



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 373 OF 2017

KIPSONGOK ARAP CHEPSIROR.....PLAINTIFF

VERSUS

WILLIAM KURGAT.....1ST DEFENDANT

ALFRED TANUI.....2ND DEFENDANT

KIBOSIA CHESERET.....3RD DEFENDANT

LUKA RUGUT.....4TH DEFENDANT

AGRICULTURAL FINANCE CORPORATION.....5TH DEFENDANT

THE CHIEF LAND REGISTRAR UASIN GISHU COUNTY.....6TH DEFENDANT

JUDGMENT

By a plaint dated 22nd November 2017 and amended on 28th February 2018, the Plaintiff herein sued the Defendants jointly and severally seeking the following orders: -

a) An order of declaration that the Plaintiff is entitled to a portion measuring approximately $\frac{1}{4}$ of the entire parcel of land known as Chesegem Farm L.R No. 8717, IR 11041/1 and IR 11041/15 now known as Cheptiret/Cheplaskei Block 1 (Chesegem) measuring in total approximately 606 acres together with the residential house and a further portion from the other $\frac{3}{4}$ of the remaining portion.

b) An order compelling the Defendants to cause a resurvey and subdivision of the entire parcel of land known as and to excise the Plaintiff's portions and for the 6th Defendant to register the Plaintiff as the legal owner of the resultant portion.

c) An order compelling the 5th Defendant to surrender the original title of parcel no. Chesegem Farm L.R No. 8717, IR 11041/1 and IR 11041/15 now known as Cheptiret/Cheplaskei Block 1 (Chesegem) to the 6th Defendant for reissuance to the resultant registration in favour of the Plaintiff.

d) Special damages.

e) General damages.

f) Costs of the suit.

PLAINTIFF'S CASE.

PW1 adopted his statement and testified that he bought the suit parcel of land known as Chesegem Farm L.R No. 8717, IR 11041/1 and IR 11041/15 now known as Cheptiret/Cheplaskei Block 1 (Chesegem) from the 5th Defendant and was issued with the payment receipts.

PW1 further told the court that he invited other members whom he allowed to make payments directly to AFC to clear the loan but they later failed to pay the balance to the financier which resulted to AFC suing the Plaintiff for recovery vide **Nakuru HCC NO. 144 OF 1973**. He had invited the court that he was later evicted from the suit land by the police. According to the Plaintiff, the Defendants forged his signature on the Land Control Board consent application form.

On cross examination by Ms Tum for the 1st - 4th Defendants, the PW1 stated that the suit land originally belonged to a white settler and it had been advertised for auction by the 5th Defendant and therefore requested 8 people to help him offset the loan of which they paid Kshs. 4,000 to the 5th Defendant.

PW1 also stated that the Defendants then took possession of the suit land and became violent towards him. That he sold his shares just like the other partners and moved to Nandi County. It was PW1 's evidence that when they went to the Land Control Board, he refused to sign the application forms only to realize a day after that the forms had his signature.

PW1 testified that in 1975 he filed a suit in Nakuru Court challenging the validity of the Land Control Board consent but he was not aware whether the same had been concluded. That he was attacked and later arrested and jailed for one year from 1972 to 1973 and when he came back he found when his land had been subdivided

Upon cross examination by Mr. Mabonga for the 5th Defendant, PW1 told the court that he had no claim against the 5th Defendant.

On cross examination by Mr. Odongo for the 6th Defendant, PW1 testified that he bought a quarter of the suit land which was approximately 150 acre and confirmed that Plot No.23 within the suit land was initially registered in his name but currently in the name of one Kiblalang Chemwok. PW1 also stated that Chemwok had lent some money but he refunded in 1979.

1ST 2ND 3RD AND 4TH DEFENDANTS' CASE

DW1 Wilfred Kirwa Tanui adopted his statement filed on 25th September 201 and stated that in 1978, the Plaintiff informed them that the suit land was at the verge of being auctioned due to an unpaid loan taken by the Plaintiff from the 5th Defendant. That as shareholders of Chesegem Farm, they resolved to repay the loan of Kshs. 62, 740/- with each contribution being equated as additional shares and thereafter the shareholders had a meeting where it was resolved that each share be equated to acreage whereby the Plaintiff was allocated 10 acres also referred to Plot No. 23.

