



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL SUIT NO. 103 OF 2010.

MARGARET NAMALWA LUSWETI ::::::::::::::::::::::::::::::::::: PLAINTIFF.

VERSUS

NGORONYANG PSENGO LONGOLEMUK ::::::::::::::::::::::::::::::::::: DEFENDANT.

J U D G M E N T.

The plaintiff, **Margaret Namalwa Lusweti**, is a daughter to the late Lusweti Omri Jacob and the late Beatrice Nasimiyu Lusweti who lived together as husband and wife until the year 1982 when they separated.

The plaintiff and her two siblings Jane Lusweti and Alice Lusweti remained with their father while the mother left the matrimonial home to live elsewhere.

In the year 2002, Lusweti passed away and thereafter in the year 2005, the plaintiff filed Succession Cause No. 203 of 2005, for grant of letters of administration respecting the estate of her deceased father.

The necessary grant was issued and confirmed on the 5th October, 2006 with the result that a parcel of land described as Koros 1-plot No. 148 measuring three (3) acres said to belong to the deceased was to be transmitted to the plaintiff to hold for her own benefit and in trust for the benefit of her two sisters.

Later in the year 2009, the late plaintiff's mother Beatrice Nasimiyu Lusweti, filed an application for revocation of the grant but unfortunately she passed on before the application could be prosecuted with the resultant effect that the application was dismissed by the court in the year 2010.

An attempt by the plaintiff to have the aforementioned property (herein, the suit property) registered in her name and hold in trust for her two sisters was thwarted by the realization that the property had been transferred by her late mother to the defendant, **Ngoronyang Psengo Longolemuk**, and that it was registered in the name of the defendant and a title deed issued to that effect.

Believing that the suit property belonged to her late father and was illegally or fraudulently transferred to the defendant by her late mother, the plaintiff instituted this suit against the defendant praying for a cancellation of the title deed issued to the defendant and for the registration of the property in her name and to hold in trust for her sisters.

In his defence, the defendant contended that he became the registered proprietor of the suit property on the 2nd December, 2004, after having purchased it from the late Beatrice Nasimiyu Lusweti. He took immediate possession of the property and carried out developments and as at the time of the death of Lusweti Omari Jacob on 14th January, 2002, the property had never belonged to him (Lusweti) nor did it belong to his estate at the time Succession Cause No. 203 of 2005 was filed in court by the plaintiff.

It was further contended by the defendant that the property was erroneously included as part of the estate of the deceased Lusweti and had the court known of the correct position, the property would not have been distributed to the plaintiff.

The defendant denied the allegations of fraud made against him and in particular in the purchase of the suit property from the late Beatrice Nasimiyu Lusweti. Consequently, the defendant prayed for the dismissal of this suit with costs.

All the foregoing facts are contained in the averments contained in the plaintiff's statement of claim (plaint) and the defendant's statement of defence.

Both parties reiterated their respective pleadings at the hearing of the suit.

The plaintiff, **Margret Namalwa Lusweti (PW1)**, testified that the suit property was registered in the name of her late father who passed away in the year 2002 after having separated from her mother in the year 1982. She (PW1) and her two sisters Jane and Alice remained with their father while their mother went to Cheranganyi from where she came after the death of their father and secretly sold the suit property to the defendant. She (PW1) reported the matter to the local administration but her mother (Beatrice) failed to surrender the title to the land despite a request to do so. She (PW1) was referred to the local land registry which wrote several letters (P. Exh. 1 a-d) to Beatrice and the defendant but they failed to surrender the title to the suit property. It was then that she (PW1) was advised to file the Succession Cause No. 203 of 2005 and she did as much. She was granted letters of administration respecting the estate of her deceased father and later a certificate of confirmation (P. Ex. 2) was issued and remained intact after the objection by Beatrice was dismissed following her demise in the year 2009.

The plaintiff contended that the suit property was registered in the name of her late mother and transferred to the defendant in a secretive manner as her late mother had no right to register and transfer the property since she was already re-married elsewhere.

Nicholas Orute (PW2), uncle to the plaintiff and brother to the late Lusweti, testified that the deceased lived at Koros 1 with his three daughters including the plaintiff and after his death, his clan resolved that the three daughters should inherit his land at Koros i.e. the suit property. Two years after the death of his late brother, he (PW2) was informed by the plaintiff that the property had been sold. The matter was reported to the area chief but he (PW2) was not aware that the property was registered in the name of the defendant. He confirmed that his late brother had separated from the plaintiff's mother and that the plaintiff's mother was re-married elsewhere upto the time she passed away.

A land Registrar in Kitale, **Aggrey Miredi (PW3)**, testified that the records at their registry indicate that the suit property is currently registered in the name of the defendant. He produced the necessary green card (P. Exh. 5) and indicated that the initial owner of the property as per the area list and record was the late Lusweti, who is shown to have transferred it directly to the Late Beatrice Nasimiyu Lusweti. He went on to testify that the necessary Land Control Board consent and transfer documents relating to the property could not be traced in the registry but acknowledged that a title was issued to the defendant on 2nd December, 2004. He said that the transaction involving the suit property may have been improper due to the absence of the necessary consent and transfer documents. He said that the area list showed that the property was to be registered in the name of the late Lusweti and in his absence, the administrator of his estate would have been registered.

The Land Registrar (PW3) produced the aforementioned area list (P. Exh. 6) and indicated that his office was not informed of the demise of the late Lusweti.

In his testimony, the defendant, **Ngoronyang Psengo Longolemuk (DW1)**, stated that he acquired the suit property from the late Beatrice Nasimiyu Lusweti after she had offered it for sale. They completed the necessary sale agreement (D.Exh. 4) at the chief's office and a first deposit of Ksh. 100,000/= was paid on 8th March, 2004.

Thereafter, the vendor (Beatrice) informed the land office that the property had been sold to him (defendant). He was handed some documents at the land office and instructed to sign them. He did so and was informed to return later for the title. After paying the full purchase price, he obtained the title deed (D. Exh. 1) respecting the property. He contended that the suit property never belonged to the late Lusweti Jacob and that it was transferred to him in the year 2004. However, in the year 2005, he received court summons respecting the present case.

Bernard Wafula Wekesa (DW2), a brother to the plaintiff, testified that they lived at the suit property but after a disagreement between their parents (i.e. the late Lusweti and the late Beatrice), their mother moved away and went to live in Cherangany. He (DW2) joined their mother at Cheranganyi while the plaintiff remained at the suit property with their father who later died and was buried there. At that time, the plaintiff was already married and had left the suit property.

Bernard (DW2) further testified that prior to his death, their father had requested their mother to return to the suit property and that she did so only for her to start ailing after awhile. She informed Bernard that the plaintiff and herself had agreed to sell the property and on the 8th November, 2004, a sale agreement was made at the chief's office between herself (mother) and the defendant and was witnessed by Bernard and some of his siblings without any objection. They all proceeded to the land office where the defendant signed some documents and was told to return later for the title. After sometime, their late mother disagreed with the plaintiff and this continued upto the time of her (mother's) death in the year 2009.

From all the foregoing evidence and pleadings, it is without doubt that the ownership of the suit property is the bone of contention. On one hand, the plaintiff claims ownership by virtue of being the appointed administrator of the estate of her late father. She produced a certificate of confirmation of grant dated 5th October, 2006 (P. Exh. 2) and a copy of the court order (P. Exh. 3) dismissing the summons for revocation of grant taken out by her late mother. The dismissal was on account of failure to prosecute the application.

The suit property described as Koros 1 – Plot No. 148 measuring three (3) acres was the only estate property. It was to be held in trust by the plaintiff for her own benefit and that of her two sisters namely Anne Naliaka Lusweti and Alice N. Lusweti.

The succession proceedings, it would appear, proceeded on the assumption that the suit property belonged to the late Lusweti Omari Jacob. However, it later turned out that the property was registered in the name of the defendant who produced the necessary title deed (D. Exh. 1) and the green card (D. Ex. 3) confirming as much. The plaintiff also produced copies of similar documents (P. Ex. 4 & 5).

It is that title deed which, on the other hand, gives the defendant the right to claim ownership of the suit property to the exclusion of all other persons including the plaintiff.

Indeed, a title deed when issued confers absolute ownership of property and the rights of a registered proprietor would not be liable to be defeated unless obtained by fraud and/or mistake.

So, as between the plaintiff and the defendant, the registration of the suit property in the name of the defendant confers to him the right of ownership thereof to the exclusion of the defendant. However, it was contended by the plaintiff that the registration of the suit property in the name of the defendant was erroneous or fraudulent since the property belonged to the late Lusweti Omari Jacob and not the late Beatrice Nasimiyu Lusweti. She (plaintiff) indicated that on learning of the disputed registration she protested to the Ministry of Lands & Settlement through the district administration. She produced several letters on the subject (P. Exh. 1 a-d).

The Land Registrar (PW3) indicated that the necessary record respecting the transfer of the property to the defendant in particular the transfer forms and the consent of the Land Control Board could not be traced at the Kitale lands office. He did not or could not state with certainty how the documents went missing. He however, was certain that the land office did not receive any complaint with regard to missing or wrong entries in the register. He was also certain that the title deed respecting the suit

property was issued for the first time on 2nd December, 2004 to the defendant even though the register was opened on 27th January, 1995 when the registered owner of the suit property was the Government of Kenya.

