



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

E.L.C CASE NO. 56 OF 2014

PAULINA CHEMUTAI CHIRCHIR-----PLAINTIFF

VERSUS

KIPYEGON ARAP SANG & 3 OTHERS-----DEFENDANTS

J U D G M E N T

(Suit for cancellation of title to land; titles acquired after sub-division of title that was in the name of a deceased person before succession proceedings; succession proceedings conducted as if title was still intact; applicant being granted a share of the original title but later discovering that the same had earlier been sub-divided; held that the sub-division was illegal; titles to the sub-divided parcels cancelled; land to revert back to the original title and same be shared in line with the confirmed grant)

This suit was commenced by way of Originating Summons (O.S) taken out pursuant to the provisions of **Order 37 Rules 1(a) (g) and Rule 2(b) and (c) of the Civil Procedure Rules, 2010**. The O.S is supported by the affidavit of the applicant and is opposed by the respondents who filed a Replying Affidavit.

It is the case of the applicant that she is one of the beneficiaries of the estate of Kipsang Chirchir (deceased). Kipsang Chirchir died on 13 June 1996 and succession proceedings for the administration of his estate were commenced in the year 2007 vide Kericho High Court Succession Cause No. 137 of 2007. At the time of death, Kipsang Chirchir owned the land parcel Kericho/Chemagel/822. The grant was confirmed on 30 July 2014 vide which the said land parcel was distributed to the beneficiaries of the estate of the deceased. The distribution was as follows :-

- (i) Kipyegon arap Sang - 7.5 acres to hold in trust for the beneficiaries of the first house.
- (ii) Maria Tapsagaa Chirchir - 3.75 acres to hold in trust for herself and Sally Chirchir's children.
- (iii) Paulina Chemutai Chirchir - 3.75 acres to hold in trust for herself and her children.

The applicant has averred that after the above confirmation of grant, she approached the 1st and 2nd respondents, who are the administrators of the estate of the deceased, so that they may excise her share of 3.75 acres. She followed up the matter at the Lands Registry only to discover that the land parcel Kericho/Chemagel/822 was sub-divided into three parcels on 9 March 2001. The resultant parcels are Kericho/Chemagel/2870 in the name of Kipsang Chirchir; Kericho/Chemagel/2871 in name of Peter K. Langat; and Kericho/Chemagel/2872 in name of Jacqueline Chepkorir. It is the position of the applicant that the sub-division of the land parcel No. 822 was irregular, inter alia, for the reason that at the time of

sub-division, there had been no grant of representation made for the estate of Kipsang Chirchir. The applicant has further averred that the 2nd respondent irregularly sold the sub-divisions to the 3rd and 4th respondents, because at the time of the purported sale and transfer, she lacked capacity to do so. She has further averred that in view of the irregular sub-division, she will find it difficult to get her rightful share from the land parcel No. 822. Her prayer in this O.S is that the titles of the 3rd and 4th respondents be revoked and the register be rectified to restore the land parcel No.822 so as to pave way for distribution of the estate.

The replying affidavit is sworn by Kipyegon arap Sang. He has averred inter alia that the said land has been bought by the 3rd and 4th respondents who have obtained registration of their parcels and that they have been in occupation since the year 2001. He has stated that the only land that is available is the land parcel Kericho/Chemagel/2870 and that fresh succession documents ought to be filed. He has averred that the applicant has not been deprived of her share on the land parcel No. 2870. It is his view that justice shall easily be met by directing the parties to seek a review in the succession cause, on the distribution of the estate, or a new succession cause be filed. He has also stated that the applicant was to succeed the land through the second respondent.

I directed that the O.S be heard by way of affidavit evidence and counsels to file their written submissions. Only counsel for the applicant filed submissions, and it was only he, who appeared at the hearing of the matter. Despite being duly served, the respondents and their counsel did not appear on the day scheduled for the formal hearing of the application.

In his submissions, Mr. Caleb Koech for the applicant, inter alia submitted that the 1st and 2nd respondents misrepresented to the Probate & Administration Court that the parcel No. 822 was still intact hence the final order on distribution of the estate. He submitted that the sub-division of the land parcel No. 822 could only have been procured through fraud as at that time, no succession proceedings relating to the estate of the deceased had been filed. He submitted that vide Section 45 of the Law of Succession Act, there could be no transaction over the property of a deceased person. He relied on the cases of ***Peter Thaaire Mwaura vs Godfrey Kaguru Mwaura & 2 Others (2014) eKLR***; ***Re Estate of M'muraa Mangua (Deceased) (2010) eKLR***; and ***Michael Ochieng Mbuya vs Jacob Ojwang Ojwang (2011) eKLR***.

I have considered the pleadings and submissions of counsel. It is not disputed that the land parcel Kericho/Chemagel/822 was owned by Kipsang Chirchir. Kipsang Chirchir died on 13 June 1996. At the time of his death, the parcel No. 822 had not been sub-divided and was intact. Succession proceedings were commenced in the year 2007 and the grant was confirmed on 30 July 2014. Pursuant to the distribution of the estate, the applicant was entitled to 3.75 acres out of the land parcel No. 822. It seems as if the 1st and 2nd respondents, had earlier gone behind the backs of the other beneficiaries of the estate, and somehow procured the sub-division of the land parcel No. 822 into the parcel numbers 2780, 2781, and 2782. Clearly, the sub-division of the parcel No. 822 was unlawful. The said land could not have been sub-divided or distributed to the 3rd and 4th respondents without an order of the court.

The sub-division and subsequent transfer of two of the resultant parcels to the 3rd and 4th respondents was contrary to the provisions of Section 45 of the Law of Succession Act, which provides as follows :-

Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

The above provision of the law further provides for a criminal sanction for any person who contravenes it. I know of no law which permits what the respondents did in this case and none has been shown to me. The sub-division and subsequent transfer of the parcel No. 822 was illegal. This court cannot condone an illegality to stand. Indeed under Section 26 of the Land Registration Act, Act No. 3 of 2012, any title procured illegally is liable to be cancelled. That section is drawn as follows :-

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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

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.

The arguments of the respondents in their replying affidavit that the titles should remain and a rectification of the grant be made does not wash with me. That will be sanctioning an illegality which this court cannot do. I in fact do not see what stake the 3rd and 4th respondents can claim to have in any portion of the land parcel No. 822, as the confirmed grant did not distribute any portion of the estate to them. They are strangers, and have absolutely no share in an inch of the parcel No. 822. They ought not to be on this land and must vacate forthwith. What ought to happen is for the land parcel No. 822 to be sub-divided according to the shares set out in the confirmed grant.

For the above reasons, this suit succeeds. I make the following final orders :-

(a) That the sub-division of the land parcel Kericho/Chemagel/822 into land parcels Kericho/Chemagel/2870, 2871 and 2872 was illegal, null and void.

(b) That the titles to the land parcels Kericho/Chemagel/2870,2871 and 2872 are hereby cancelled.

(c) That the District Land Registrar in custody the subject registers do forthwith proceed to rectify the registers by cancelling the titles to the land parcels Kericho/Chemagel/2870,2871 and 2872 and do forthwith restore the register of the land parcel Kericho/Chemagel/822 in the manner that it was before the purported sub-divisions.

(d) That the land parcel Kericho/Chemagel/822 be distributed in the manner directed in the confirmed grant of 30 July 2014 in Kericho High Court Succession Cause No. 137 of 2007.

(e) That a declaration is hereby issued that the applicant is entitled to 3.75 acres of the land parcel Kericho/Chemagel/822 to hold in trust for herself and her children as directed in the confirmed grant of 30 July 2014 in Kericho High Court Succession Cause No. 137 of 2007.

(f) That a declaration is hereby issued that the 3rd and 4th respondents or any other person, save for those noted in the confirmed grant, have no recognizable interest in the land parcel Kericho/Chemagel/822, and if they are in occupation, they should forthwith vacate and if they do not do so, the applicant is at liberty to apply for an eviction order.

(g) The costs of this suit shall be shouldered jointly and/or severally by the respondents.

It is so ordered.

DATED, DELIVERED & SIGNED AT KERICHO THIS 26TH DAY OF JUNE 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT.

In the presence of:

Mr. Caleb Koech instructed by M/s Bett & Company Advocates for the applicant.

No appearance on the part of M/s Kipkoech Terer & Associates Advocates for the respondent.

Court Assistant - F. Juma.