On cross examination by Mr. Tarigo for the Plaintiff, DW1 told the court that the portion he occupied belonged to his father and it measured 49 acres whereby his father paid Kshs. 1200/ and that he paid Kshs. 14,000/- towards the loan repayment.

On cross examination by Mr. Mabonga, DW1 testified that their advocate, one Tanui, ensured that the suit land was transferred to the shareholders and respective titles issued.

DW2 Ronald Wanjala equally adopted his statement of 22nd December 2017. He also produced the documents in the Defendants' list of documents dated 22nd December 2012 as DEXH 1 to 10 and reiterated DW1's evidence.

DW3 Sheila Mwai, the Uasin Gishu County Land Registrar testified that the suit land was first registered under the government of Kenya on 25th October 1994; second registration was on 13th February 1995 to the Plaintiff and one Kiblalang Chemwok. DW3 explained that the registration was done through adoption of the members' register forwarded to their offices through the officials of the farm. She added that the said Plot 23 measuring 4.3700 Ha was registered to the Plaintiff and one Kiblalang Chemwok.

On cross examination by Ms. Tum, Sheila confirmed that there has been no complaints filed in relation to the suit land, neither was there any caveat registered.

PLAINTIFF'S SUBMISSIONS

Counsel listed 4 issues for determination and relied on section 26 of the Limitation of Actions Act, Cap 22 and the cases of **Justus Tureti Obara v Peter Koipetai Nengisoi [2014] eKLR; George Nyakundi Ombaba v Turusira Osiemo & 2 others [2020] eKLR; Silvester K. Kaitany v Nyayo Tea Zones Development Co-operation & another [2020] eKLR and finally Kenneth Kipkosgei Kemboi & another v Leah Tuwei & 5 others [2012] eKLR**, and submitted that the Plaintiff discovered fraud on the part of the Defendants around the year 2012 the suit is not time barred since time began to run in the year 2012.

On the issue whether the Plaintiff has proved purchase and acquisition of the subject parcel, counsel submitted that the Plaintiff produced a bundle of receipts hence the court should find that the Plaintiff is entitled to ¼ of the suit land. And relied on the case of **Musa Kiptai Mulwo v Ngobitwo Farmers' Co-operative Society Limited & 3 others [2019] eKLR**.

Counsel also submitted that the Plaintiff had proved fraud on the part of the Defendants and he never attended the Land Control Board which gave consent to subdivide and transfer the suit property to the Defendants. Further that there was no document to show how the land was converted from leasehold to freehold and that the register given to the 6th Defendant did not show the amounts contributed by each member to justify the acreage allocated to each member.

Counsel cited the provisions of section 80 of the Land Registration Act and submitted that the Plaintiff having successfully proven fraud on

the part of the Defendants, the court should grant the Plaintiff the orders sought in the plaint.

Counsel further relied on the case of **Martha Chelal & another v Elijah Kipkemoi Boiywo & 20 others [2019] eKLR and Samuel Odhiambo Oludhe & 2 others v Jubilee Hardware Limited & another [2018] eKLR.**

1ST TO 4TH DEFENDANT'S SUBMISSIONS

Counsel raised four issues for determination namely, whether the suit is time barred, whether the Plaintiff has proved allegation of fraud, whether the consent of Land Control Board was obtained before subdivision was carried out and finally whether the Plaintiff failed to join other crucial parties to the suit.

On the first issue as to whether the suit is time barred, counsel submitted that under section 7 of the Limitation of Actions Act, recovery of land must be done within a period on 12 years and in this case the letter of consent to transfer the suit land from the Plaintiff herein was executed on 19th March 1971 and subdivision was completed on 25th October 1994. Hence the suit is time barred.

Counsel relied on the cases of **Bosire Ongero v Royal Media Services [2015] eKLR and Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Limited [1989] KLR 1.**

On the second issue as to whether the Plaintiff has proved the allegations of fraud, counsel submitted that the Plaintiff did not specifically plead and particularize the facts of fraud on the part of the 1st to 4th Defendants and further that the Plaintiff has not met the standard of proof of fraud.

On the issue as to whether the consent of Land Control Board was obtained before subdivision was carried out, counsel submitted that the consent dated 19th March 1971 was granted on 16th March 1971 to the Plaintiff and the title deed was then surrendered to the Commissioner of Lands for conversion from leasehold to freehold. That thereafter the subdivision was done.

On the issue whether the Plaintiff failed to join other crucial parties to the suit, Ms Tum submitted that Order 1 rule 9 provides that no suit shall be defeated by reason of non-joinder of parties, but there was need to join the other land owners within the suit land who would be affected by the outcome of these proceedings and relied on the case of **David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR.**

ANALYSIS AND DETERMINATION

The issue for determination is whether this suit is time barred and whether the Plaintiff has proved fraud on the part of the Defendants.

The Plaintiff and the Defendants gave a chronology of what transpired in the acquisition of the suit land. It is not in dispute that these transactions took place in 1971 and the consent of the Land Control Board which is the subject of this fraud was issued on 16th March 1971 and was acted upon leading to subdivision of the suit land and issuance of titles to respective owners.

The Plaintiff stated that he filed a suit vide **Nakuru HCC No 144 of 1975** challenging the issuance of the Land Control Board Consent of which he stated that he does not know what the outcome was. At the time of writing this judgment, there was no evidence of the outcome of the case. This means that the consent as issued is still valid and not impeached.

The Plaintiff informed the court that he was imprisoned and when he came back he found that the land had been subdivided and transferred to other parties and he also confirmed that he was allocated 10 acres where he was registered as owner of plot No 23. The Plaintiff confirmed to court that he sold his shares and moved to Nandi County just like the other shareholders who sold their shares.

The Plaintiff has not told the court why he had to wait for 46 years to bring this suit and further why he did not follow up the suit that he filed in 1975 challenging the issuance of the Land Control Board Consent. Litigation must come to an end and parties cannot be allowed to file cases in different courts and abandoning without pursuing them to their logical conclusion. There cannot be parallel processes seeking for determination of the same issues, this is an abuse of court processes and can embarrass the court where contradictory decisions are made in respect of the same subject matter.

If the court heard and determined the issue challenging the issuance of the land Control Board consent either in the affirmative or negative, it would have a bearing on the legality of the subdivision and transfers which is the subject matter in this case.

Section 7 of the Limitation of Actions Act provides as follows: -

An action may not be brought by any person to recover land after the end of Twelve (12) years from the date on which the right of action accrued to some persons through whom he claims to that person.

The Plaintiff slept on his right to recovery of land as no reasonable explanation has been tendered on why he did not pursue this claim in the 1970's. The ground has shifted and granting the Plaintiff orders sought for would occasion injustice to the land owners who are in occupation pursuant to the subdivisions and the transfers. The court notes that the land owners were also not sued as this was a scheme with many shareholders as confirmed by both the Plaintiffs and the Defendants including the Land Registrar who gave evidence that they prepared the titles according to the members' register given by the officials of the Chesegem farm.

The Plaintiff tried to hang on a claim of fraud which he stated that he discovered in 2012 but the same did not tally with the evidence on

record. Section 26 of the Limitation of Actions Act cannot come to the aid of the Plaintiff as it is on record that he was aware of this fraud in 1972 and that is why he filed a case in Nakuru in 1975.

In the case of **Bosire Ongere V Royal Media Services (20154) eKLR Justice R.E. Aburili** held that: -

“The law of Limitation of Actions is intended to bar the Plaintiffs from instituting claims that are stale and aimed at protecting Defendants against unreasonable delay in the bringing of suits against them. The issue of Limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of Limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over.”

I have considered the pleadings, the evidence and submission by counsel and find that this suit is time barred and is therefore dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF FEBRUARY, 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.