



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 918 of 2012

JACOB KIMETO & 3 OTHERS.....PLAINTIFF

VS

ANDREW K. KENEI.....DEFENDANT

JUDGMENT

1. This matter was commenced by the four plaintiffs by way of a plaint filed on the 9 February 2012. It is pleaded in the plaint that the plaintiffs are the beneficial owners of the parcel of land known as Kiplombe/ Kiplombe Block 10 (Growell) / 113 -120. These parcels of land are described in the plaint as "being a series of sub-divided portions of land currently closed for amalgamation vide land board consent dated 17/11/2011 and cumulatively measuring 3.14 Ha."
2. It is pleaded that on or about the 30/11/2011 and in utter disregard of the aforesaid amalgamation process and further in breach of a vesting order in Eldoret CMCC Award No.8 of 2005, the defendant illegally, unlawfully and fraudulently registered himself as owner of the land parcel Kiplombe/ Kiplombe Block 10 (Growell) /119 measuring 0.38 Ha and which land forms part of the aforementioned parcels of land under the amalgamation process.
3. The following particulars of fraud have been pleaded against the defendant
 - i. *Fraudulently and illegally presenting conveyance to register himself as the owner of all that parcel of land known as Kiplombe/Kiplombe Block 10 (Growell)/119 measuring 0.38 Ha.*
 - ii. *Fraudulently obtaining registration of the said suit parcel in his favour without proper procedure.*
 - iii. *Fraudulently and improperly altering the register of the suit parcel of land to remove a subsisting Court Order in Award No.8 of 2005.*
 - iv. *Fraudulently obtaining title in his name.*
 - v. *Fraudulently uttering a title to purport that he is the legal owner of all that parcel of land known as Kiplombe/ Kiplombe Block 10 (Growell) / 119 measuring 0.38 Ha.*
4. The plaintiffs have thus sought orders to cancel the registration of the defendant as the owner of the suit land, an order to ask the defendant to surrender the original title deed of the suit land and an order vesting the suit land in favour of the plaintiffs as tenants in common in equal shares. They have also sought a permanent injunction to restrain the defendant from any further use of the suit land.
5. The defendant was duly served with summons to enter appearance but he neither entered appearance nor filed defence. A hearing date was taken by the plaintiff and the matter proceeded before me ex parte, on 25 February 2013. Only the 2nd plaintiff testified.
6. It was his evidence that the four plaintiffs bought 8 acres of land in Growell Farm at the price of Kshs.

5,000/= per acre. They then took possession of the land and commenced to sub-divide the same. He testified that in the process of sub-division, the defendant took the title deed to one acre out of the 8 acres that the plaintiffs had bought. This parcel that the defendant took away was registered as Kiplombe/ Kiplombe Block 10 (Growell)/119 (the suit land). After the plaintiffs discovered this, they went to the office of the Lands Registrar who wrote a letter dated 5/1/2012 asking the defendant to return the title deed. The letter was produced as plaintiff's exhibit No. 1. The witness stated that there was no response to this letter and thus they filed the present suit.

7. PW-1 further testified that they had a previous dispute at the Kapseret Land Dispute Tribunal, being case No.8 of 2005. The Tribunal issued an award which was adopted by court. The award and the order of court that adopted the award were produced as exhibits 2 and 3 respectively.

8. Pursuant to the order, PW-1 stated that a survey of the land was done and a mutation form prepared. The form was produced as exhibit No.4. Consent of the land control board was sought but the mutation was however not registered as the defendant refused to surrender the title deed to the suit land which was among the parcels in the mutation form.

9. The defendant needed to surrender the title deed to this land parcel so that the mutation could be registered and new titles issued. PW-1 stated that they wish to have the title of the defendant cancelled so that "the 12 persons can get title". He stated that the parent title to the suit land was registered as land parcel No. 113 which was about 8 acres and that the defendant took one acre without the consent of the plaintiffs. PW-1 stated that the defendant was one of their members; that he was a shareholder to the 8 acres but that he is only entitled to 3/4 of an acre and not one acre.

10. PW-1 having testified, Mr. Komen, learned counsel for the plaintiffs closed the case of the plaintiffs. I gave a date for submissions and counsel opted to file written submissions with nothing to add orally. In his submissions, counsel for the plaintiffs averred that the plaintiffs have proved their case on a balance of probabilities. He argued that the defendant went against the wishes of the plaintiffs to obtain one acre of land instead of 3/4 of an acre. It was contended that the defendant fraudulently got himself registered as owner of the suit land contrary to the award in Eldoret Land Disputes Tribunal Case No. 8 of 2005.

11. It is with the above pleadings and evidence that I need to make a decision on the plaintiffs' case.

12. At the outset it will be appreciated that the pleadings point at four persons (being the four plaintiffs) arguing that the defendant has obtained title to the suit land by way of fraud and for that reason, they ask that the title of the defendant be cancelled. Fraud must not only be pleaded but must be proved as well. If the defendant truly obtained title by fraud, then this court has jurisdiction to cancel such title. This flows from the provisions of Section 143 of the Registered Land Act, (CAP 300) Laws of Kenya (repealed) that was operative when the title was issued and when this suit was filed.

13. I must say that the oral evidence of the plaintiffs' witness is very thin and I have not seen anything that points at the particulars of fraud pleaded in the plaint. This case concerns four plaintiffs but in the course of giving evidence, PW-1 alluded to the presence of 12 persons as being complainants. That is probably why PW-1 testified that the land bought was 8 acres and that the defendant was only entitled to 3/4 of an acre.

14. I suppose, because no evidence was led, that the argument of the plaintiffs is that 12 persons sharing 8 acres equitably would entitle each to 3/4 of an acre and not the one acre that was obtained by the defendant. If this hypothesis is correct it was incumbent for evidence to be led to prove the same. However, no such evidence was led. The identity of these 12 people was never revealed in the oral testimony of PW-1. These 12 people are also not parties to this suit, as there are only four plaintiffs, and PW-1 stated in his evidence that it was the four of them (the plaintiffs) who bought 8 acres of the suit land and the defendant later got registered wrongfully.

15. Neither was an agreement produced to show that there was an agreement to sub-divide 8 acres amongst 12 persons. Indeed, no agreement of sale was ever produced to demonstrate that the plaintiffs

purchased land at Growell Farm and that they are entitled to be registered as proprietors or that another person, to be specific, the defendant, has become registered in their place.

16. Save for the production of evidence that the defendant is the registered proprietor of the suit land which measures 1 acre, no evidence was led as to how the defendant obtained title to the suit land. I therefore have no evidence that demonstrates that the suit land was obtained fraudulently.

17. The documents produced in evidence by PW-1 do not also point at any fraudulent acquisition of land. It is pleaded that the suit land vested upon the plaintiffs by dint of the award of the Land Disputes Tribunal in Tribunal Case No. 8 of 2005. I have read the award and the order that adopted the award. The case at the tribunal is case No. 17 of 2003. It was between James Kiprono Kimeto as complainant and Jacob Kimeto as defendant. The complaint before the tribunal was that the complainant owned land parcel No. 120 at Growell Farm and that the defendant was given land parcel No.115, but that the defendant has refused to move to his land and has instead occupied the parcel No.120 owned by the complainant.

18. PW-1 herein gave evidence in favour of the respondent in the Tribunal. It is in his evidence before the tribunal that he alleges that the parcels NO.113-120 are not legal. I probably need to set out the full verdict of the Tribunal. The verdict was issued as follows :-

1. *That although the idea to give land to different locations from Keiyo by their leaders was noble and whereas all locations followed the correct instructions to select 8 people per 8 acres, only Kamwosor deviated from the norm and registered 12 people and also surprisingly the acreage reduced to six (6) instead of the 8 acres allocated.*

2. *After going through the evidence adduced by all the 4 witnesses called, and then statements of both parties, the tribunal observed that there was no alternative but to be fair to all the members since all were registered and should be considered. The tribunal therefore awarded each party 0.7 acre as every other member since this was an anomaly created by their leaders had Mr. James Kirpono Kimeto taken steps to attend meeting he would probably have corrected this anomaly.*

3. *The other land which was fenced off by Mr. Mining to be surrendered and annexed to the original eight acres but not 6 acres as had been done by the Chief of Chepkoilel Location, thus enabling each party to receive more acreage.*

4. *The district surveyor is instructed to liase with the committee and the D.O. who placed the caveat on the parcel to confirm the boundaries of the 12 members and issue them with individual titles.*

Present

Chairman: Philip Tuwei

Signed

Members: John Tanui

Signed

Jonathan Nyaoke

Signed

19. With respect, I think the Tribunal meandered away from the initial dispute which involved occupation of the land parcel No. 120 and went on to decide other matters that had little bearing on the dispute filed by the complainant. That aside, I have great difficulty in understanding the award which the plaintiffs herein claim vested the land parcel No.119 upon them.

20. Holding No.1 talks of 12 people being settled on 8 acres and the acreage reducing to 6 acres instead of the supposed 8 acres. Holding No. 2 states that to be fair to "all members" the tribunal awards 0.7 acres to every "member" yet the identity of these "members" is not disclosed. Holding No.3 talks of land fenced off by a person called Mr. Mining and the same is supposed to be surrendered and annexed "to the original 8 acres but not 6 acres ...". Finally Holding No.4 is a direction that the District Surveyor to confirm boundaries of "the 12 members and issue them with individual titles". This award was adopted by

the Magistrate's Court at Eldoret on 1st March 2006 as the judgment of the court.

21. It is this award that the plaintiffs now state vested the defendant's land upon them. I can see no such thing. I could of course say a lot about how the tribunal veered off the dispute before it, and how incomprehensible the award is, but let me summarise my feelings by stating that this is probably one of the classical cases that shows how inept the Land Disputes Tribunal was and a pointer as to why the Land Disputes Tribunal Act (Act No.19 of 1991) was repealed by the Environment and Land Court Act, 2011. That aside, I can see no vesting order vesting the defendant's land upon the plaintiffs in the award.

22. I have also seen the Mutation Form produced as an exhibit. I can see from the Mutation Form that 8 people proposed to amalgamate their land parcels from No.113 - 120 to form one land parcel proposed to be registered as parcel No.749. These 8 persons are Jacob K. Kimetto, James K. Kimetto, Kiprugut Bartile, Dorcas Kiprotich, William Chemweno, Ego Kebenei, David Komen and Andrew K. Kenei. The amalgamation is for 3.1 hectares.

23. I have seen the consent for amalgamation and sub-division of the land parcels No. 113-120 into 12 portions. That consent was issued upon an application by the Executive Officer of Eldoret Court, and although the application for consent was not annexed, I presume that it was pursuant to the award of the tribunal.

24. Again, I think the award of the tribunal has been misinterpreted. I repeat that the case before the tribunal was only one of trespass on the land parcel No.120. There was no case before the tribunal touching on the land parcels Nos. 113-120. The award does not mention the land parcels No.113-120 in the decision. One cannot assume an award to be describing certain land parcels when it does not mention them specifically. How it was ever interpreted that the award called for the amalgamation of the land parcels Nos. 113- 120, then a sub-division to twelve people who have not been specified, is beyond my comprehension. I am unable to interpret the award as vesting any land upon the plaintiffs. Even if the award did, the four plaintiffs, who are not representative of the 12 people who remain unknown, have not sued on behalf of the other 8 people who are not parties to this suit. I cannot therefore vest this land to the four plaintiffs as tenants in common in equal shares. What about the other 8 people ?

25. I think the whole of this suit was founded on a misinterpretation of an award of the Tribunal. That misinterpretation seems to have stemmed from the time the award was adopted as a judgment of the court. My own view about the award is that it is so incomprehensible that it is incapable of being executed.

26. None of the particulars of fraud pleaded have been proved. One of the particulars of fraud pleaded is that the defendant fraudulently and improperly altered the register of the suit parcel of land to remove the subsisting court order in award No. 8 of 2005. I have seen a copy of the search to the suit land. The defendant became registered as proprietor on 30.11.2011 and title deed was issued to him. There is an undated entry placing a restriction on the title of the land "until compliance with court order in award No.8 of 2005- CMC- Eldoret". I cannot tell whether the defendant obtained title in the face of the restriction or whether the restriction came after the plaintiff had already obtained title. It cannot therefore be said that the defendant altered the register to remove the subsisting court order. In any event, the order has not been removed from the register of the title. I can see that it is still existing.

27. The other particulars of fraud are not proven at all nor has there been any attempt to prove them. No evidence has been led that the defendant fraudulently and illegally presented conveyance to register himself as the owner of the suit land. Indeed no evidence at all was led as to how the defendant got registered as owner of the suit land in the first place. Neither was any evidence produced that the defendant obtained registration of the suit land without following proper procedure. Again there is even no evidence of the procedure that was followed by the defendant to obtain title so that I can say that that procedure was improper. Neither have I seen any evidence that the defendant uttered the title deed to the suit land purporting to be legal owner of the same when he is not.

28. In brief, what I am saying is that there is no evidence upon which I can cancel the title of the

defendant nor vest the suit land upon the plaintiffs. Neither can I issue any order of permanent injunction against the defendant to prevent him from dealing with the suit land.

29. The plaintiffs have failed to prove their case on a balance of probabilities. I have little option but to dismiss this suit. I will not make any order on costs as the defendant never participated in this suit.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF MAY 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

J.K. Ruto advocate of Ms A.K. Chepkonga & Co for the plaintiff.

N/A for the defendant who never entered appearance.