



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 185 OF 2010

MUSA KIPRONO NGETICH.....1ST PLAINTIFF
KIPLANGAT NGETICH.....2ND PLAINTIFF

VERSUS

CHEPYATOR CHERONO.....DEFENDANT

RULING

The applicants herein are Musa Kiprono Ngetich and Kiplangat Ngetich. They filed this suit against Chepyator Cheronno by a plaint dated 19/7/2010. The plaintiffs seek to have the defendant's title to Title Number BARINGO/PERKERRA-101/232 be annulled/cancelled and the plaintiffs be declared owners of 15 of the suit land which they will hold in trust for the family of the late Kiptalam Ngetich. Filed simultaneously with the plaint was the Chamber Summons dated the same date. It is expressed to be brought pursuant to **Order 39 Rules 1, 2 & 3** of the **Civil Procedure Rules** and **Section 3A** and **63(e)** of the **Civil Procedure Act**. The plaintiffs seek an order of injunction to issue against the defendant, or his agents be restrained from working or in any other way dealing with, alienating or disposing of L.R. BARINGO/PERKERRA-101/232 pending the hearing and determination of this suit. The plaintiffs claim to be the owners in trust, of 25 acres, and that the defendant fraudulently registered it without regard to the plaintiffs' beneficial interest. Both plaintiffs swore affidavits dated 19/7/2010 and a supplementary affidavit sworn by the 1st plaintiff in support of the Chamber Summons.

The defendant has opposed the application and filed a replying affidavit dated 5/8/2010 and a notice of preliminary objection dated 2/8/2010. The two plaintiffs are the administrators of the estate of Kiptalam Ngetich, as evidenced by the limited grant and letters of administration ad colligenda bona (MKN1), dated 26/3/2001. It is the plaintiffs' case that sometime back, the defendant paid a debit of Kshs.5,920/- on behalf of their late father, Kiptalam and the defendant was to get 10 acres out of the deceased's land at Kiptoin farm. When their father died, the defendant proceeded to obtain the title No. BARINGO/PERKERRA 101/232 and fenced off a portion of 25 acres instead of 10 acres thus fraudulently disinherited the plaintiffs of 15 acres of land. Despite efforts made to have the defendant vacate the 15 acres, the same have been fruitless. The plaintiffs further deponed that they realized the fraud committed by the defendant in 1979 and since then, they have never co-existed with the defendant peacefully. The matter was considered by the Land Disputes Tribunal Koibateck, the Provincial Appeals Tribunal which found in favour of their deceased father. They annexed the Tribunal's proceedings and award (MKI 1). It was denied that the matter was res judicata since the High Court faulted the procedure before the Tribunals and quashed the said decisions.

In his replying affidavit, the defendant deponed that he purchased the disputed land from the plaintiffs' father in 1979, and it was registered in 1983. He exhibited the copy of Title (CCI). That there was consent from Land control Board (CC2). The plaintiffs filed a dispute at the Provincial Appeals Board in 2001

(CC3) and the defendant was not satisfied with the Tribunal's verdict and he appealed to the High Court (CC4). The court quashed the verdicts of the Land Disputes Tribunal and the Appeals Committee. Mr. Ombati, counsel for the defendant urged that this matter is res judicata because the plaintiff should have appealed against the decision of the High Court. Counsel also urged that the plaintiffs have no capacity to bring this suit. It is also contended that this suit is time barred.

The onus is on the plaintiffs to demonstrate to this court that they have a prima facie case with a probability of success and that they will suffer irreparable loss which cannot be compensated in damages if an order of injunction is not issued. (see **GIELLA V CASSMAN BROWN (1973) KLR**).

The plaintiffs have brought this suit and application on the strength of the limited grant of letters of administration ad colligenda bona, dated 26/3/2001. The same was issued, for the sole purpose of institution of a civil suit and a land dispute case at the Land Disputes Tribunal regarding parcel of land known as Plot No. 9 PERKERRA SCHEME 101. It is evident that the plaintiffs filed a case with the Land Disputes Tribunal, and the defendant appealed against the decision of the Tribunal to the Provincial Land Disputes Appeals Tribunal CCM3 – which decision was in favour of the plaintiffs. Dissatisfied with that decision, the defendant appealed to the High Court in HCC No.69/02 and on 14/3/2010 J. Emukule quashed both the decisions of the Land Disputes Tribunal and the Appeals Tribunal on the ground that the Appeals Tribunal and Land Disputes Tribunal lacked jurisdiction to adjudicate on questions of rectification, cancellation of title which are a preserve of the High Court of Kenya under **Section 143** of the **Registered Land Act**. There is no evidence that the plaintiffs have filed any other case. The grant clearly allows the plaintiffs to file a civil suit and an application at the Disputes Tribunal in relation to Plot 9 PERKERRA SCHEME 101. The claim which was before the Land Disputes Tribunal and Appeals Tribunal relates to the same parcel of land as the one in this civil suit, that is BARINGO/PERKERRA 101. It is my view that the limited grant does give the plaintiffs the capacity to institute these civil proceedings.

Is the suit res judicata? For a suit to be res judicata, the issues therein should have been directly or substantially in issue in a former suit between the same parties or between parties under whom any of them claims and which issue has been heard and finally decided by a court of competent jurisdiction. The issue before the court has never been heard and determined on merit by a court of competent jurisdiction. The decisions of the Tribunal and Provincial Appeals Board were quashed as the bodies lacked jurisdiction to determine the said issues. The matter cannot be said to have been heard and determined on the merits. The tribunals were not competent to determine these issues. This suit is not res judicata.

Is the suit time barred? The land in issue is said to have been sold as far back as 1979. The title deed was registered on 22/9/1983, it is really not clear when the issue of fraud was first raised by the plaintiffs. The plaintiffs exhibited the proceedings before the Land Disputes Tribunal but they do not bear any dates. The deceased who entered into an agreement with the defendant died in 1997. It is the defendant's contention that the deceased never raised the issue of the defendant having hived off more land than was agreed upon, but that the plaintiffs came up with the claim after their father's death and the registration. The defendant has exhibited the title deed and consent of Land control Board which has allegedly signed by the deceased, dated 20/7/79. It is not denied that the deceased had sold some land to the defendant. The consent of the Land Control Board does not indicate the acreage that was to go to the defendant. From the documents before the court, the land issue has been ongoing since the deceased died in 1997 though it was before the wrong forum. There being allegations of fraud, **Section 143** of the **Registered Land Act** allows for cancellation and rectification of title on account of fraud or title. Whether or not the suit is time barred will be an issue for determination at a full hearing. Fraud can take long to unearth and that is an issue to be determined by evidence at a full hearing.

In my view, this is a serious issue that needs determination at the hearing of the suit and since this is a land issue which is very sensitive, I find that the plaintiffs have demonstrated that there is a serious issue of alleged fraud that can only be determined at the main hearing with the parties adducing evidence. It cannot just be wished away. If an order of injunction is not granted, there is the danger of the land being put out of reach of the plaintiffs and the substratum being destroyed. This being land, the plaintiff will

suffer irreparably. The court therefore grants an order of injunction to preserve the subject matter pending hearing and determination of the suit in terms of prayer 3 of the Chamber Summons dated 19/7/2010. Costs will be in the cause.

DATED and DELIVERED this 25th day of March, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Rodi for the plaintiffs.

Mr. Ombati holding brief for Mr. Onkoba for the defendant.

Kennedy – Court Clerk.