's estate as his late father was never a member of Cheukta Farm.

DW2 was one Daniel Busienei testified that he was a clerk at Cheukta farm in the year 1973 and confirmed that the defendant was a member of Cheukta farm who paid for the parcels of land that were allocated to him. He also produced a member's register which confirmed that the defendant was a member and had sold cows to purchase the land

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff submitted that the issue for determination is whether the suit land is ancestral land hence subject to a generational trust.

Counsel relied on Section 27 of the Registered Land Act (Cap 300, Laws of Kenya) (now repealed) which provided that the rights in the registered titles were subject to the rights recognized under Sections 28 and 30(g) of the Registered Land Act — rights protecting trustees — as well as other overriding interests

Ms Isiaho also cited the case of *Kanyi v. Muthiora [1984] KLR 712*, where the Court of Appeal held that a registered proprietor of land was not relieved of such obligations as attached to him or her as a trustee.

Counsel therefore submitted that the trust claimed by the Plaintiff is not founded as a result of possession or occupation of the suit property, but from the fact that the property was ancestral land, passed on from their father to then hence qualifying as an intergenerational trust and urged the court to allow the plaintiff's claim as prayed in the plaint.

DEFENDANT'S SUBMISSION

Counsel reiterated the evidence by the parties and submitted that the defendant is the absolute and indefeasible owner of the suit land having acquired it lawfully and for valuable consideration. That the defendant has provided documentary evidence on how he acquired the suit land for value from Cheukta farm.

Mr. Kiboi submitted that the defendant having acquired the suit land legally is protected under Article 40 of the Constitution of Kenya, 2010 which provides that every person has the right to acquire and own property of any description in any part of Kenya, and that owners of property shall not be deprived of their property or their rights and interests over the property except as is otherwise provided for in the law.

Counsel also relied on Section 23 of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) which was in force at the time of filing this suit provides that the certificate of title issued by the Registrar upon registration or upon 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.

Counsel further relied on the case of sections 24, 25 and 26 Land Registration Act, (Act No. 3 of 2012) on indefeasibility of title and further cited the cases of Dr. Joseph Arap Ngok Vs Justice Moijo Ole Keiwa & 5 others, Nairobi Civil Appl. No. 60 of 1997 and Ernest Kibiwott Kipkosgei Vs David Bett & Another [2019] eKLR, cited with approval the holding in the case of Benja Properties Limited -versus- Syedna Mohammed Burhannudin Sahed & 4 others (2015) eKLR,

Mr. Kiboi also submitted that the burden of proof was upon the plaintiff to prove his claim which the plaintiff fell short of as the defendant is then absolute owner of the suit land. Counsel urged the court to dismiss the plaintiff's claim with costs.

ANALYSIS AND DETERMINATION

The issues for determination are whether the suit land was ancestral land and whether the land belongs to the defendant as an absolute owner. This matter was first filed in 2009 in the High court and was later transferred to the Environment and Land Court after establishment in 2012.

It is unfortunate that this matter has seen better days in the court. On the first issue whether the suit land was ancestral land, the evidence on record does not point towards that finding. The plaintiff's evidence together with his witness did not establish that the suit land was ancestral and if so then it should have formed part of the estate of their deceased father. The plaintiff stated that their father divided the suit land while he was still alive and that the defendant registered the land fraudulently in his name.

The defendant gave a chronology of events on how he acquired the suit land, the payment receipts and demand notices from the county Council and further that DW2 who was an official at Cheukta Farm confirmed that the defendant was a member of the farm.

The plaintiff admitted that he was given 28.8 acres of land which he currently occupies but did not prove that there were any additional acres that was to be given to him by the defendant. The defendant produced a titled deed registered in his name which is indefeasible. There was no evidence that the title deed was procured fraudulently.

Section 24, 25, and 26 of the Land Registration Act provides for indefeasibility of title and that if it can be proven that the title was procured fraudulently then the same can be impeached. The root of the title is also pertinent and in this case the defendant has explained how he got the title through purchase with proof of payment and membership of Cheukta Farm.

Section Section **26(1)** of the **Land Registration Act**, which states as follows;

“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.*

Further in the case of *Salim Seif Ambunya Andanje & Another ...Vs... Alice Jepkoech Yano & Another [2019]eKLR*, where the Court held that;

“The Respondents provided titles and proof that the proprietary rights legally vest in the Respondents. The correct legal position in the absence of the Judgment in the Eldoret Environment and Land Court Case No.608 of 2012 being overturned or appealed is that the Respondents have the right to the property and the same should be protected as per Article 40 of the Constitution.”

The defendant proved that he is the registered owner of the suit land and that the same has not been revoked hence he should be protected by the law.

In the case of *Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR Mutungi J.* held that

“the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law”.

I have considered the pleadings, the evidence and the submissions by counsel and find that the plaintiff has not proved his case against the defendant and therefore the case is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF JANUARY, 2022

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.