



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 183 of 2002

FUNDI K.BIWOTT.....1ST PLAINTIFF

ESTHER J. NG'ETICH.....2ND PLAINTIFF

VERSUS

ANTHONY K. LELEI.....DEFENDANT

JUDGMENT

The Defendant filed this suit on 13th December, 2002 seeking the following prayers:-

- a) A declaration that the registration of the Defendant as the sole proprietor of the land parcel No. Nandi/Ndalat/Settlement Scheme/2006 was fraudulent and the cancellation of the said registration with an effective order that the Plaintiffs and the Defendant be awarded the parcel of land in portions of 7 acres, 2 acres and 15.25 acres to the 1st Plaintiffs and the Defendant respectively.**
- b) Mesne profits**
- c) Costs of this suit**
- d) Interest on a), b) and c) above at court rates till payment in full.**
- e) Any further relief that the court will deem fit and just to grant.**

Summons to Enter Appearance were taken out on 24th March, 2003. The Defendant filed his statement of defence dated 14th January, 2004 in which he denied the Defendant's claim. He urged the court to dismiss the Plaintiffs' suit. His defence was filed by C. S. Lilan & Co. Advocates who later ceased acting for him after their application to that effect dated 7th October, 2005 was allowed by this court on 21st November, 2007.

The matter came up for hearing on 18th June, 2008. The Defendant was not present despite service. An affidavit of service was on record sworn by one Joseph Omallah Achode.

The 1st Plaintiff gave evidence. He informed the court that the 2nd Plaintiff was his sister and the Defendant was his brother. His claim was for the suit property NANDI/NDALAT Settlement Scheme/2067 measuring 25 acres which he claimed belonged to their late father who passed on in 1974. At the time of his father's death, he was 14 years old while the Defendant was 24 years old and had a family.

In his viva voce evidence he informed the court that his late father had three (3) wives. The Defendant held the suit land in trust for the minors. When they became of age, the Defendant denied them use of the land.

In an effort to resolve the dispute, the 1st Defendant reported the matter to the elders and a Tribunal was constituted to arbitrate over the matter. The Tribunal reached a decision and gave an award which was adopted as an order of the court. This was the Defendant's exhibit No. I

Mr. F. K. Biwot contended that they discovered that the Defendant registered the land in his name without their consent. This to him was fraudulent. He was pursuing his fair share of the land.

It was also Mr. Bowot's testimony that his late father had other parcels of land at Kapragon measuring 5 and 7 acres respectively out of which the Defendant sold 3 acres. He urged the court to cancel the title and the suit land be subdivided between the 1st, 2nd Plaintiff and the Defendant in the ratio of 15.25: 7 :2 respectively as per the award.

The 2nd Plaintiff Esther Jepkemboi Ng'etich testified that she was the sister of the 1st Plaintiff and confirmed all that the 1st Defendant had testified as true. She also informed the court that her father had three (3) wives:-

1. Jemeli Ng'etich who was her mother. She had other sisters who were all married.
2. Tabunei Ng'etich who had 5 children, three (3) boys and two (2) girls. She was the mother of the Defendant.
3. Chemunyei Ng'etich who had two (2) boys and one (1) girl.

She concluded by saying that the Defendant did not share the land with his other brothers. That closed the Plaintiffs' case.

I have considered the evidence presented before me by the Plaintiffs. I have also perused the exhibits adduced as evidence. The borne of contention is a piece of land NANDI/NDALAT Settlement Scheme/2067 measuring 25 acres. The certificate of title was not produced and I therefore cannot reach a finding that it is registered. The Defendant who claimed the land was registered failed to attend the hearing. The contention that this was a first registration and the title impeachable was not supported. Its trite law that he who alleges must prove.

The litigants are siblings. The deceased Mr. Ng'etich had three (3) wives. From the Plaintiffs' exhibit 1, the dispute was reported to the elders and an arbitration award reached.

The award by the tribunal of elders was that the suit land be re-allocated as follows:

- | | | |
|-----------------------|-------------|---------------------------|
| 1. Fundi K. Biwot | 7 acres | 1 st Plaintiff |
| 2. Esther J. Ng'etich | 2 acres | 2 nd Plaintiff |
| 3. Anthony Lelei | 15.25 acres | Defendant |

This award was recorded as an order of this court on 14th February, 2001. The Green Card has an entry (6) dated 19th February, 2002 that reads:

“Court Decree Entry No. 4 & 5 quashed by H.C.K MISC OF 19 OF 2001”.

This entry was not explained to me but my understanding and interpretation of it, is that the order

of the Tribunal adopted by the Court on 14th February, 2001 was quashed.

Article 159 (2) (c) of our Constitution recognizes alternative forms of dispute resolution. It provides;

“Alternative forms of dispute resolution including reconciliation, mediation and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)”

Clause (3) provides;

“Traditional dispute resolution mechanisms shall not be used in a way that:-

(a) Contravenes the Bill of Rights.

(b) Is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality or

(c) Is inconsistent with this Constitution or any written law”

All the parties participated in the arbitration/mediation that took place on 1st September, 2000. Parties put forth their respective cases and cross examined the witnesses. To my mind, no party was prejudiced by the mediation and the atmosphere was cordial. The elders reached a decision which in my view was reasonable and just. The Constitution encourages this mode of dispute resolution.

The Defendant’s claim that the suit land was wholly given to him to the exclusion of all others cannot be without doubt. In any event he declined to attend Court to give his version. He has nobody to blame. My comments in respect of the Constitution are obiter and this Judgment is based on the issues and evidence in this case.

The upshot of this is that judgment is hereby entered in favour of the Plaintiffs as prayed in prayers (a) only. The Defendant shall pay the costs of this suit to the Plaintiffs. Order accordingly.

Dated AND SIGNED at Nairobi ON this 24TH day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at ELdoret on this 31ST day of OCTOBER 2012

F. AZANGALALA
Judge

In the presence of: Mr. Kitiwa for the Plaintiff