



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 140 OF 2005

KOMPLEI LOMARIA KIPTUKUM.....PLAINTIFF

VERSUS

JOSEPH GICHINA MUHORO.....DEFENDANT

JUDGEMENT

INTRODUCTION

1. The defendant is the registered owner of Land Parcel No. West Pokot/Keringet "A"/44, (Suit land). The defendant bought the suit land from the plaintiff's father in the seventies. On 24/10/2005, the plaintiff filed an originating summons in which he seeks an order that the defendant is holding the title in his trust and that the trust should be terminated and the entire suit land registered in his name.

PLAINTIFF'S CASE

2. The plaintiff testified that he is the administrator of the estate of his father Lokeno Kiptukum alias Lomaria who died on 11/2/1982 (deceased). The deceased owned LR NO West Pokot/Keringet "A"/36 which was 20 acres. As at the time the deceased died, he had not obtained title to his land. The plaintiff contends that the defendant obtained title to the suit land fraudulently. He further contends that the suit land is a sub-division of LR West Pokot/Keringet "A"/36 which belonged to the deceased.
3. The plaintiff referred to a sale agreement signed by the deceased as well as the defendant and three other buyers and contends that his father never used to sign. That he only used to thumb-print and that therefore the signature appearing on the sale agreement was not appended by his father. The plaintiff called PW2 William Mwasio Chimbole who testified that he knew the deceased. This witness testified that he was a close friend of the deceased who used to slaughter cows whereas he used to slaughter goats. He testified that the deceased was illiterate and that he did not know how to sign. He testified that the deceased did not tell him that he had sold land to anyone. He went on to state that in Pokot tradition, a day is set one month after burial when people who have any claim from the deceased come up to state their claims. He testified that that ceremony was conducted but that the defendant never came up to say that he had bought land from the deceased.

DEFENDANT'S CASE

4. The defendant testified that in 1970 he was working with the Ministry of Water at Makutano. The deceased started selling his land. He and three others namely Edward Ng'ang'a, Hassan Talib and

Edward Mwangi bought various sizes of land from the deceased. When the process of land adjudication started in the area the four buyers claims were documented. The four including the deceased were given their respective parcels. The deceased's parcel was West Pokot/Keringet "A"/36. The defendant's parcel was West Pokot/Keringet "A"/44. The defendant then processed and obtained his title in 1986.

5. The defendant called DW2 Serah Karigo who testified that she has known the suit property since the 70's. Between 1976 to 1981 she was a tenant in one of the 9 mud walled rooms on the suit property. Seven rooms were demolished during tribal clashes of 1992. In 1993 she started cultivating the suit land as she took care of it on behalf of the defendant. In 2005 the area chief gave her a notice to stop cultivating the land. She contacted the owner of the land (defendant). She testified that she is cultivating the suit land to date.

ISSUES FOR DETERMINATION

6. The following issues were agreed by the parties. They are the ones to be determined.

(a) Does the defendant hold the land comprised in Title West Pokot/Keringet "A"/44 in trust for the plaintiff.

(b) Was the registration of Title No. West Pokot/Keringet "A"/44 into the defendant's name fraudulent?

- c. ***Was the registration of Title No West Pokot/Keringet "A"/44 a first registration?***

- d. ***Has the plaintiff been in occupation of any part of the land comprised in Title No. West Pokot/Keringet "a"/44?***

(e) If the defendant has been holding the land comprised in Title NO. West Pokot/Keringet "A"/44 in trust for the plaintiff, would such trust be terminated and the land transferred to the plaintiff?

(f) What would be the appropriate order on costs?

ANALYSIS OF EVIDENCE

7. The defendant bought the suit land in the 70's. He produced an agreement in which he and other three persons bought land from the deceased. This was before adjudication process started in the area. When the process of adjudication was completed, the defendant processed and obtained his titled on 25/2/1986. A copy of the certificate was produced as exhibit 4. The defendant's name was on the register as from 9/4/1984. The defendant's title was a first registration. This was not a sub-division of LR NO West Pokot/Keringet "A"/36 as contended by the plaintiff. The defendant produced a copy of green card [exhibit 2] which shows that the deceased was first registered as owner of LR West Pokot/Keringet "A"/36 on 9/4/1984. On 5/4/1990 the title was closed and new titles that is 1187 and 1188 came out. This was the first time the main title in respect of LR NO West Pokot/Keringet "A"/36 was sub-divided. It is therefore not true when the plaintiff claims that LR NO West Pokot/Keringet "A"/44 was a sub-division of LR West Pokot/Keringet "A"/36.
8. The plaintiff testified that after he obtained letters of administration in respect of the estate of his father, he sold part of his father's land to Faith Homes of Kenya Sun-flower Academy. Though he claims to have sold plot No. West Pokot/Keringet "A"/43, this is not true because the only subdivision of his father's parcel No. West Pokot/Keringet "A"/36 was done on 5/9/1990 and this was after the death of his father in 1982.
9. The plaintiff contended in his pleadings and testimony that the defendant obtained title to the land

in a fraudulent manner. In his evidence in court, he stated that he does not know how the defendant obtained title to the suit land. The defendant has demonstrated that he bought the suit land from the deceased. The sale agreement is contained in his list of documents filed in court. In that agreement, it is clear that the deceased sold part of his land to three other people a part from the defendant. All these three buyers have obtained their titles. All the three including the defendant bought their parcels through one agreement for sale. It defeats logic why the plaintiff only picked the defendant for this case. The plaintiff has not demonstrated any act of fraud against the defendant. The plaintiff has portrayed himself as a liar. He claimed that the suit land is a sub-division of LR West Pokot/Keringet "A"/36 which is not the case. West Pokot/Keringet "A"/36 was a first registration. The deceased died in 1982 at the age of 56 years. He sold the suit land in 1970 when he was relatively young. There is evidence that he was operating a butchery. It cannot therefore be argued that he did not know how to sign and that he could only thumb-print a document.

10. The plaintiff has never occupied the suit land. It is the defendant who has been utilising it since the 70's when he bought it. DW2 Serah Karigo is the one taking care of the suit land on behalf of the defendant. The first time the plaintiff attempted to come into the property was in 2005 when the area chief wrote a notice to DW2 asking her to stop cultivating the suit land. On 11/4/2006 the plaintiff's lawyer wrote a letter for him. This letter was meant to allow the plaintiff to cultivate the suit land. This shows that he was never in possession of the suit land. Following the plaintiff's attempts to go into the suit land, the area chief and the OCS Kapenguria wrote to the plaintiff warning him against interfering with the suit land. All these letters are attached to the replying affidavit of the defendant. There is also another letter dated 27/3/2006 addressed to DW2 warning her from cultivating the suit land. These letters were written by the plaintiff's lawyer after he had filed this case. It is therefore clear that the plaintiff has never been in possession of the suit land.

11. There is no basis upon which trust can be inferred in this case. The defendant obtained title to the suit land in a legal way. His registration could only be cancelled if it is shown that he obtained it fraudulently or through a corrupt scheme. In the present case, the plaintiff has not shown any act of fraud to which the defendant was a party. The defendant bought the land before the process of adjudication started in the area. When the adjudication process started, his rights were documented and he was accordingly registered as owner of the suit land. Lord Denning in the *case of Hussey -Vs- Palmer (1972) 3ALL E.R 70 (A)* had this to say regarding constructive trust;

"..... by whatever name it is described, it is a trust imposed by law wherever justice and good conscience require it. It is a liberal process founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. It is an equitable remedy where the court can enable an aggrieved party to obtain restitution".

12. The defendant in this case obtained the suit land in a legal way. There was no fraud involved. The plaintiff therefore has no basis to claim the whole or a share of the suit land. His claim is brought belatedly and has no basis at all. The defendant is not holding the suit land in trust for the plaintiff. The alleged trust cannot therefore be terminated as requested by the plaintiff as none is existing.

DETERMINATION

13. For the reasons stated hereinabove, I find that the plaintiff has failed to prove his claim to the required standards. The same is hereby dismissed with costs to the defendant.

Dated, signed and delivered at Kitale on this 27th day of October, 2014.

E. OBAGA

JUDGE

In the presence of Mr Teti for M/S Nyakibia for plaintiff and defendant in person. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

27/10/2014