



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE 111 OF 2007

KANYIKE OLE SADERA.....1ST PLAINTIFF

STEPHEN NTOKOIWAN KOIKAI.....2ND PLAINTIFF

VERSUS

RAPHAEL LEKISHON KOIKAI.....DEFENDANT

JUDGMENT

In a Plaint dated and filed on 25th May 2007, the Plaintiff sought the following orders -

- (a) An order that the title deed in the parcel of land known as CIS- MARA/OLOLUNGA/12199 issued to the Defendant be cancelled and the Register be rectified to reflect the 1st Plaintiff's as the lawful registered owner.
- (b) In the alternative, an order that the 2nd Plaintiff be registered as the owner of the said parcel of land known as CIS-MARA/OLOLUNGA/12199 and a title deed be issued in his favour.
- (c) the court does issue a permanent injunction restraining the Defendant from asserting any rights to the parcel of land herein.
- (d) Costs of this suit.

Through a Chamber Summons dated and filed on even date with the Plaint, and in quite a departure from the orders sought in the Plaint, the plaintiffs also sought injunctive orders restraining the Defendant from developing, constructing structures, selling, alienating disposing or in any other way whatsoever from dealing with the parcel of land comprised in the aforesaid letter, CIS-MARA/OLOLUNGA/12199 pending the inter partes hearing of the Application.

For inexplicable reasons that application was not heard to date – but an order standing over the application to 17th September 2007 and maintaining the status quo (*as of 25th May 2007*) was made on 11th June 2007, and issued on 4th September 2007. That order of status quo was the subject of an application for contempt of court dated and filed on 20th December 2012 but that application too was not prosecuted.

DEFENCE

In his Defence dated 5th June 2007 but filed on 6th June 2007, the Defendant denied the Plaintiffs' claim to the land, and also contended that the Defendant had acquired title to the land lawfully through the orders of a competent court, namely the court of the Principal Magistrate Narok and that this court

lacked jurisdiction, and that the Plaintiff's entire suit was bad in law, frivolous, scandalous, vexatious and an abuse of the court process, and that it discloses no reasonable cause of action, and that it ought to be struck out.

In the event an application was made to strike out the suit on the grounds of *res judicata*. The application dated 5th June 2007 (brought by way of a Preliminary Objection) was dismissed in a Ruling by Hon. Mr. Justice Kimaru dated 26th October 2007 as lacking in merit. No further applications were made, and the matter proceeded to hearing on 29th March 2011 when the Plaintiff gave his evidence, and closed his and the 2nd Plaintiff's case. The Defendant's case was heard on 6th June 2012, when the Defendant along with his 3 witnesses testified. Thereafter, counsel for the respective parties filed written submissions as well as authorities for and against the respective claims.

THE ISSUES

At the various stages of the preparation of this case for hearing, counsel for the plaintiff raised the following seven issues -

- (1) **WHETHER** the plaintiffs herein entered into agreement for the disposition of a parcel of land excised out of CIS- MARA/LOLUNGA/3492,
- (2) **WHETHER** the Plaintiffs executed the consent forms from the Land Control Board to sub-divide and sell a portion of the land herein,
- (3) **WHETHER** the 1st and 2nd plaintiffs obtained the consent of the Land Control Board, paid stamp duty and executed the transfer forms and applied for registration of the transfer and issuance of the title deed in favour of the 2nd plaintiff,
- (4) **WHETHER** the Defendant lawfully purchased the parcel of land herein from 2nd plaintiff or any other party,
- (5) **WHETHER** any sale/purchase by/to the Defendant was tainted by fraud,
- (6) **WHETHER** the fraud is a matter of Police and criminal department and whether this court has original jurisdiction, and
- (7) **WHETHER** the plaintiffs are entitled to the orders sought together with costs.

OPINION

To answer all of these issues except issue No. 6, the court will examine the evidence adduced by and/or on behalf of both the plaintiffs and the Defendants.

Issue No. 6 is two-pronged, **firstly** whether this court has original jurisdiction to determine this matter on the question of fraud and criminality and **secondly** whether that is a question for the Police Criminal Department.

The answer to this question is also two-pronged. Original jurisdiction to determine whether a matter discloses a criminal offence is for the Police Criminal Department and not this or any other court. The question whether this court has jurisdiction to determine whether the transaction between the plaintiffs and the Defendant is tainted with illegality is a question of evidence in this or any other proceedings and the court being seized of the matter has jurisdiction to determine that question and therefore entire suit.

THE FACTS/EVIDENCE

On the other issues what clearly emerged from the evidence of both the 1st Plaintiff (2nd plaintiff did not testify) and the Defendant and his witnesses is that before the issue of title to the suit land, the 1st

Plaintiff was by virtue of the Adjudication Register (under Section 24 of the Land Adjudication Act, Cap. 284, Laws of Kenya), the beneficial owner of the suit land which with other land became known as CIS-MARA/OLOLUNGA/3492 comprising approximately 24-25 acres. He only obtained title on 10th November, 2005.

Evidence also emerged that as the 1st Plaintiff did not himself live on the land, he had entrusted it to the care of his friend/clansman Njaanga Ololoigero “(Njaanga)” and eventually sold it to him for the sum of Ksh 90,000/= in the year 1995. Despite his protestations that he was only paid Shs 36,000/= which he purported to refund, he was in fact paid the entire purchase price of shs 90,000/=. Njaanga took possession of the land but as he too did not live on the land asked KONTURA OLE KOTIOKO (DW4), to look after the land and graze his cattle on it. However after a shortwhile, and by a Sale Agreement dated 28.07.2004 Njaanga too sold the land to Raphael Lekishon Koikoi (*the Defendant herein*), for shs 280,000/= which the Defendant also paid in full and he (DW4) together with Njaanga and the 1st Plaintiff showed the beacons to the Defendant.

While the Defendant was looking for documentation to perfect his title, the 1st plaintiff by an Agreement dated 5.12.2005 purported to sell the same parcel of land to the 2nd Plaintiff for the grand sum of Ksh 30,000/= per acre, or Ksh 300,000/= for the ten acre plot.

DW4 stated in his evidence that he and others were surprised later when cases were started against the Defendant, but as far as he was concerned and as he stood at the dock (*witness box*) the land belongs to Raphael Lekishan Koikoi (the Defendant).

DW4 reiterated his firm evidence that the land in question belonged to the Defendant. He was aware of two agreements, **firstly** when his late brother Njaanga handed over the land to him, and **Secondly** when they (*Njaanga and himself*), showed the shamba to Raphael Lekishon Koikoi (*the Defendant*). He relied on his brother's word, he was a witness at the hearings before the Land Disputes Tribunal, and that Njaanga told him he was selling the land.

However Njaanga died before completing the transaction with the Defendant, principally because the land had no title at the time, (*and was subject of Land Adjudication*). Being ill-advised, the parties went before the Ololunga Land Disputes Tribunal claiming that the land had been sold to him by the 1st Plaintiff. Notwithstanding the fact that dead men cannot sue, except through their legal representatives, Njaanga's widows, without first taking out Letters of Administration went before the said Land Disputes Tribunal. The Tribunal without having any jurisdiction over a contract for the sale of land purported to award a portion of ten acres to the Defendant – a person who was not a party but a witness to the proceedings before the Tribunal. An order made without jurisdiction is of course void and a nullity and it does not matter that it was adopted by the court of the Principal Magistrate at Narok. Courts do not sanction illegalities.

By this time however the Defendant had obtained consents from the Land Control Board and procured title to the ten acre parcel of land. Mr. Githui learned counsel for the plaintiff impugned the consent as fraudulent because it was purportedly issued on a date before the application therefor was made. There were in fact two sets letters of consent.

There was the application for sub-division made on 5th December 2005 and for which Letter of Consent was granted and issued to the 1st plaintiff two days later on 7th December 2005. The second Consent Letter dated 7th December 2005 concerned the Transfer of the sub-division by the 1st plaintiff to the second plaintiff for the consideration of Ksh 300,000/= as stated above.

There was however another application dated 10th and 14th February 2007 respectively for consent of the transfer of the same parcel of land CIS-MARA/OLOLUNGA/1219 by the First plaintiff to the Defendant. The consent is however dated 10th January 2007. This is the consent which counsel for the plaintiffs submits was evidence of fraud on the part of the Defendant. There was no explanation for these dates. Evidence by the Chairman of the Land Control Board who issued it might have been helpful. Without such evidence the consent letter of 10th January 2007 issued before the application made on 14th

February 2007, over a month later was an attempt to sanitize a situation which was getting out of hand for the Defendant. It could be construed as fraudulent. If this were the end of the dispute, the plaintiffs could have their orders. They however cannot do so.

They cannot have their orders because the 1st Plaintiff moved the lower court in Miscellaneous Application No. 1 of 2006, under Sections 27 and 28 of the Registered Land Act (*Cap. 300, Laws of Kenya*) and sought orders that the Land Registrar issue title to the plaintiff and in default the Executive Officer of the court execute documents to do so.

Unfortunately for the 2nd plaintiff, the learned Principal Magistrate after hearing the respective counsel for the parties ordered that Parcel No. 12199 be registered in the name of the Defendant Raphael Lekishon Koikai.

Notwithstanding the existence of the orders in Narok Misc. Application No. 1 of 2006, the plaintiffs rushed to the same court in Misc. Application No. 3 of 2006, and sought very similar orders as in Misc. Application No. 1 of 2006 (***Stephen N. Koikai vs. Raphael Koikai and the District Land Registrar***). Though the Defendant filed an appeal in the High Court in Nairobi, he abandoned it and proceeded to have himself registered as the proprietor of parcel No. 12199 as the lower courts had ordered. The Executive Officer of the court executed all the relevant documents and had title issued to himself. Did he do so fraudulently?

The answer to this question must be emphatically NO. From documentation tendered in evidence before court by both the plaintiff and the Defendants, it is the First Plaintiff who has been most dishonest in his dealings.

Out of the one plot he has collected shs 90,000/= from “Njaanga”, Kshs 300,000/= from the 2nd Plaintiff, and if his claim herein was allowed, he would cause a loss of Ksh 280,000/= to the Defendant and what is his reason? It is that no Land Control Board consent was obtained within the requisite period of six months for the transfer to “Njaanga”, and Njaanga having obtained no title, he could not deal with the Defendant on the plot. That is not so in law.

Firstly, the Land Control Act, (*Cap. 302, Laws of Kenya*) was never intended, and no statute is intended to be an instrument of fraud. **Secondly**, having paid the purchase price in full, and having taken possession, “Njaanga” had a valid and enforceable contract under the then Section 3 of the Law of Contract Act (*Cap. 23, Laws of Kenya*). “Njaanga” could lawfully pass that interest to the Defendant, and the Defendant ensured that he obtained title to the suit land.

It is clear from the Defence evidence that the 1st Plaintiff sold his land to his friend or clansman, the late “Njaanga”. Njaanga kept his wives well informed of his dealings. That was the evidence of DW2 Nareiyio Enol Olologei the late Njaanga's youngest wife, that before his death Njaanga sold the land to the Defendant. The Defendant paid the entire purchase price except small sums for survey and sub-division. The first plaintiff was therefore less than honest when he insisted that he was willing to refund “Njaanga” estate shs 36,000/= (*or at times sh 46,000/=*) which Njaanga had paid.

The totality of the situation is that the lower court had jurisdiction in terms of Section 159 of the Registered Land Act (*Cap. 300, Laws of Kenya*) to determine the question of title and made orders in favour of the Defendant. The value of the land was less than Ksh 500,000/= which is the lower court's limit on questions of title to land at the time of the transaction with Njaanga, and by “Njaanga” to the Defendant.

In this regard the Defendant obtained title not by virtue of the alleged “*fraudulent*” letters of consent but rather through the order of the lower court made and issued on 8th February 2007. That order was never set aside, and is valid and enforceable.

For those reasons, I find no merit in the plaintiff's suit and dismiss the same with costs to the Defendants.

Dated, signed and delivered at Nakuru this 12th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE