



No. 338

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 71B OF 2008

AGNES SYOMBUA MASILA

FARID SALIM KIPRASH

Suing as the legal administrators of the

Estate of IBRAHIM SALIM KIPRASH (Deceased) PLAINTIFFS

VERSUS

IGNATUS CHEGE MWANGIDEFENDANT

JUDGMENT

1. Ibrahim Salim Kiprash (hereinafter referred to only as “the deceased”) brought this suit against the defendant on 2nd May 2007 at the Resident Magistrate’s court at Kilgoris. The suit was by consent of the parties transferred to this court on 7th May 2008. The deceased died on 15th June 2011 while this case was pending and was substituted by the plaintiffs herein on 23rd February 2012. The plaintiffs are the wife and son of the deceased respectively. By their amended plaint dated 23rd February 2012, the plaintiffs averred that the deceased was at all material times the proprietor of the all that parcel of land known as **LR No. Trans-Mara/Ololchani/232** (hereinafter referred to as “**Plot No. 232**”). The plaintiffs averred further that sometimes in the year 2001 the defendant colluded with the District Land Adjudication Officer Trans-Mara District and caused a portion of Plot No. 232 to be hived off and registered in the name of the defendant as **LR No. Trans-Mara/Ololchani/237** (hereinafter referred to as “**the suit property**”). The plaintiffs averred that following the said excision and transfer of the suit property into the name of the defendant, the defendant moved into the said portion of Plot No. 232 took possession thereof and has thereby interfered with the plaintiffs possession and enjoyment thereof.
2. The plaintiffs prayed for; a declaration that the deceased is the owner of Plot No. 232 and that the suit property was fraudulently excised there from after the completion of adjudication and demarcation process at Ololchani Adjudication Section, an order for the eviction of the defendant from the suit property, an order nullifying the allocation of the suit property to the defendant and directing the return of the suit property to the plaintiff and in the alternative, the rectification of the register of the suit property by deletion of the name of the defendant and the transfer of the suit

- property to the estate of the deceased and general damages for unlawful retention and/or conversion.
3. By a further amended statement of defence filed in court on 16th March 2012, the defendant denied the plaintiffs' claim in its entirety. The defendant denied that he caused a portion of Plot No. 232 to be excised, and transferred to his name as the suit property in the year 2001 or at all. The defendant denied that the suit property was excised from Plot No. 232 as claimed by the plaintiffs or at all. The defendant contended that the plaintiffs' suit is time barred under the Limitation of Actions Act, Cap 22 Laws of Kenya in that the Adjudication register of Ololchani Adjudication section having been completed and published on 8th January 1988, any objections in relation thereto were to be brought within 60 days from the date of such publication. The plaintiffs' suit that was brought 19 years later is therefore time barred. The defendant contended that he is the registered proprietor and occupant of the suit property and as such the reliefs sought by the plaintiff cannot be granted.
 4. When this suit came up for hearing, the 1st plaintiff gave evidence and called one (1) witness. On his part, the defendant gave evidence but called no witness. The 1st plaintiff, Agnes Symbua Masila (PW1) testified that she is the wife and one of the legal representatives of the estate of the deceased, Ibrahim Salim Kiprash. She told the court that the deceased owned Plot No. 232 which was allocated to the deceased by the land adjudication board. Before Plot No. 232 was allocated to the deceased, there were objection proceedings involving the property. She produced as P.exh. 2 the proceedings of the adjudication board in Case No. 21 of 1987 that involved the deceased and one, John Konchella pursuant to which Plot No. 232 was awarded to the deceased. There was also an objection Case No. 143 over Plot No. 232 which involved one, E. T. Konchella and the deceased which objection was dismissed in favour of the deceased.
 5. PW1 testified further that after Plot No. 232 was allocated to the deceased, the deceased built a house thereon and carried out other developments. In the year 2007, the deceased learnt that Plot No. 232 had been sub-divided and a portion thereof that was assigned Plot No. 237 ("the suit property") carved out and registered in the name of the defendant. The deceased on learning of this development lodged a complaint at the lands office and was advised to file a suit. In this regard, the deceased was issued with a consent to file suit since the area was still under adjudication. PW1 produced as P.exh. 4 a copy of a letter dated 7th October 2009 that the deceased had written to the Permanent Secretary, Ministry of Lands complaining about the creation of the suit property. This letter was copied to the director of lands and settlement and the director of surveys. PW1 stated that the director of land adjudication and settlement responded to the deceased's said letter of complaint through letters dated 8th June 2009 and 20th August 2009 respectively in which letters, the said director admitted that Plot No. 232 was sub-divided fraudulently. PW1 stated that the director of land adjudication and settlement had directed that the two parcels of land namely Plot No. 232 and the suit property do remain in the deceased's name but the recommendation was not implemented. PW1 stated that the defendant has not developed the suit property and he should be evicted there from. PW1 stated that she has incurred losses by not using the suit property.
 6. The plaintiff's witness was one, Samuel Odari (PW2), an assistant director of land adjudication and settlement. PW2 testified that his office had received complaints concerning Plot No. 232 and the suit property from the deceased. The complaints were dealt with by one J. N. Mutiso who was then the assistant director in charge of land adjudication. PW2 took over from J. N. Mutiso and had in his custody the records relating to Plot No. 232 and the suit property. He had in his possession a letter dated 8th June 2009 that was addressed to the District Land Adjudication and Settlement Officer, Kilgoris by J. N. Mutiso over the dispute relating to Plot No. 232. He produced the letter as Pwxh.5. The letter by J. N. Mutiso had requested the District Land Adjudication and Settlement Officer to carry out investigations. No response was received to the said letter. J. N. Mutiso wrote another letter on 20th August 2009 to the District Land Adjudication and Settlement Officer Kilgoris on the same issue. This letter questioned the origin of the suit property. In the letter dated 20th August, 2009, Mr. J. N. Mutiso had asked the District Land and Adjudication Officer, Kilgoris to right some wrongs. The directions by J. N. Mutiso were not complied with by the District Land Adjudication and Settlement Officer, Kilgoris.
 7. He stated that if the direction by J. N. Mutiso had been complied with, it would have affected the

- status of the suit property. PW2 also produced as an exhibit a copy of a letter dated 9th October 2009 by the Director of Land Adjudication and Settlement concerning Plot No. 232, the suit property and another parcel of land known as Plot No. 110. This letter was produced as Pexh.9. PW2 stated that the direction that was given to the District Land Adjudication and Settlement Officer, Kilgoris by J. N. Mutiso through his letter dated 20th August 2009 (Pexh.6) has not been vacated. He stated that the decisions that were made concerning the dispute between the deceased and the defendant over the suit property were merely administrative and that the dispute had remained unresolved.
8. On cross examination by the defendant's advocate, PW2 stated that; according to the records held at the land adjudication and settlement offices, Plot No. 232 and the suit property appear in one sheet namely sheet no. 9 and that the two parcels of land share a common boundary. PW2 stated further that according to adjudication records in his possession for Plot No. 232 and the suit property, both parcels of land are products of the original demarcation. He stated that according to adjudication records, Plot No. 232 measured 0.90ha while the suit property measured 2.00ha. According to him, the two parcels of land enjoy the same status having arisen from the original demarcation and adjudication through which Plot No. 232 was demarcated in favour of the deceased while the suit property was adjudicated in favour of the defendant. He stated that according to the adjudication records in this possession, Plot No. 110 has no relationship with Plot No. 232 and the suit property was not a sub-division of Plot No. 110.
 9. He stated further that he had no evidence that the suit property should be in sheet no. 4 and that it was transferred from that sheet to sheet to sheet no. 9. He stated that Ololchani was declared an adjudication section in 1977 and that the adjudication register was completed and laid for inspection in the year 1988. He stated that whoever was aggrieved with the register had a right to lodge an objection within 60 days from the date of the publication of the same. He stated that there was no objection in relation to the suit property. He stated further that he did not have in his records any material that points to the wrongs that J. N Mutiso had referred to in his letter dated 20th August 2009 (Pexh.6).
 10. In his evidence, the defendant testified that; he is the registered owner of the suit property which measures 2.00ha. He produced a copy of the register for the suit property as D.exh. 1 (a). He also produced a certificate of official search as D.exh.1(b). The defendant stated that he was allocated the suit property by the Ololchani Adjudication Committee. He produced in evidence as D.exh. 2 a copy of the adjudication record for the suit property and a copy of the rough book that was being used by the adjudication officers as D.exh.3. He stated that the said adjudication record and rough book show that the suit property was allocated to him. The defendant stated that the deceased owned Plot No. 232 and that the said Plot is separated from the suit property by a road. The defendant produced in evidence Ololchani/Lepolosi registration section diagram (sheet) no. 9 to show how Plot No. 232 and the suit property appear on the ground. The diagram (sheet) no. 9 was produced in evidence as D.exh.4. The defendant stated that he was allocated the suit property between 1984 and 1985 and denied that the suit property is a sub-division of Plot No. 232.
 11. The defendant stated that the suit property was not created in the year 2001 as claimed by the plaintiff. He produced a map as D.exh.6 which shows that Plot No. 232 and the suit property existed side by side as at 22nd February 1988. He stated that the suit property is lawfully registered in his name and that there is no reason why the title of the same should be cancelled. The defendant denied that he was allocated the suit property by a Mr. Waithaka. The defendant stated that that the suit property did not originate from Plot No. 110 and that there had been cases involving Plot No. 110 in which cases the suit property never featured. The defendant also produced in evidence the proceedings relating to objection No. 27 of 1985 that concerned Plot No. 110 in which proceedings, the suit property was not mentioned neither was the defendant made a party. The defendant denied that the suit property is in sheet no. 4. He produced in evidence as D.exh. 9 Ololchani/Lepolosi registration section diagram (sheet) no. 4 which shows that the suit property is not in that sheet. The defendant stated that J. N. Mutiso was misled in writing the letter dated 20th August 2009 (P.exh.6). The defendant in conclusion urged the court to dismiss the plaintiff's suit.
 12. In cross examination, the defendant testified that he was a resident of Ololchani during the land adjudication in the area and it is for that reason that he was allocated the suit property. He stated that he was registered as the proprietor of the suit property in the year 2010 after the adjudication

process at Ololchani was finalized. He stated that he had applied for but had not been issued with a title deed because the deceased had lodged a caution on the title of the suit property that was to last until the hearing and determination of this suit. After the close of the defendant's case, the advocates for the parties agreed to make their closing submissions in writing. The defendant filed his submissions on 23rd June 2014 while the plaintiffs did the same on 26th June 2014.

13. I have considered the pleadings by both parties, the evidence on record and the closing submissions by the advocates for the parties. The advocates for the parties did not agree on the issues for determination by the court. In their closing submissions, they each came up with their own issues for determination. I have looked at the two sets of issues. The parties seem to be agreed on the issues for determination save for minor variations on the framing of the same. From the issues drawn by each of the parties, the pleadings, and the evidence adduced, the following in my view are the issues that arise for determination in this suit.

- i. Whether the parcel of land known as Trans-Mara/ Ololchani/237 ("the suit property") was excised or curved out of the parcel of land known as Trans-Mara/Ololchani/232 ("Plot No. 232")?
- ii. Whether the plaintiffs' suit is time barred?
- iii. Whether the plaintiffs are entitled to the reliefs sought against the defendant?

14. Issue No. I;

There is no dispute that Plot No. 232 was adjudicated, demarcated and recorded in the name of the deceased during the adjudication process at Ololchani adjudication section. The evidence that was tendered by the 1st plaintiff (PW1) and PW2 fully supports this position. What is disputed is whether after the adjudication and demarcation of Plot No. 232 in favour of the deceased, the same was sub-divided and a portion thereof measuring 2.00ha. transferred and registered in the name of the defendant as Trans-Mara/Ololchani/237 ("the suit property"). This is what the plaintiffs have claimed in this suit and the onus was upon the plaintiffs to prove the same. What have the plaintiffs placed before this court in proof of this claim? The 1st plaintiff produced in evidence a letter dated 7th October 2009 (P.exh.4) that the deceased had written to the Permanent Secretary Ministry of Lands complaining that Plot No. 232 had been unlawfully sub-divided and a portion thereof assigned parcel number 237 and registered in the name of the defendant. The deceased had asked the said Permanent Secretary to intervene and ensure that the defendant is not issued with a title deed for Plot No. 237 ("the suit property").

15. The 1st plaintiff also produced in evidence two (2) letters dated 8th June 2009 and 20th August 2009 (P.exh.5 and P.exh.6) respectively that were addressed to the District Land Adjudication and Settlement Officer (DLSO), Kilgoris by one, J. N. Mutiso on behalf of the director of land adjudication and settlement on the deceased complaint. In the letter dated 8th June 2009, J. N. Mutiso had asked DLSO Kilgoris to let him know how the suit property came about. In the letter dated 20th August 2009, J. N. Mutiso referring to a report prepared by DLSO Kilgoris dated 26th June 2009 noted that the said DLSO had confirmed that the suit property was a sub-division of Plot No. 110 which is in sheet no. 4 and that the same was transferred to sheet no. 9 and registered in the name of the defendant. J. N. Mutiso took issue with the stand that the DLSO had taken that he could not correct the errors concerning the creation of the suit property, as the matter was in court and urged him to proceed to do so and advise the court accordingly.

16. In her evidence, the 1st plaintiff testified that the purport and effect of the foregoing correspondence is that Plot No. 232 was sub-divided fraudulently to create the suit property. In his evidence, PW2 while acknowledging the said correspondence termed the contents thereof as administrative decisions that had been made on the dispute that the deceased had with the defendant and which decisions did not settle the said dispute. In his evidence in cross-examination, PW2 stated that the letters by J. N Mutiso were merely investigative in nature and that he had no material pointing out to the wrongs that J. N Mutiso had referred to in his letters aforesaid. In their submissions, the plaintiffs advocates submitted that the letters aforesaid by J. N Mutiso were conclusive that the suit property was created irregularly and wrongfully and thereafter transferred from where it was created in sheet no. 4 to sheet no. 9 next to the suit

property. The plaintiffs' advocates submitted that the contention that the suit property was irregularly curved out of Plot No. 232 was settled beyond contest by the said correspondence. The defendant's advocates termed the said letters by J. N. Mutiso as inconsequential on the ground that J. N. Mutiso was not called as a witness and secondly, that the evidence adduced shows clearly that the suit property was not curved out of Plot No. 232.

17. I have considered the evidence tendered by the plaintiffs in proof of the alleged excision of the suit property from Plot No. 232 in light of the totality of the evidence tendered before me on the issue. Apart from the letters by J. N. Mutiso aforesaid (P.exb.5 and P.exhb.6), the plaintiffs did not tender any evidence to show that the suit property was curved from Plot No. 232. In the face of the other evidence pointing to the contrary, can this court take the said letters by J. N. Mutiso as conclusive on the issue as to whether or not the suit property was created illegally and fraudulently from Plot No. 232? To start with, I would like to point out that this court is not bound by the decision that was arrived at by J. N. Mutiso on the investigations that he or his office carried out on the complaint that the deceased had raised with his office regarding the creation of the suit property. J. N. Mutiso was not sitting as a court or as a quasi judicial body while undertaking the said investigations. I am not sure even whether he observed the rules of natural justice. I have no evidence that the defendant was involved in the said investigations. His correspondence relied on herein were all copied only to the deceased. It follows therefore that whatever decision that he arrived at must be considered together with all other evidence placed before the court and an independent determination made on the issue before the court namely, whether the suit property was curved out of Plot No. 232.
18. As rightly submitted by the defendant's advocate, J. N. Mutiso was not called as a witness to produce his letters aforesaid and justify the conclusions that he had arrived at. PW2 who gave evidence in his place as I have pointed out above, termed J. N. Mutiso's said letters as merely investigative. PW2 also testified that the decisions that were made by J. N. Mutiso could not be implemented. The contents of J. N. Mutiso's letter dated 20th August 2009 (P.exh.6) was based on a report by the DLSO Kilgoris dated 26th June 2009. Although PW2 referred to this report and stated in his evidence that he had the same in his possession, the same was not produced in court as an exhibit so that the court may have the advantage of reviewing its contents. PW2 testified that the said report was not even made by J. N. Mutiso himself. It was prepared by a Mr. Mwangangi who did not also appear as a witness. The court would have put some weight to the conclusion that was arrived at by J. N. Mutiso in his letter dated 20th August 2009 if the report on which it was based was produced in court and the court had confirmed that the same justified his conclusions.
19. The said report that formed the basis of J. N. Mutiso's letter dated 20th August 2009 on my reading of the said letter claimed that the suit property was created after the sub-division of Plot No. 110 and that it is supposed to be in sheet no. 4. The report also claimed that after the sub-division of Plot No. 110 and the creation of the suit property the same was carried to sheet no. 9 next to Plot No. 232. The findings in the said report are totally contrary to the evidence before me. First, it has not been explained how the suit property after being created upon sub-division of Plot No. 110 was again curved out of Plot No. 232. Again the defendant produced overwhelming evidence that was confirmed by the plaintiffs witness PW2 that the suit property came from the original adjudication and demarcation process at Ololchani and that the suit property is in sheet no. 9 and not in sheet no. 4. The defendant also placed convincing evidence before the court that the suit property is not a sub-division of Plot No. 110. See, defendant's exhibits 2, 3, 4, 6, 8a and 9.
20. I am satisfied on the evidence before me that the suit property was not curved from Plot No. 232. The evidence placed before the court by the defendant strongly points to the fact that the suit property is a product of the adjudication and demarcation process at Ololchani. The suit property could not have been created after the adjudication process since the year 2001 as pleaded in the plaint or in the year 2007 as stated by the 1st plaintiff in her evidence. The adjudication record (D.exh.2) and the rough book (D.exh.3) shows that the suit property was created during the adjudication process. The defendant also produced a map as D.exh.6 which shows that the suit property was in existence as at 22nd February 1988. It was also admitted by the plaintiff that there was an objection proceedings between the deceased and the defendant in the year 1990 in which

both Plot No. 232 and the suit property featured. The said objection proceedings appear at page 27 of the plaintiff's bundle of documents. The plaintiff's advocates have referred to the same in paragraph 21 of the plaintiffs' submissions. I cannot see how the suit property could have been created after the adjudication process was completed and at the same time be mentioned in the objection proceedings that were undertaken during the adjudication. Due to the foregoing, I am not satisfied that the plaintiff has proved that the suit property was curved out of Plot No. 232.

21. Issue No. 2;

Having reached the conclusion that the suit property was not curved from Plot No. 232, the determination of this issue will only be academic as it will not determine the outcome of this case either way. The plaintiffs claim herein is based on the tort of fraud. The defendant has been accused of colluding with the District Land Adjudication officials and fraudulently causing the suit property to be curved out of Plot No. 232 and transferred to the defendant. According to the plaintiff the alleged fraud was committed in the year 2001. The plaintiff filed this suit on 22nd May 2007. The defendant's advocates have submitted that the limitation period for tort under the Limitation of Actions Act, Cap 22 Laws of Kenya is 3 years from the date of the accrual of the cause of action. The defendant has contended therefore that this suit was filed out of time. I am not in agreement with the defendant's submission that this suit is time barred. According to the evidence adduced by the 1st plaintiff (PW1), the deceased discovered that Plot No. 232 had been sub-divided, a portion thereof given parcel No. 237 and registered in the name of the defendant in the year 2007. The Limitation of Actions Act, Cap 22 Laws of Kenya provides that in cases of fraud time starts to run from the date when the fraud is discovered. In this case the alleged fraud was discovered in the year 2007. The cause of action therefore accrued in the year 2007. This suit that was filed in the year 2007 is therefore not time barred.

22. Issue No. III;

I have held hereinabove that the suit property was not curved from Plot No. 232. The plaintiffs' entire case against the defendant was hinged on this issue. The plaintiffs having failed to establish that the suit property was curved from Plot No. 232, their claim must fail in its entirety. The plaintiffs are therefore not entitled to any of the reliefs sought in their amended plaint dated 23rd February 2012.

23. Conclusion

The plaintiffs have failed to prove their case against the defendant on a balance of probability. The plaintiffs' suit is dismissed accordingly with costs to the defendant.

Delivered, signed and dated at KISII this 31ST of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Oguttu-Mboya for the plaintiffs

Mr. Bosire h/b for Asati for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE

