



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 205 of 2007

MUKURIA OLE KOILEKEN.....1ST PLAINTIFF

HELLEN NOOSEYIA MERIKI.....2ND PLAINTIFF

VERSUS

JOHN MWANGI KOILEKEN.....DEFENDANT

JUDGMENT

The 1st plaintiff herein, Mukuria Ole Koileken is the original owner of land parcel No. NAROK/CIS-MARA/NAIRAGIE ENKARE/229 which has since been subdivided into two portions namely, NAROK/CIS-MARA NAIRAGIE ENKARE/1043 and NAROK/CIS-MARA NAIRAGIE ENKARE/1044, with the first parcel No. 1043 being registered in the name of the defendant, John Mwangi Koileken. The second plaintiff is the only daughter of the 1st plaintiff and sole dependant.

The plaintiffs have sued the defendant in respect of the said parcels of land on the grounds, mainly, that between the years 2004 and 2007 the defendant fraudulently, through deceit and misrepresentation, caused the original parcel of land to be subdivided into two parcels and the larger portion to be registered in his name.

The plaintiffs pray that the following reliefs do issue as per the plaint dated 17th September 2007 and filed on the same date;

- a) A declaration that the subdivision of land parcel No. NAROK/CIS-MARA NAIRAGIE ENKARE/229 into two parcels namely NAROK/CISMARA/NAIRAGIE ENKARE/1043 and 1044 and the subsequent registration of parcel No. NAROK CIS-MARA/NAIRAGIE ENKARE/1043 in the name of the defendant was unlawful and fraudulent.
- b) An order do issue cancelling the title in respect of NAROK/CIS-MARA/NAIRAGIE ENKARE/1043 registered in the name of the defendant and in its place, a new title be issued in the name of the 1st plaintiff and/or the 2nd plaintiff to hold in trust for the 2nd plaintiff's children.
- c) A permanent injunction restraining the defendant, his agents or any other person acting on his behalf from selling, disposing of or in any other manner interfering with the land parcel No. NAROK/CIS-MARA/NAIRAGIE ENKARE/1043.
- d) Costs of the suit plus interest.
- e) Any other or further relief as the court may deem just and expedient to grant.

The 2nd plaintiff claims to be the only legal heir of the 1st plaintiff being his only child. The fraud allegedly committed by the defendant herein, is particularised in the plaint as follows:

- i)The defendant fraudulently misled the 1st plaintiff to sign documents without advising him of the nature, purport and consequence of such signing.

- ii) Fraudulently misleading and deceiving the 1st plaintiff to sign documents without explaining the contents thereof.
- iii) Fraudulently and through deceit taking advantage of the 1st plaintiff's illiteracy and having him sign documents relating to the suit land.
- iv) Fraudulently having the suit land subdivided into two parcels and the bigger portion transferred to himself and registered in his name.
- v) Fraudulently disinheriting the 2nd plaintiff.

The 1st plaintiff avers in paragraph 9 of the plaint that he is illiterate and that although he signed documents at the request of the defendant he did so believing that the documents were needed to facilitate the procurement of medication that the 1st plaintiff needed. He avers that he had no intention whatsoever of transferring the suit land to the defendant.

After being served with the summons to enter appearance and the plaint, the defendant entered appearance through counsel but failed to file a defence. The suit then proceeded ex parte, this court having satisfied itself that a hearing notice had been duly served on the defendant's advocate. Four witnesses, including both plaintiffs testified.

PW1, the plaintiff testified that he was the duly registered owner of the suit land which he knew as plot No. 229, originally measuring 10 acres but which had been subdivided into two portions. The 1st plaintiff, who clearly appeared senile (*he stated for instance that he was 10 years old*), told the court that he is the one who effected the subdivision. He was however clear in his testimony that he never gave the defendant any land and to his knowledge there was only one Title Deed to the same. He testified that at one time the defendant took him to the Narok Land's Office and made him sign certain papers under the pretext that the same were necessary, to enable the 1st plaintiff "*block anyone from taking away (the) land.*"

The 1st plaintiff also testified that the defendant also made him sign other papers under the pretext that the 1st plaintiff's signature was required on certain documents necessary for the procurement of medication. The 1st plaintiff was quite firm in his testimony that he has never had any intention to subdivide his parcel of land or to give any part thereof to the defendant, always holding the intention to bequeath it to his only daughter Helen (*the 2nd plaintiff*). His desire is that the court assists him in order that the defendant does not "*snatch*" the land from him and "*to remove him from there.*"

PW2 (*the 2nd plaintiff*) testified that she was the custodian of the original land certificate in respect of NAROK/CIS-MARA/NAIRAGIE ENKARE/229 which she showed to the court. With the court's permission she produced a copy thereof which was admitted in evidence and marked "*Ex P.1*". It shows the registered owner as her father, the 1st plaintiff. The 2nd plaintiff also testified that she conducted an official search of the property and discovered that the land had been subdivided into two portions, namely, parcel No. 1043 measuring 7 acres, registered in the defendant's name and parcel No. 1044 measuring 3 acres registered in the 1st plaintiff's name. She produced the search certificates as exhibits.

The 2nd plaintiff testified further that she was the only child of the 1st plaintiff and that she had 10 children 5 of whom were married. She testified that she lived on the suit parcel with her children and wished that the ownership of the land be restored to the 1st plaintiff. She stated that she was the sole beneficiary of her father's estate in the event of his passing. PW3 and PW4 gave similar testimonies confirming that the 2nd plaintiff was the only child of the 1st plaintiff and that she lived with him on the suit land together with her children. They both knew the defendant but not as a relative.

As earlier stated in this judgment, the defendant never filed a defence to the action. Despite being served with a hearing notice, the advocates on record for the defendant did not attend court for the hearing either. After the hearing, counsel for the plaintiffs applied to file written submissions which I have duly considered.

That the 1st plaintiff was the duly registered owner of NAROK/CIS-MARA/NAIRAGIE ENKARE/229 is clearly demonstrated by the certificate of lease issued in his name on 23rd March 1984. He held the land as an absolute proprietor. There is undisputed evidence that the said document of title has always been under the safe custody of his daughter PW2. That the suit land was subdivided into two portions on 5th February 2007 and the original title closed is supported by the certificates of official search submitted in evidence as exhibit 2 and 3.

Although it appears in the certificate of official search No. 51/07 that reference is made to a court order issued in Narok SRM'S Court Civil Suit No. 82 of 2004, it is unclear what the same was in respect of. The defendant having not filed any defence to counter the plaintiffs' allegations that he obtained a subdivision of the parcel of land and caused himself to be registered as owner through fraud, I have no reason to disbelieve them. I therefore find that their suit against the defendant is proved on the balance of probabilities and must succeed on the basis of their unchallenged evidence.

Accordingly I allow the plaintiffs' claim and make the declaration prayed for in prayer (a) of the plaint. The injunction sought in prayer (c) of the plaint is also granted. I order and direct that the title issued to the defendant in respect of parcel No. NAROK/CIS-MARA/NAIRAGIE ENKARE/1043 be cancelled and in its place a new title in the name of the 1st plaintiff be issued. The 2nd plaintiff, having not sought to be made her father's guardian cannot be registered as co-owner as sought. The defendant shall deliver immediate possession of the parcel No. NAROK/CIS-MARA/NAIRAGIE ENKARE/1043 to the plaintiffs, who shall also have the costs of the suit with interest thereon at court rates.

Dated signed and delivered at Nakuru this 23rd day of July 2009

M. G. MUGO

JUDGE