



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ELC CASE NO. 146 OF 2021

(FORMERLY ELDORET E & L NO. 33 OF 2015)

FARIDA CHARITY CHERUTO

CHEBUSIO KOBUT KIPSONGOK.....1ST PLAINTIFF

BASIL BARASA NYONGESA.....2ND PLAINTIFF

-VERSUS-

SARAH JELIMO BOIT.....DEFENDANT

JUDGMENT

BACKGROUND

1. The Plaintiffs vide the plaint dated 27.01.2015 have sued the Defendant seeking
 - a) Declaration that the survey and subdivision of land parcel No. Nandi/Kamobo/5513 was illegal and fraudulent and that the Defendant's actions of out (sic) portions of the Plaintiff's land and/or encroaching onto or any form of occupation on the Plaintiff's land amounts to trespass.
 - b) An order of revoking subsequent titles issued the same being Nandi/Kamobo/5639, Nandi/Kamobo 5690 and Nandi/Kamobo/564 and the title reverts back to Nandi/Kamobo/5513 and further that the Defendant be evicted from the Plaintiff land.
 - c) Costs of the suit.
2. Simultaneously with the suit, the Plaintiff filed a Notice of Motion application under a Certificate of Urgency dated 4th February, 2015, where at the ex parte stage an interim injunction was issued and subsequently orders of maintenance of status quo were issued.
3. The original first Plaintiff Chebosio Kobot Kipsongok was later substituted by her legal representative Faridah Charity Cheruto. There was filed a Further Amend Plaint dated 26th April 2018, where the prayers sought remained unchanged by the name of the Defendant changed to Sarah Jelimo Boit from Sarah Boit Chelimo.
4. The Defendant entered appearance and filed defence and denied the averment of the plaint in toto.
5. The matter was heard initially by the Hon. Justice A. Ombwayo and the Plaintiff's case as closed. On the date, the defence case was slated for hearing the Defendants and/or their Counsel were absent, and the defence case closed.
6. Later on the said date, the Defendant's Advocate appeared before Court and sought to reopen the case, he was directed to file a formal application, which he filed and was allowed.
7. By this time Justice A. Ombwayo had been transferred and the matter was again handled by Justice S.M. Kibunja who did not hear any witness and thereafter it was transferred to this Court at Kapsabet for hearing and determination.
8. Parties took direction to proceed from where it had reached, and proceedings were typed and this Court heard the Defence case.

PLAINTIFF'S CASE: -

9. It is the Plaintiff's case as pleaded that the original 1st Plaintiff was the registered proprietor of land parcel known as title No. Nandi/Kamobo/5513 and that the 2nd Plaintiff bought 0.04 acres in the said title while the Defendant bought 0.3 acres.
10. That the said purchasers were each shown their respective boundaries in consonance with their respective acreage which they had purchased.
11. It is the Plaintiff's claim that on or about the 15/4/2014, the Defendant illegally without any colour of right and without due regard to their rights and without consent carried out an/or caused to be carried out a survey on land parcel No. Nandi/Kamobo/5513; and that whilst carrying out a search on land parcel No. Nandi/Kamobo/5513 they found the same had been closed and that subdivision had been done with resultant titles Nandi/Kamobo/5639, title Nandi/Kamobo/5640 title No. Nandi/Kamobo /5641.
12. The Plaintiff have pleaded and particularized illegality and fraud on the part of the Defendant, and that the Defendant further incorporated land parcel No. Nandi/Kamobo/5640 measuring 0.47 acres which acreage included a portion curved out of from the 1st Plaintiff's land measuring approximately 0.13 acres and 2nd Plaintiff's parcel measuring 0.04 acres.
13. It is against this background that the Plaintiff's sought for the prayers as enumerated above.

DEFENDANT'S CASE: -

14. Against the accusation by the Plaintiff's as stated above, the Defendant filed its statement of defence. In a nutshell, the Defendant denied all the allegations, the particulars of fraud and pleaded that at the time of the subdivision, she obtained the consent of the original 1st Plaintiff and her daughter Charity Farida Cheruto, who is the now the first Plaintiff. Particularly the Defendant pleaded that the 1st Plaintiff and her daughter Charity attended the Land Control Board and gave their consent, and that during the subdivision conducted by the Government Surveyors, the original 1st Plaintiff and her daughter were in attendance.
15. The Defendant further denies that the 2nd Plaintiff has never occupied Nandi Kamobo 5513 before it was subdivided into Nandi/Kamobo 5640 and or Nandi/Kamobo/ 5641.
16. The Defendant further states that Nandi Kamobo/5640 comprises 0.18 hectares and does not comprise the 0.13 acres allegedly owned by the 1st Plaintiff nor 0.04 acres by the 2nd Plaintiff and as such she has not trespassed on the property.
17. The Defendant maintains that the Nandi/Kamobo/5640 wholly belongs to her and an injunction cannot issue against her.

PLAINTIFFS EVIDENCE: -

18. The original 1st Plaintiff testified before her demise. It was her testimony that she had sold the Defendant 0.3 acres and towards this end she produced as **P Exhibit 1**, the agreement for sale. The agreement produced (**P Exhibit 1**) shows that the property was sold for the kshs 150,000/= and the agreement was made on 22/8/2002, the 1st Plaintiff appended her thumb print while the Defendant signed the same and it was witnessed by Simion Rono ID No. 3998122 and Faith Kogo ID No. 56175905. It was her testimony that her land was upto the river and she did not agree the subdivide and further stated that she did not give her consent to subdivide. That she complained to the chief via a letter and prepared an affidavit to the Land Registrar on 8/5/2014. She further stated that she was not present during the subdivision; although confirmed that she had agreed to mutation of 0.3 acres.
19. She sold to the Defendant land near the middle. She further confirmed that she had sold another portion to Margaret Abuka and the 2nd Plaintiff the same.
- On cross- examination she was shown **DMFI (d)** photographs and confirmed that she had sold the 2nd Plaintiff the footpath. She stated that the trees in the photographs were on her land.
20. The PW2 was the 2nd Plaintiff in the matter, he testified that he had bought the property in 2013 and paid kshs 5,000/= as deposit on 16/10/2013.
21. The agreement was produced as **P Exhibit 7**, and he bought 0.04 acres.
22. The witness states that he had already bought land and was buying additional land. He produced **P Exhibit 8**.
23. The 2nd Plaintiff further stated that his portion fall within 5640, which had been taken by the Defendant. He produced photographs **exhibits 10 a, b, c, d 10 (a)** shows the footpath. The left of the path was his fence, while the right of the footpath was his neighbor's fence, but he stated that he bought the footpath.
24. PW3 was Farida Chematia, her testimony was that the Defendant had bought 0.3 acres in 2002. The land was Nandi/Kamobo/5513. It was her testimony that the title to the property Nandi/ Kamobo/5640 was issued in 2014 without the involvement of her mother the original first Plaintiff.

In cross examination she confirmed that during the sale process she was not present.

25. Charles Kipchumba testified as PW4 he confirmed that the 2nd Plaintiff purchased the property from the original first Plaintiff. However he confirmed in cross examination not having been present and was not aware of the boundary issues.

26. PW5 as Peter Koskei, a village elder, whose testimony was that the original Plaintiff and 2nd Plaintiff were neighbors and had complained about the Defendant have blocked a road access.

27. PW6, Kiprugut Chumba who adopted his witness statement. In his statement the witness stated that the original Plaintiff had the complained in 2014 that the Defendant had given her two title deeds yet her parcel of land was one together with PW5 they accompanied the area Chief to the suit property, and found that the access road had been fenced.

28. PW7 Ms. Sheila Chepkemei Mwei, a Land Registrar testified. She produced copies of green card in respect of Nandi/Kamobo/5513. That title was closed and gave rise to 5639 – 5641.

29. It was her testimony that Nandi/Kamobo/5640 measuring 0.18 Ha which converted to 0.43 acres. She further confirmed that the Defendant has 0.5 acres in 5640 while the 2nd Plaintiff 0.04 acre is not in parcel 5640.

30. The County Surveyor – Nandi County Barnabas Kiplimo equally testified as PW8, he produced the mutation forms of Nandi/Kamobo/5513, as was originally before the subdivision as **P Exhibit 12**. There is a road shown in the mutation form measuring 0.03 acres. He confirmed in cross – examination that he Nandi/Kamobo/5313 had been subdivided into 5639, 5640 and 5641. That the mutations had been conducted by the County Surveyor and were signed by the Registrar.

31. After the testimony of the 8 witnesses who testified in favour of the Plaintiff, the Plaintiff's case was closed. Proceedings were typed after the transfer of Justice Ombayo who heard the 8 witnesses, the successor Justice Kibunja did not hear any witnesses and thereafter the matter was transferred to this Court for Defence hearing.

DEFENCE EVIDENCE: -

32. The Defendant called a total of 5 witnesses, including the County Land Surveyor, who had testified as PW8.

33. It was the Defendant's evidence through her testimony and her witnesses, and her exhibits that she was the bonafide owner of the parcels in question having bought Nandi/Kamobo/5640 and 4815.

She narrated that she bought the same in 3 phases and she exhibited 3 agreements as **P Exhibits 22 – 24**. Her final payment was made on 5/7/2003. She stated that the 1st Plaintiff had attended the land control board. She bought 0.5 acres in Nandi/Kamobo/5513 which was subdivided into Nandi/ Kamobo/5639, 5640 and 5641.

34. In relation to the footpath. She stated that the footpath was comprised in number 5640 which belonged to her and did not belong to the 2nd Plaintiff.

35. In cross examination, she reiterated that she had bought 3 batches. In 23/9/2000 – Agreement related to purchase in L.R. NO. 3706. She bought 4815 from a different person who had from the deceased original Plaintiff.

36. She got her title after the agreement between the original Plaintiff and the 2nd Plaintiff.

37. She stated in re-examination that she bought the property in three batches, in the first agreement he bought 1.10 acres, in the 2nd agreements she bought 0.010 acres and in the 3rd agreement she bought 0.3 acres all from 3706 which later was subdivided. In 4815 she bought 015 acres.

38. She stated that at the time of the subdivision in 2014 3706 was 5513, and that she brought and occupied the area in 2000 while the 2nd Plaintiff purchased in 2013.

39. DW2 testified stating that he was present when the Defendant purchased 0.1 acre in parcel 3706 from the original Plaintiff and he executed the agreement for sale as a witness.

40. DW3 testified that he was present and executed two agreements for sale between the Defendant and the original Plaintiff. He could not recall the number of the property being sold.

41. DW4 testified that he was the husband to the Defendant and that he was there during all the purchases that were made. It was his evidence that they brought land in 3706 in 3 phases, initially buying 0.1 acre, and then another 0.1acre and 0.3 acres making it a total of 0.5 acres, and that when the dispute arose, the 2nd plaintiff surveyed and found that the acreage of 5640 was 0.47 acres.

42. That initially the property was 3706 and it was subdivided. 5640 was a subdivision of 5513. The 18 metres road was in 5640, so when they bought 4815 they merged the same but the two hold different titles.

43. That the footpath claimed by the 2nd Plaintiff was formed part of their property and they had upon taking possession but granted the original Plaintiff a footpath. So that her cows could access the river.

44. DW5 the County Land Surveyor testified in the matter, he gave an account of the relationship between Nandi/Kamobo/3706 and 5640. He produced a copy of the original control register that created numbers.

45. It was his testimony that on 4/10/2006 – Nandi/Kamobo/3706 was subdivided into Nandi/Kamobo/4496 and 4497.

46. On 28/10/2009 – Nandi/Kamobo/4498 was subdivided into Nandi Kamobo 4812, 4813, 4814, 4815 and 4816.

47. On 29th July 202 – Nandi/Kamobo 4812 was subdivided into Nandi/Kamobo/4918 and 4919.

48. On 1st September 2011, 4918 was subdivided into 5067 and 5068, whilst on 26th September 2013, number 5067 was subdivided into 5513 and 5514.

49. On 26th September, 2014 number 5513 was subdivided into 5639, 5640 and 5641.

50. In cross examination, he confirmed that he did not have the mutation forms which are the primary documents, from which the control register, the secondary documents feeds its information from.

51. After hearing 5 defence witnesses, the Defendant case was closed. Parties agreed to file written submissions and judgment reserved.

ISSUES FOR DETERMINATION: -

52. No agreed list of issues for determination was filed, but the Plaintiff in its written submissions framed 3 issues for determination to wit.

- a). whether or not the 2nd Plaintiff acquired interest in the property known as Nandi/Kamobo/5513.
- b). whether or not the Plaintiffs have proved their case for fraud against the Defendant
- c) What orders sought to issue.

53. The Defendant framed the following issues for determination in its written submissions.

- a) Whether the Plaintiff has proved fraud
- b) Where the witnesses evidence direct evidence.
- c) Does the Defendant have the power to alter and/or extend boundaries.
- d) Is title No. Nandi/Kamobo/5640 nonexistent.

54. There being no agreed issues the Court frames the following issues for determination

- a) Did the footpath measuring 0.03 acres form part of the Plaintiff's land or the Defendant's land in Nandi/Kamobo/5513 before the subdivision?
- b) If the footpath formed part of Plaintiff's land, did the Defendant's transfer it fraudulently to themselves during subdivision?
- c) If so, has the Plaintiff's proved their case for fraud against the Defendants?
- d) What orders commend themselves for the Court to issue?
- e) Who bears the cost of the suit?

PLAINTIFF'S SUBMISSION: -

55. In their written submission, the Plaintiff submit that the right to acquire and own property under Article 40 of the Constitution as read together with Section, 24, 25 and 26 of the Land Registration Act is not an absolute right, but it is limited on the limitations set out in Article 40 (6) of the Constitution as read together with Section 26 of the L. R. A. and the rights does not protect those who acquired the same unlawfully.

In support of this the Plaintiff places reliance on the Court of Appeal decision in Henry Muthee Kathurima vs Commissioner of Lands & Another (2015) eKLR.

56. Further reliance was placed on the decision in Funzi Island Development Limited and 2 others Vs. County Council of Kwale and 2 others (2014) Eklr; as well as Republic vs. Land Registrar Kilifi and Another exparte Daniel Ricci 2013 eKLR.

57. The Plaintiff's submit that where a title has been challenged, one has to demonstrate how he acquired title to justify such enjoyment; and in support of this position, they have cited the Court of Appeal decision in Munyu Maina vs. Hiram Gathitha Maina Civil Appeal No. 239/2019 where the Court observed "when a registered proprietors root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership, it is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

58. It was the Plaintiffs submissions, that the original Plaintiff was the original owner in Nandi/Kamobo/5513 and that she sold to the 2nd Plaintiff 0.0444 acres vide agreements for sale dated 31/12/2013 and 16/12/2013 and that at the time of the said sale Nandi/Kamobo/5513 was in existence as was demonstrated by the copy green card – **P Exhibit 2 d**.

59. On the fraud, the Plaintiffs submit that the Defendant fraudulently caused the subdivision of Nandi/Kamobo/5513. The Plaintiffs place reliance on Black's Law Dictionary on the definition of fraud lawful transfer of Nandi/Kamobo/5640 to the Defendant as required under Section 37 of the Land Registration Act. "fraud consists of some deceitful practice or willful device, resorted to with intent the deprive another of his right or in some manner to do him an injury....."

60. The Plaintiff have further submitted on the standard of proof in land fraud cases as set down by the Court of Appeal in the case of Kinyanjui Kamau vs. George Kamau 2015 (eKLR) where the Court held.....

"...it is trite law that any allegations of fraud must be pleaded and strictly proved....since the Respondent was making a serious charge of forgery or fraud... the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases.... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts....."

61. The Plaintiffs further submit challenging the whole process of subdivision and that there was no.

62. In support of this submission, the Defendant cites the cases of Cermila w/o Mahendra Shali vs. Barclays Bank International Ltd, as well as the case of Yijay Morjaria vs. Nonsingh Madhusingh Darbar & another for the proposition that fraudulently conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts.

63. Finally the Plaintiff submits that in view of the illegalities as above, the Honourable Court should not sanction the same and has cited the decision of the Court of appeal in Uganda, in Makula International al Limited vs. his Eminence Cardinal Nsubuga & Another (1982/HCB).

DEFENDANTS SUBMISSIONS: -

64. It is the Defendants submissions that the Plaintiff did not prove its case as required under Section 109 and 112 of the Evidence Act which was defined as

65. The Defendant submits that the PW1's evidence was that the 2nd Plaintiff bought a 2 metre footpath between Nandi/Kamobo/5640 and Nandi/Kamobo/1244.

66. The Defendant in further submissions to submits that it is the County Surveyor who fixed boundaries upon mutation, hence the Defendant did not fix the boundaries; for the above submissions the Defendant prays that the suit be dismissed with costs.

ANALYSIS AND DETERMINATION: -

67. This is a suit that the Plaintiffs allege and have pleaded illegality and fraud on the part of the Defendant. The allegation of fraud and illegality were pleaded at paragraph of the plaint.

68. The test on the standard of proof, in cases where fraud has been alleged and pleaded as the case herein; is founded in the decision by the Court of Appeal Kinyanjui Kamau vs. George Kamau 2015 eKLR which Ms. Moraa learned Counsel for the Plaintiff has cited.

69. From the evidence adduced, the 2nd Plaintiff purchased 0.04 acres from the original plaintiff PW2 at kshs 20,000/= and two agreements were produced in support thereof. The sale and purchase happened in December 2013.

70. On the other hand, the Defendant as well as her husband DW4 indicates that they purchased a total of 0.5 acres in Nandi/Kamobo/5513 from the 1st Plaintiff sometimes in between 2000 and 2002.

71. The purchase of the 0.5 acre by the Defendant happened on 3 occasions, where on 23/9/2000 the Defendant, purchased 0.1 acre on 12/10/2001 the Defendant, purchased another 0.1 acre, and on 22/8/2002 the Defendant purchased another 0.3 acre. The agreement produced as **D Exhibit 22 – 24**. The Defendant took possession of the said property, and created a footpath giving the 1st Plaintiff access to the river, but planted trees on either side of the footpath.

72. PW3 the substituted Plaintiff confirmed that the Defendant indeed was residing in the suit property from 2002. PW1 the original Plaintiff

confirmed that the trees were planted by the Defendant. The Court finds that the Defendant purchased 0.5 acres in Nandi/Kamobo/3706 which was later subdivided into 5513 and later 5640, and that the Defendant was first in time from 2002, while the plaintiff purchased in 2013 and has not occupied.

73. The original Nandi/Kamobo/5513 as exhibited as **P Exhibit 6** was approximately 0.98Ha. The subdivisions to wit, 5639 measures 0.71 Ha, 5640 - measures 0.18 Ha, and 5671, measures 0.06 Ha.

74. Thus the total acreage from the subdivisions is 0.95 Ha while the original title number Nandi/Kamobo5513 was 0.98Ha.

75. The 2nd Plaintiff conducted a survey on Kamobo/5540 and found that the same 0.47acres, this acreage was however small than what the Defendant had purchased and occupied since 2002.

76. It follows there from that the 1st Plaintiff having sold 0.5 acra to the Defendant and the Defendant having occupied 0.47 acres, the 1st Plaintiff believed that the 0.04 acre was available in 2013 and sold the same to the 2nd Plaintiff. However having sold 0.5 acres, the 1st Plaintiff did not have a saleable interest in the 0.03 acres capable of selling the same to the 2nd Plaintiff.

77. The decision in Malindi ELC case 32/2016, Pius Muture vs. John Kaingu & 2 others in a similar situation held that once a person sold property he had no interest capable of being sold to another person.

78. The Court holds and finds that having sold her interest in 2002, the 1st Plaintiff did not have ant interest capable of selling the same to the 2nd Plaintiff in 2013.

79. Having found that the Defendant purchased 0.5 acres and occupied the acreage in Nandi/title number 5640, it follows that the Plaintiffs have not proved the allegations of fraud as pleaded.

80. The Plaintiffs case was premised on the wrong fact that the Defendant purchased 0.3 acres and that title number 5640 was 0.47acres, 0.17 more than what she had purchased hence the claim of 0.04 acre by the 2nd Plaintiff and 0.13 acre by the 1st Plaintiff, yet the Defendant had actually purchased 0.5 acres and occupied the same.

81. Section 35 (i) of the Land Registration Act provides that *“every document purported to have been signed by Registrar shall in all proceedings be presumed to have been so signed unless the contrary is proven.”* The title number Nandi/Kamobo/5640 was issued by the Land Registrar and the Legal presumption is that all the procedures before issuance were followed as equity regards as done what ought to be done.

82. The Plaintiffs have not proved their cases on the required standard and the particulars of fraud have not been proven.

83. consequently the Plaintiffs case is thus dismissed with costs to the Defendant.

DATED AT KAPSABET THIS DAY OF 28TH FEBRUARY, 2022

HON. M. N. MWANYALE

JUDGE

Delivered in the presence of:-

Ms. Moraa for the Plaintiff

Mr. Chemwok for the Defendant.