



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 100 OF 2005

PHILIP KIMUTAI LANGAT.....PLAINTIFF

VERSUS

KIBET MAINA.....DEFENDANT

JUDGEMENT

1. Through a Plaint dated the 7th September 2007 and amended on 7th November 2007, the Plaintiff herein sought for judgment against the Defendant for an order that the transfer of land parcel number Kericho/Sosiot/604 in favour of the Defendant and the subsequent subdivision into parcels No. Kericho/Sosiot/1655 and 1656 is null and void ab initio. The Plaintiff further sought for Mesne profits, costs of the suit, interest therein at court rates and any other relief that the honorable court may deem fit to grant.
2. On the 14th October 2005, a Memorandum of Appearance was entered by S. B. Mbeche & Co. Advocates on behalf of the Defendant wherein they filed their defence on 2nd November 2005. However a Notice of Change of Advocates was filed by the firm of S. G Onganyi Advocates who then filed an undated amended defence and counterclaim in which the Defendant denied the allegations brought forth by the Plaintiff seeking instead that he be declared entitled to land parcel No. Kericho/Sosiot/1655 measuring 1.34 hectares.
3. After several adjournments and hearing of applications, the matter was finally set down for hearing on the 28th March 2012 wherein the Plaintiff testified as PW 1, relied and adopted his witness statement recorded on the 8th April 2011 as his evidence and produced the documents contained in his list of documents filed on the 11th April 2011 as Pf exh exhibits 1(a) (b) (c), 2, 3, 4, 5 and 6.
4. On cross examination the Plaintiff confirmed that he lived in Kaptoboiti sub-location in Kapatoboit. That his father's land was subdivided and they now lived on parcel No. 1656 which had been transferred to Kiplangat Arap Maina, his father. He confirmed that his father was alive and at home. He further testified that he knew Job Kibet Maina, the Defendant who was his father's brother and who had acquired the whole parcel of land in 1976.
5. He confirmed that he was born in 1978 and that their next neighbor was called Tesi Arap Sang, although he did not know the parcel number of his land. That Zacharia Maina was the son of the Defendant and that he occupied parcel No. 1655 which was adjacent to their land. That he had found Zacharia on that land when he was born but could not tell when he took possession of the same where he had lived for 34 years.
6. The Plaintiff further confirmed that his father lived with him on parcel No. 1656 and proceeded to testify that he was a graduate of the university Bachelor of Education. That he was not sure whether his father had ever complained about the land but that he had discovered an anomaly in the year 2001 but did not raise the issue until 2005 because he had still been in college and did not have money.
7. This testimony was that his uncle the Defendant had brought some men to their home although he did not know under what circumstance, wherein the Defendant had acquired the land. He confirmed that although he held his father's Power of Attorney, yet he had not taken it to the Lands office for registration. That his father had owned the original parcel of land No. 604 but that he did not know whether he had sold a portion of the same to the Defendant.
8. On re- examination, he confirmed that he was 27 years old at the time he filed suit in 2005. That he knew Zachariah Bett who was his cousin and who he had seen move into the land in the year 1986. That the Title to the land had been issued in 1977 after which the land had been subdivided into 2 parcels in 2001 resulting into land parcels No. 1655 and 1656.
9. He reiterated that his father was not aware that his uncle had obtained title a fact which he had discovered in the year 2001. That further, the documents he had produced did not show that his father had voluntarily transferred hi share of land to the Defendant. He denied that his father, who was now senile, had ever participated in any fraud and that he had been aware of.
10. The Plaintiff closed its case and despite the Defendant having been given ample opportunity to defend and present his case, he had

decided to give no evidence. The defence case was closed on the 6th December 2021 and the Plaintiff put in their written submissions.

The Plaintiff's submissions

11. The Plaintiff's case is that the Defendant herein fraudulently transferred to himself Title to the Plaintiff's land No. Kericho/Sosiot/604 by purporting to correct the name therein from Kiplangat Maina to Kibet Maina. That thereafter he had sub divided the same resulting into parcels being No. Kericho/Sosiot/1655 and 1656 wherein he took possession of the same.

12. The Plaintiff framed his issues for determination as follows;

- i. Whether the title was fraudulently transferred
- ii. Whether the Defendants subdivision of the land was lawful
- iii. Whether the Plaintiff is entitled to the prayers sought.

13. On the first issue for determination, it was the Plaintiff's submission, that his father was the lawful owner of parcel of land number Kericho/Sosiot/604. That sometime on the 30th and December 1976, the Defendant without any legal cause proceeded to transfer the said piece of land to himself on the pretext that he was correcting the name on the title. That he had then taken possession of 1.34 hectares of the land to the exclusion of the Plaintiff, purporting to be its registered proprietor. Subsequently he had caused the sub division of the suit land resulting into two parcels of land No. Kericho/Sosiot/1655 and 1656 to which the Plaintiff now seeks a nullification of the same and a declaration that the same were null and void.

14. On the second issue for determination, the Plaintiff relied on the provisions of Section 26 of the Land Registration Act to submit that the Defendant herein had unlawfully subdivided the parcel of land without the relevant consent from the Land Control Board. That his title was therefore defeated by fraud and the same ought to be canceled.

15. Lastly the Plaintiff, on the third issue for determination submitted that he had suffered loss and damages from the Defendant's fraudulent activities as he had been denied the use and enjoyment of his property. The Plaintiff went on to list the particulars of fraud committed by the Defendant as being; the procurement and subdivision of No. Kericho/Sosiot/604 without the relevant consent of the Land Control Board, execution of transfer documents in favour of the Plaintiff without his consent, and purporting to be the proprietor of parcel No Kericho/Sosiot/604 wherein he was not.

16. That the Plaintiff therefore was entitled to an award of damages for trespass and interest at court rates, as well as the cancellation of the illegal subdivision.

Determination.

17. I have duly considered the evidence adduced before court by the Plaintiff and find that the same was believable as it was backed by genuine documents and was not contested as the Defendant only appeared at the hearing of the Plaintiff's case but not his own case either in person or through Counsel. I find that this matter is one that pities a brother through his son against his brother the Defendant.

18. The Plaintiff, who brought suit against the Defendant by virtue of a General Power of Attorney dated the 8th August 2005, donated to him by his father Kiplangat Arap Maina is seeking for the cancellation of the registration of the Defendant as owner of parcels No. Kericho/Sosiot/1655 and 1656. The Plaintiff further seeks for Mesne profits, costs of the suit, interest therein at court rates, and any other relief that the honorable court may deem fit to grant.

19. It is evident that the Defendant herein entered appearance but did not defend the case. The suit is therefore undefended. However, even if this is the position, the Plaintiff still had the duty to formally prove his case on the balance of probabilities as required by law.

20. The Plaintiff in this matter, adopted his witness statement recorded on the 8th April 2011 as his evidence and produced the documents contained in his list of documents filed on the 11th April 2011 as Pf exh exhibits 1(a) (b) (c), 2, 3, 4, 5 and 6. I shall endeavor to produce the said statement in summary form for the benefit of this judgment.

21. The Plaintiff's statement is to the effect that he was a son to Kiplangat Arap Maina the registered proprietor of parcel of land known as No. Kericho/Sosiot/604. That the said Kiplangat Arap Maina had often complained of the fraudulent acquisition and possession of his land by his brother the Defendant herein whom in the year 2001 had proceeded to sub divide the same thus giving rise to parcels No. Kericho/Sosiot/1655 and 1656.

22. That subsequently the Defendant had transferred parcel No. Kericho/Sosiot/1656 to the Plaintiff's father and registered parcel No. Kericho/Sosiot/1655 to himself. That the fraudulent activity by the Defendant had been occasioned in the year 1976 through the amendment of the name Kiplangat Arap Maina as registered in the green card to read Kibet Arap Maina. Subsequently the Defendant had obtained title in 1977 and despite the Plaintiff's father having pleaded with him to correct the anomaly, he had been adamant.

23. The Plaintiff, in support of his case, produced copies of the green cards to land parcel No. Kericho/Sosiot/604, 1655 and 1655 as Pf exh 1(a) (b) (c) respectively and also a letter dated 14th December 1976 from the Ministry of Lands and Settlement which the Defendant had used to exchange the name registered on the green card with his name, as Pf exh 2.

24. Pf ex 3 was an affidavit sworn by the Defendant on the 18th April 2005 in Kericho High Court P&A 42 of 1993 wherein the Defendant was the Petitioner therein and in which proceedings show his name as Kibet Maina.

25. The Plaintiff also produced as Pf ex 4, an application purportedly written by the Plaintiff dated the 23rd December 1976 and addressed to the Land Control Board Belgut, seeking to correct the name in the register to read the Defendant's name. A letter dated the 4th July 2000 from the Land Registrar Kericho addressed to the Defendant summoning him to appear before the land Registrar in connection with the subdivision of parcel of land number No. Kericho/Sosiot/604 was produced as Pf ex 5.

26. Lastly, the Plaintiff produced as Pf ex 6 the General Power of Attorney dated the 8th August 2005, donated to him by his father Kiplangat Arap Maina.

27. The issues that come out clearly for determination are as follows.

- i. Whether there was fraud involved in the registration of the No. Kericho/Sosiot/604 to the Defendant.
- ii. Whether the subsequent subdivision of No. Kericho/Sosiot/604 into No. Kericho/Sosiot/1655 and 1656 was therefore null and void.
- iii. Whether the Plaintiff has any cause of action against the Defendant herein?
- iv. Who should pay the cost of the suit?

