



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 18 OF 2011

IBRAHIM MWENY KOTIT.....PLAINTIFF

VERSUS

ALEMU SIA KOT.....DEFENDANT

JUDGMENT

The plaintiff is an elder brother of the defendant. They are both sons of Kotit Chemaklot who had three sons. The third and youngest son is Samuel Kotit. The plaintiff was the eldest followed by the defendant and the last one was Samuel Kotit. Kotit Chemaklot had three parcels of land. Two parcels were at Chelombai and one was at Kosulol. Kotit Chemaklot died in 1971 before the process of demarcation started.

When the process of demarcation started, the plaintiff who was the eldest son was involved. He had the Chelombai parcels demarcated and registered into plot No. West Pokot Chepareria/724 and 725. The Kosulol parcel was demarcated and became plot No. West Pokot Chepareria/756. plot No. West Pokot Chepareria/724 was registered in the name of Samuel Kotit. Pot No. West Pokot Chepareria/725 was registered in the name of the plaintiff. As the defendant was away during the process of demarcation, the plaintiff too had plot No West Pokot Chepararia 756 registered in his name in trust for his other brothers.

The plaintiff contends that there was a family arrangement in which it was agreed that plot No. West Pokot Chepareria/756 was to be subdivided into three portions to be shared between the three sons of Kotit Chemaklot. The plaintiff further contends that there was an arrangement between the defendant and their younger brother Samuel Kotit that the defendant was to surrender his share in plot No. West Pokot Chepareria/756 in return for the defendant's share in plot No. West Pokot Chepareria/724.

Plot No. West Pokot Chepareria/724 is 33.53 hectares, plot No. West Pokot Chepareria is 15.82 hectares and plot No. West Pokot Chepareria is 20.08 hectares. The plaintiff sent one of his sons to reside on his share of plot No. West Pokot Chepareria 756. The plaintiff contends that unknown to him, the defendant fraudulently had plot No. West Pokot Chepareria 756 transferred into his name and that the defendant mischievously filed Kitale Chief Magistrate Land Case-No. 94 of 2003 in which he seeks to evict his son and others from his portion of land. He therefore seeks a declaration that the transfer of plot No. West Pokot Chepareria/756 into the defendant's name was fraudulent and that the court should order cancellation of the title which is in the name of the defendant and order that Plot No. West Pokot Chepareria/756 should be divided into three portions. He also prays that proceedings in respect of Kitale Chief Magistrate's Court Civil Case No. 94 of 2003 should be declared a nullity.

The defendant on his part contends that during demarcation he was away. When he came back, he found that his elder brother, the plaintiff herein had had himself registered as owner of plot No West Pokot Chepareria/725 and 756 into his name. He approached his brother who agreed to transfer plot No. West Pokot Chepereria/756 into his name. The transfer was duly effected into his name after the same was duly given the consent of the Land Control Board. He denies that the transfer was fraudulent as the plaintiff claims. The defendant contends that he was entitled to a share of his father's land and that the plaintiff voluntarily transferred the portion which had been registered in his name in trust for him as he was away during the time of demarcation. The defendant contents that he properly sued the plaintiff's son who is occupying a portion of his land as well as some people who bought land from the plaintiff's son. He contends that he obtained a decree which has never been appealed against and that the plaintiff's prayer in his plaint that the proceedings in respect of Kitale Chief Magistrate's Civil Case No.94 of 2003 be declared null is misguided and should be dismissed.

I have carefully considered the plaintiff's case as well as the defence case. There is no contention that the plaintiff and the defendant are sons of Kotit Chemaklot. There is also no contention that Kotit Chemaklot had three parcels of land and also had three sons. The issue which arises for determination is whether plot No. West Pokot Chepareria/756 is held by the defendant in trust for his other brothers. There is no contention that plot No. west Pokot Chepareria/756 was initially registered in the name of the plaintiff. The plot was transferred into the defendant's name on 24.5.2002.

All the three parcels that is West Pokot/Chepareria/724, 725 and 756 were registered and titles issued on 1.7.1998. It is the plaintiff who processed titles two of which came out in his name and one in the name of their last born brother. The plaintiff did this as he was the only son of the three who was educated. When the defendant came to lay claim for his share, the plaintiff transferred to him land Parcel No. West Pokot Chepereria/756. He cannot therefore turn round and claim that the defendant fraudulently transferred the land into his name. The particulars of fraud listed down in the plaintiff's claim were not proved. During the hearing, it emerged that the plaintiff had made a complaint against the defendant at Kapenguria Police Station alleging that the defendants forged his signature. The claim was investigated and dismissed and the defendant was never charged for any criminal offence. There was no evidence adduced by the plaintiff to show that the defendant is holding the suit land in trust for him and his other brother. Contrary to the plaintiff's claim, it is clear that it is the plaintiff who is out to disinherit the defendant of his rightful share of their father's properties. The evidence of the younger brother of the defendant and plaintiff was clear that the defendant was away when when their elder brother was involved in the process of demarcation. Plot No. West Pokot/Chepareria is 20.08 hectares. Plot No. West Pokot/Chepareria 725 is 15.82 hectares. It is registered in the name of the plaintiff. Plot No. West Pokot/Chepareria 724 is 33.53 hectares and it is registered in the name of Samuel Kotit, the younger brother of the plaintiff and defendant. If plot No. West Pokot/Chepareria/56 was to be subdivided into three portions, it is the defendant who will end up losing as his entitlement will be reduced. The defendant is not laying any claim to plot No. West Pokot/Chepareria 724. There is evidence that the defendant has another plot No. West Pokot/Chepareria 311. He did not buy this land. He was allocated during demarcation. It will therefore be unfair that he is again claiming a share of plot No. West Pokot/Chepareria/756.

The total acreage of the three parcels owned by the father of the plaintiff and defendant is 69.43 acres. If the three brothers were to get equal shares, each was to get about 23 acres. Already the defendant is content with the 20.08 hectares he has. He is not laying any claim to the plot which is held by his younger brother Samuel Kotit which is 33.53 hectares. There was an attempt by the plaintiff to show that the defendant and their younger brother had agreed to swab their respective shares in plot No. West Pokot/Chepareria/724 and 756. This evidence was not convincing. The plaintiff brought his sister as a witness. This is PW2 Chepoksang Silet who claimed that Plot No. West Pokot/Chepareria/756 was supposed to be subdivided into three portions. It turned out that she does not know the dispute before court. This was the case with PW4 Daniel Lolukai assistant chief of Kosulol sub-location who purported to give evidence of a matter which began even when

he had not been born.

The the plaintiff in asking the court to nullify proceedings in respect of Kitale Chief Magistrate Civil Case No. 94 of 2003 is like preferring an appeal through the back door. This prayer cannot be granted. What the plaintiff is trying to do is to litigate on behalf of other persons. He was not a party to the civil case in the lower court. The parties concerned never appealed from the decree in the lower court. The plaintiff cannot therefore purport to litigate on their behalf and in any case the prayer for declaring the proceedings thereof a nullity is without basis. The plaintiff has failed to prove any trust as alleged. I find that this suit is frivolous. The same is hereby dismissed with costs to the defendant.

Dated, signed and delivered at Kitale on this 14th day of January, 2014.

E. Obaga “J”

C/C - Kassachuon

In court at 9:26 am. Parties absent.

Parties can read judgment at the registry.

E. OBAGA

JUDGE