The Land Registrar (PW3) was of the opinion that the absence of the transfer documents in their office implied that the transaction pertaining to the transfer of the suit property to the defendant was improper thereby confirming more or less the allegations of fraud made by the plaintiff against the defendant.

The said allegations were however denied by the defendant who went on to state that he purchased the property knowing that it belonged to Beatrice Lusweti and that he did not know that the late Lusweti Jacob was already dead. He indicated that prior to the issuance of the title he appeared at the land office and signed several documents which he could not specifically identify and could not tell whether they included transfer forms. He implied that the transaction leading to the issuance of the title deed in his name was proper and lawful but conceded that he knew nothing about the consent of the Land Board. He admitted that he did not attend to the suit property. He said that he visited the land office on several occasions in the company of the late Beatrice and was never told that she had no capacity to sell the suit property. He said that the only document availed to the land office by the late Beatrice was a clearance certificate and after the material transaction he took possession of the suit property after paying the full purchase price to the late Beatrice. He contended that the title deed (D. Ex. 1) was not issued by mistake.

Neither the plaintiff nor the defendant produced the necessary transfer forms or the consent form from the Land Control Board. The said documents could not be traced in the land office as per the evidence of the Land Registrar (PW3). However, it is a well known fact that copies of such documents would remain with the parties involved in the necessary transaction. These were the late Beatrice and the defendant, and since Beatrice is no more, the obligation to produce copies of the relevant documents to prove that the transaction was above board lay with the defendant and more so considering that the property was said to have been transferred from the late Lusweti Omari Jacob to the late Beatrice Nasimiyu Lusweti on the 2nd December, 2004 whereas as at that time the late Lusweti had already passed away in the year 2002. The defendant did not produce any of the transfer documents. He was therefore unable to counter the allegation that the material title deed was obtained in a manner which suggested fraud or impropriety perpetrated by the late Beatrice.

Indeed, if the property could not have been transferred to the late Lusweti when he was dead, it followed that it could not have been transferred to the late Beatrice and therefore, she had no capacity to sell the suit property to the defendant. The defendant's remedy would therefore lie in a civil suit for damages against the estate of the late Beatrice.

On the outset, the green card (P. Exh. 5) (D. Exh. 3) clearly shows that the suit property belonged to the Government of Kenya before the late Lusweti, the late Beatrice and the defendant entered the scene.

The alleged transfer of the property from the Government of Kenya firstly to the late Lusweti, secondly to the late Beatrice and thirdly, to the defendant on the same day (i.e. 2nd December, 2004) was most suspect and pointer towards impropriety of the entire transaction.

Consequently, it may safely be stated that the title deed issued to the defendant was suspect and most likely a product of fraud and/or illegality at the behest of mostly the late Beatrice and some officials of the land registry in Kitale. The existence of the suspect title deed cannot therefore be said to accord absolute ownership of the suit property to the defendant.

Similarly, the existence of a certificate of confirmation of grant of letters of administration in favour of the plaintiff cannot also be said to accord ownership of the property to the plaintiff in her capacity as the administrator of the estate of the late Lusweti Omari Jacob as there was no proof that the property indeed belonged to the deceased and that it was formerly transferred to him by the Government of Kenya prior to his death.

The damage crewed in the faulty transfer transaction between the late Beatrice and the defendant can only

be undone by the cancellation of the title deed issued to the defendant thereby opening the door for the plaintiff or even the defendant to apply to relevant authorities for issuance of a fresh title deed.

It is evident that the late Lusweti and his immediate family comprising of his late wife Beatrice and his children including the plaintiff were in occupation of the suit property for a long period of time and even though the late Beatrice moved out of the land and proceeded to Cheranganyi after a disagreement with her husband, he continued to stay on the land with his three children including the plaintiff and her two sisters.

At that time and prior to its unlawful transfer to the late Beatrice and then to the defendant, the land was the property of the Government of Kenya which had the power to allocate it to the late Lusweti but it did not thereby rendering him a squatter on Government land.

In essence, neither the plaintiff nor the defendant can be regarded as the owner of the suit property and although the defendant holds a title to the property, it is clearly a title issued by unlawful means and therefore worthless, fit for cancellation as prayed by the plaintiff in the plaint. However, it would be inappropriate for this court to order that the suit property be transferred to the plaintiff for her own benefit and that of her two sisters given the finding that ownership of the property on the part of the plaintiff and the defendant was really not established.

In the upshot, judgment is entered for the plaintiff against the defendant only to the extent that the title deed dated 2nd December, 2004 issued to the defendant be and is hereby cancelled.

Each party shall bear own costs of the suit.

[Delivered and signed this 21st day of May, 2014.]

J.R. KARANJA.

JUDGE.