



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Civil Case 14 of 2007

ELIJAH KIPTUI TARAGON.....PLAINTIFF

VERSUS

GEORGE KIPTANUI CHEBOI.....DEFENDANT

R U L I N G

By a plaint dated 24th January 2007 the plaintiff pleaded at paragraphs:

3. That the plaintiff is a member of Koitogos estate limited legal owners of LR NO(S).1839, 5553/4,3709 and 6145/5.
4. That the plaintiff was listed under group four (4) listed as No.137 which he was entitled to get 19 acres from the company after sub-division.
5. That the plaintiff was allocated his portion of land from the company and given new numbers as plot No.201 and 264 at Kibomet Farm.
6. That in 1986 the plaintiff appointed his caretaker Mr. George Kiptanui Cheboi with instruction to take care and cultivate on behalf of the plaintiff.

7. That on 7th January 1986 the defendant forged a letter claiming that it was written by the plaintiff to transfer the land to himself.
8. That the plaintiff has never at any given time transferred the land to the defendant or he has never written any letter to the defendant regarding transfer of the land.
9. That the plaintiff reported the matter at DCIO's office at Kitale, whereby the defendant was charged with cheating contrary to section 315 and forcible retainer contrary to section 91 of CPC Laws of Kenya, the Criminal Case NO.5003 of 2001 at Kitale Law Courts.
10. That the Criminal Case No.5003 of 2001 was terminated by the Attorney General whereby, the plaintiff filed a Civil appeal case NO.606 of 2002 at Kitale SPM's court and later civil appeal No.24 of 2003 at Kitale High Court which is still pending.
11. That the plaintiff filed a civil case No.152 of 2000 at Kitale High Court against the defendant for forgery which is still pending before the court.
12. That the defendant through fraudulent means, went ahead and paid survey fees using his name as George .K. Taragon and George Kiptanui Cheboi in receipt No.599 of 10th September 1987, receipt No.718 of 2nd August 1988, receipt No.137 of May 1989 which indicate that he was the son of the plaintiff and yet he is not.
13. That in the memorandum of the company article seven (7), the committee passed a resolution that no share will be given without original receipt, unless the member produce valid receipt and no transfer will be registered unless transferee avails in person.
14. That all cases that have been filed in court by the plaintiff were against the fraudulent and forgery means the defendant used to acquire the plaintiff's portion of land.
15. That the defendant is a son of the plaintiff's brother, he trusted him and authorized him to pay survey fees on behalf of the plaintiff.
16. That the plaintiff seeks for an order to set aside all pending cases and pave way for this case to proceed without interference from the previous cases.

17. That the plaintiff also seeks for an order to evict the defendant from Plot No.264 Kibomet Farm.
18. That the plaintiff seeks for an order that the defendant be restrained from interfering with the plaintiff's portion of land and be compelled to pay all damages.

19. That the defendant was registered illegally as the sole proprietor of Plot No.264 and 201 at Kibomet Farm.

20. That the two title deeds of Plot No.201 and 264 bears the names of the defendant instead of the plaintiff.

21. That there are several cases pending in court as indicated in this plaint.

22. That the cause of action arose at Kibomet Farm, within the jurisdiction of this honourable court.

Against that backdrop of pleadings the plaintiff sought:

- (a) An order for the defendant to give vacant possession of the Plot No.264 Kibomet Farm and that all title deeds bearing the name of the defendant be cancelled.

- (b) All pending cases be set aside.

- (c) Costs of this suit and interest thereon.

By a defence dated 5th September 2007, the defendant pleaded at paragraphs:

3. The defendant denies that the plaintiff is a member of Koitogos estate limited and invites the plaintiff to strict proof thereof.

4. The defendant denies that the plaintiff was listed under any group from the Company.

5. The defendant denies paragraph 5 of the plaint.
6. The defendant denies being appointed as a caretaker by the plaintiff.
7. Paragraph 7 and 8 are denied and the defendant avers that the plaintiff disagreed with the directors of the company and sold and transferred his shares to the defendant and which the plaintiff did acknowledge in writing.
8. In reply to paragraph 9 and 10 the defendant avers that the same was terminated for lacking any proper basis for its prosecution.
9. The defendant admits the presence of Kitale High Court civil case No.152 of 2000 and avers that the prayers and claim sought therein are denied and counter-claimed.
10. The defendant denies any fraud in having the suit property surveyed.
11. The defendant avers that the plaintiff duly signed a letter transferring his shares to the defendant and the same was acceptable under the Memorandum of the Company for giving out any share(s).
12. The defendant avers that he moved into the suit land upon purchasing it from the plaintiff and like all other members applied and paid for the process of title deeds which were issued in 1993.
13. The defendant denies that the title for the suit lands was issued fraudulently or erroneously and avers that since it is a first registration, the same cannot be impeached.
14. The defendant avers that he has occupied and worked the suit land since 1986 without any secrecy, evasion, or interruption for over 15 years.
15. The defendant avers that the present suit is an abuse of the court process in view of the admission by the plaintiff of pending cases over the same subject matter between the parties herein and shall at the first instance apply for the same to be struck out.

16. The defendant avers that the plaintiff's suit is time barred contrary to the limitation of actions act and a preliminary objection shall be raised on that.
17. The defendant avers and maintains that the plaintiff is not entitled to the prayers and orders sought in the plaint.
18. No demand or notice of intention to use was issued.
19. Jurisdiction is admitted.

By a Notice of Preliminary Objection dated 2nd August 2009, the defendant raised the following points of law:

- (a) The suit is Resjudicata and an abuse of the court process in view of Kitale SPMCC NO.606 of 2002 between the same parties and seeking similar order which suit was struck out giving rise to Kitale HCCA No.24 of 2003 which was struck out for being incompetent, and further Kitale HCC 152 of 2000 is still pending for hearing.
- (b) The orders sought cannot legally avail.
- (c) The defendant's registration is a 1st registration and which is indefeasible in law.

The defendant was served by W. Wanyonyi Advocate as per affidavit of service sworn on 20th January, 2010. The defendant failed to attend the hearing which went on ex-parte pursuant to leave of the court.

Mr. W. Wanyonyi advocate argued that on the basis of averments in the plaint it is clear as day light that there is a pending suit being Kitale HCC NO.152/2000. The other suits were, however, dismissed.

In the premises the filing of the current suit during the pendency of Kitale HCC No.152/2000 offends the mandatory provisions of section 7 of the Civil Procedure Act as the subject matter is the same and the prayers sought are also similar.

Counsel thus contended that the current sought orders ought to be stayed in the circumstances.

Section 7 of the Civil Procedure Act provides:

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

I have scanned through the application and the annexures thereto. I have also scanned through the various complaints and defences alluded thereto – the relevant pleadings. Having done so, I find as a fact that the subject matter is the same and the prayers sought are also the same. Accordingly, this suit offends the provisions of section 7 of the Civil Procedure Act.

Accordingly there shall be orders of stay of Kitale HCC No.14/2007 pending the hearing and determination of Kitale HCC No.152/2000.

Dated and delivered at Kitale this 3RD day of FEBRUARY 2010.

N.R.O. OMBIJA
JUDGE