28. On the first issue for determination, having pleaded fraud and illegality on the part of the Defendant in the manner in which he had obtained the suit land, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

29. I have no doubt in my mind that the Plaintiff herein has distinctly pleaded the facts on which fraud is alleged against the Defendant. The next step however was for him to prove those allegations to the required standard. I will therefore interrogate this allegation of fraud as submitted by the Plaintiff as fraudulent conduct must be distinctively alleged and distinctively proved and that it was not allowable to leave fraud to be inferred from the facts.

30. Since the burden of proving fraud was left to the person claiming the same, the standard of proof was higher than the balance of convenience and to prove the Defendant's fraudulent conduct, the Plaintiff outlined the particulars of fraud as follows; the procurement and subdivision of No. Kericho/Sosiot/604 without the relevant consent of the Land Control Board, execution of transfer documents in favour of the Plaintiff without his consent, and purporting to be the proprietor of parcel No Kericho/Sosiot/604 wherein he was not.

31. I have considered the Green card to land parcel No. Kericho/Sosiot/604 herein produced as Pf ex 1(a) and find the undisputed fact as being that the suit land measuring 2.2 hectares was registered to the Plaintiff's father Kiplangat Arap Maina on the 2nd June 1972, on the 30th December 1976 the title was registered to the Defendant based on the false information given by the Defendant that he was also known as Kiplangat Arap Maina. This was made possible through the letter dated the 23rd December 1976 addressed to the Belgut Land Control Board which letter was written by the Defendant who appeared before the Board posing as Kiplangat Arap Maina while seeking to have the name appearing on the register substituted with his own name. Now if this was not the work of an ingenious fraudster then I do not know what fraud is.

32. Indeed the letter speaks for itself in the following words:

‘I certify that the above named Kibet Arap Maina otherwise known as Kiplangat Arap Maina appeared before me on the 17th day of December 1976 and being identified by Kipngeno Arap Rono I/D No 51192/Kip’

33. It is not in contention that subsequent to registering the original suit parcel of land No Kericho/Sosiot/604 into his name, the Defendant then caused the same to be subdivided into two being No Kericho/Sosiot/1655 and 1656 wherein he registered both parcels of land into his name on the 21st June 2001 and later registered parcel No. Kericho/Sosiot/1656 measuring 0.86 hectares to Kiplangat Arap Maina's name while he remained with parcel No. Kericho/Sosiot/1655 measuring a whopping 1.34 hectares! I find that the Plaintiff has established the onus placed on him.

34. Section 26(1) of the Land Registration Act which states as follows:

“the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.

35. It is therefore clear from the above provisions that title can be impeached under Section 26(1) (a) of the Act wherein it is found that it had been acquired through fraud and/or misrepresentation. Indeed The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, held as follows:

‘We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.’

36. Thus it is clear that whereas the law respects and upholds sanctity of title, it also provides for situations when title shall not be absolute and indefeasible.

37. Having established that the transfer of land parcel number Kericho/Sosiot/604 in favour of the Defendant and the subsequent sub-division into parcels No. Kericho/Sosiot/1655 and 1656 was null and void ab initio, this court pursuant to the provisions of Section 80(1) of Land Registration Act is mandated to rectify the register herein. The said Section of the Land Registration Act provides as follows:

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

38. The court has therefore powers under Section 80 of the Land Registration Act to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I am persuaded that the Defendant fraudulently obtained the Certificate of Title to parcel No. Kericho/Sosiot/604 wherein he subsequently sub- divided the same thus giving rise to parcels No. Kericho/Sosiot/1655 and 1656.

39. That being the case, I find that the Plaintiff, having proved his case on a balance of probabilities, and further owing to the ruling that was delivered on the 19th January 2007 on the issue of limitation of time, which ruling was not appealed against, the Plaintiff is entitled to the prayers sought in the Plaint. I thus enter judgment for him against the Defendant in the following terms:

- i. A Declaration that the transfer of land parcel No. Kericho/Sosiot/604 in favour of the Defendant and the subsequent sub-division into parcels No. Kericho/Sosiot/1655 and 1656 was null and void ab initio.
- ii. The title of the Defendant is hereby cancelled and I direct that his name be removed as proprietor of the land parcel No. Kericho/Sosiot/1655.
- iii. The name of Kiplangat Arap Maina be reinstated as the registered proprietor of the original parcel No. Kericho/Sosiot/604 as per the certificate of Registration dated 2nd June 1972 herein produced as Pf exhibit 1(a).
- iv. Costs to the Plaintiff at the lower scale since the suit was undefended.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 28TH DAY OF APRIL 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE