



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 443 of 1999

JAMES BINSAI CHEPSONGOL.....PLAINTIFF

VERSUS

JOSHUA CHEROP SONGOL.....1ST DEFENDANT

ALFRED MBUGUA KARANJA.....2ND DEFENDANT

JUDGMENT

The plaintiff, James Binsai Chepsongol filed this suit in his capacity as the administrator of the estate of the Chepsongol Cherop – Deceased. The plaintiff sued Joshua Cherop Songol (*hereinafter referred to as the 1st defendant*) and Alfred Mbugua Karanja (*hereinafter referred to as the 2nd defendant*) seeking a declaration order of this court that the transfer of all that property known as plot No.52 Rhonda in Rift Valley Enterprises Ltd farm (*hereinafter referred to as the suit land*) by the 1st defendant to the 2nd defendant was irregular, unlawful, fraudulent and therefore null and void. The plaintiff further sought an order of permanent injunction to restrain the defendants jointly and severally, from alienating, wasting, disposing, transferring, dealing or in any manner whatsoever interfering with the suit property.

The basis of the plaintiff's claim is that he avers that the suit property which measures about one acre is the property of Chepsongol Cherop – Deceased (*hereinafter referred to as the deceased*). The plaintiff avers that on the 14th May 1997, the 1st defendant in collusion with the 2nd defendant had the suit property fraudulently transferred to the 2nd defendant for a consideration of Ksh.450,000/= without the consent or authority of the administrators of the estate of Chepsongol Cherop – Deceased. The plaintiff pleaded the particulars of fraud on the part of the defendants. He, *inter-alia*, averred that the 1st defendant had fraudulently and unlawfully presented himself as the lawful owner of the suit property and had thereby purported to transfer the same to the 2nd defendant. He averred that the 1st defendant had unlawfully forged the signatures in the transfer documents in respect of the suit land and thereby unlawfully transferred the same to the 2nd defendant. He further averred that the defendants fraudulently and unlawfully altered the title documents in respect of the suit land and thereby deprived the estate of the late Chepsongol Cherop of the suit property. The plaintiff averred that as a result of the fraud committed by the defendants, the estate of the deceased was unlawfully deprived of the said suit property. He therefore urged the court to allow the prayers sought in his plaint.

The 2nd defendant filed a defence. He denied that he had fraudulently colluded with the 1st defendant so as to have the suit land transferred to him. He denied the averments by the plaintiff that he had colluded with the 1st defendant to have the suit land fraudulently transferred to him. He averred that he was a *bona fide* purchaser for value with one Henry Kariuki Kamau of the 1st defendant's 75 shares in Rift Valley Enterprises Ltd for the sum of Ksh.450,000/= which entitled them to the suit property. The 2nd

defendant averred that the 1st defendant had represented to him that he had inherited the suit land from the deceased, who was his late father. He averred that after he purchased the suit land, He took possession of the same and had developed the said property at a substantial cost. He prayed for this court to find in his favour and dismiss the plaintiff's suit with costs. The 1st defendant did not file any defence. At the hearing of the suit, it transpired that the 1st defendant died on the 4th January 2000. No effort was made either by the plaintiff or the 2nd defendant to have the 1st defendant substituted as a party to this suit. For the reasons that will become apparent later in this judgment, neither the plaintiff nor the 2nd defendant was interested in having the 1st defendant substituted as a party in this suit.

The plaintiff called four witnesses in support of his case. He testified as PW1. The other witnesses were PW2 Wilson Cherop, PW3 Reuben Chirchir and PW4 Josephine Kobilo Cherop. It was the plaintiff's case that the deceased was a member of Rift Valley Enterprises Ltd. The deceased had purchased 75 shares in the said company which was equivalent to one acre of land (*copy of the share certificate produced as plaintiff's exhibit No.1*). It was the plaintiff's case that the deceased was allocated plot No.52 at Rhonda Estate measuring the said one acre. The deceased died on the 15th May 1986. The plaintiff with his brother Edwin Cherop were issued with letters of administration in respect of the deceased's estate on the 16th August 2002 (*letters of administration produced as plaintiff's exhibit No.4*). It was the plaintiff's case that in 1997, without the authority of the administrators of the deceased's estate, the 1st defendant (*who is the younger brother of the plaintiff*) sold the suit land to the 2nd defendant. It was the plaintiff's case that the 1st defendant forged documents to enable him achieve his objectives of selling the said property to the 2nd defendant. The plaintiff testified that the 1st defendant stole the title documents in respect of the suit land and thereafter purported to transfer the suit land to the 2nd defendant.

It was the plaintiff's case that among the documents that were forged by the 1st defendant was a letter from the Assistant Chief of Terik Sub-location dated the 7th May 1997 (*letter produced as plaintiff's exhibit No.2*). It was the plaintiff's case that at the time the said letter was said to have been written by the area Chief, there was no substantive holder of the office of the Assistant Chief of the said sub-location. PW3 Reuben Chirchir, the current Assistant Chief of Terik Sub-location confirmed that on the 7th May 1997 the office of the Assistant Chief of Terik Sub-location was vacant. He testified that the former Assistant Chief who retired was known by the name Rotich Chepyego and not Joseph R. Chepyego. He testified that the rubberstamp that appeared in the said letter was not the genuine rubberstamp of the Assistant Chief. He therefore testified that the said letter was a forgery.

PW2 Wilson Cherop, a brother to the plaintiff and the 1st defendant denied that he had given authority to the 1st defendant to sell the said parcel of land. He denied that he had signed the document which was produced as *plaintiff's exhibit No.3*. He testified that the signature that purports to be his on the said document was a forgery. Similarly, PW4 Josephine Kobilo Cherop, the wife of the 1st defendant, denied that she had authorised the 1st defendant to sell the suit land to the 2nd defendant. She testified that the signature that appeared in the said document purporting to be hers was also a forgery. It was the plaintiff's case that the 1st defendant had secured the transfer of the said property to the 2nd defendant by fraud. The plaintiff testified that when he learnt of the purported sale of the suit property, he made a report to the police and specifically to the CID office. His report to the police resulted in the arrest of the defendants. He testified that the police managed to retrieve the sum of Ksh.270,000/= from the 1st defendant which amount was surrendered to the Area Chief. The plaintiff reiterated that the 1st defendant have no authority to sell the suit property to the 2nd defendant because he had not obtained letters of administration to administer the estate of the deceased. He further testified that the 1st defendant did not have the authority of the family to sell the said parcel of land. He therefore urged the court to grant the orders prayed in his suit with costs.

The 2nd defendant called two witnesses in support of his case. He testified as DW1. He testified that he knew the deceased. He recalled that during his life time, the deceased had indicated to him that he would

sell the suit land to him should he be interested in buying the same. He recalled that in 1997, the 1st defendant approached him with his friend called Henry Kariuki Kamau. He testified that the 1st defendant told them that the family of the deceased would be interested to sell the suit land. He negotiated with the 1st defendant and the purchase consideration of Ksh.450,000/= was agreed for the said parcel of land. He testified that he paid Ksh.225,000/= whilst his partner Henry Kariuki Kamau paid the balance of Ksh.225,000/=.

The 2nd defendant testified that before he entered into the agreement dated the 14th May 1997 (*which was produced as defence exhibit No.2*), he confirmed from the 1st defendant that his family had authorised him to sell the suit property. He recalled that he saw the letter from the chief and the letter from the family members of the 1st defendant which convinced him that the 1st defendant had authority to sell the said parcel of land. He testified that after he and his partner had paid the purchase consideration in full, the 1st defendant introduced them to the officials of Rift Valley Enterprises Ltd whereby the shares which appeared in the name of the deceased were transferred to the 2nd defendant and his partner. The 2nd defendant testified that he was issued with the title deed in respect of the suit land on the 2nd June 2000. He reiterated that he was issued a title deed in respect of his portion of land measuring half an acre. The title deed in respect of **Nakuru Municipality Block 29/52 (Rhonda)** was produced as *defence exhibit No.1*.

The 2nd defendant testified that after he had paid the purchase consideration, he took possession of his portion of land and commenced development thereof. He testified that so far, he had built several single room permanent houses for rental purposes. He testified that he had used more than Ksh.2 Million to develop the said property. The 2nd defendant called DW2 Pius Isaiah Khaoya, a Land Economist who produced a valuation report of the said property as *defence exhibit No.5*. Mr. Khaoya noted that the value of the improvements and development on the said parcel of land was Ksh.4 Million. He noted that the 2nd defendant had developed several single roomed houses on the said parcel of land numbering more than forty rooms. The 2nd defendant testified that he was a genuine and *bona fide* purchaser of the said property without notice of any fraud that could have been perpetrated by the 1st defendant. He urged this court to dismiss the plaintiff's suit with costs.

After the close of both the plaintiff's and the 2nd defendant's case, the plaintiff and the 2nd defendant agreed to file closing written submissions in support of their respective cases. Both the plaintiff and the 2nd defendant filed the said closing written submissions. I have carefully read the pleadings filed by the parties to this suit. I have further considered the evidence that was adduced by the parties to this suit in support of their respective cases. I have considered the written closing submissions filed by the plaintiff and the 2nd defendant. The issues for determination by this court are as follows;

- (i) Who was the owner of parcel No.52 Rhonda at the time the agreement dated the 14th May 1997 was executed?
- (ii) Was the transfer of the suit land to the 2nd defendant by the 1st defendant tainted by fraud?
- (iii) Was the 2nd defendant a purchaser for value of the suit property without notice?
- (iv) What are the appropriate orders that would be issued by this court in respect of the present suit?

As regard to issue (i), both the plaintiff and the 2nd defendant testified that the suit property was owned by the deceased. The deceased was the owner of the 75 shares in Rift Valley Enterprises Ltd which entitled him to own a parcel of land equivalent to one acre at Rhonda farm. The deceased was allocated parcel No.52 at the said farm measuring one acre. The deceased died in 1986. It is apparent from the evidence of the plaintiff that no letters of administration in respect of the deceased's estate were applied for until 2002 when the plaintiff and his brother Edwin Cherop were issued with the said letters of administration. The said letters of administration was produced as *plaintiff's exhibit No.4*. It was issued on 16th August

2002. It is therefore clear that the plaintiff filed the present suit before he had obtained letters of administration to administer the estate of the deceased.

When the 1st defendant purported to have sold the suit land to the 2nd defendant on the 14th May 1997, he did not have authority to sell the same. He had not obtained letters of administration to administer the estate of the deceased. However, it is evident from the testimony of the plaintiff and his witnesses that the suit land was at the time not registered. The 2nd defendant was aware of the status of the suit land at the time the 1st defendant offered to sell the same to him and his partner Henry Kariuki Kamau. The 2nd defendant insisted that the 1st defendant obtains the requisite authority from the members of his family to enable him sell the said parcel of land. The 1st defendant, who was the son of the deceased, showed the 2nd defendant two letters. The said two letters were purported to have been written by the area assistant chief of Terik Sub-location which purportedly recognised the 1st defendant as the beneficiary and the heir of the said parcel of land. As was evident from the testimony of the plaintiff and PW3, the said letter was an obvious forgery. Having evaluated the evidence adduced in this case, it is evident that the office of the assistant chief of Terik sub-location was vacant at the time the said letter is purported to have been written. Further, it is clear that the letter which was purportedly written by the members of the family of the deceased was similarly forged. PW2 and PW4 testified that they did not sign the said letter purportedly authorising the 1st defendant to sell the suit property. The two letters were produced as *plaintiff's exhibit No.2 and 3* respectively.

When the said letters were presented to the 2nd defendant by the 1st defendant, the 2nd defendant was convinced that the 1st defendant had the authority of the family to sell the said parcel of land. After the agreement in respect of the suit land was executed on the 14th May 1997, the 1st defendant handed over the documents in respect of the suit land to the 2nd defendant and his partner. It is apparent from the testimony of the plaintiff that the 1st defendant took the said documents in respect of the suit property without the authority or consent of the members of the family of the deceased. The 1st defendant then introduced the 2nd defendant and his partner to the officials of Rift Valley Enterprises Ltd. The name of the deceased was deleted from the register and substituted by the names of the 2nd defendant and his partner Henry Kariuki Kamau.

I have evaluated the evidence as regard the circumstances under which the said parcel of land was transferred to the 2nd defendant and his partner by the 1st defendant. It is clear to this court that although the 1st defendant did not have authority to deal with a property of a deceased person having not obtained letters of administration, the 2nd defendant in the circumstances of this case was a purchaser for value without notice. The 2nd defendant genuinely believed that the 1st defendant had the authority and consent of the family of the deceased to transfer the said property to him and his partner. The 2nd defendant insisted that the 1st defendant obtains the consent of the family members and of the local provincial administration in writing before he could enter into any written agreement with the 1st defendant.

The plaintiff and the 2nd defendant testified that the deceased was close to the 1st defendant during his lifetime. It is therefore evident that the 2nd defendant was duped by the 1st defendant into believing that the 1st defendant had indeed inherited the said parcel of land. Having evaluated the evidence adduced, I do not subscribe to the proposition of the plaintiff that the 2nd defendant colluded with the 1st defendant to have the said parcel of land fraudulently transferred to the 2nd defendant and his partner. I therefore hold that although the 1st defendant did not have authority to sell the said parcel of land to the 2nd defendant, from the nature of the transaction that took place, the 2nd defendant was a purchaser for value of the said parcel of land without notice of any defect as to title.

When the defendant testified before court he produced the title in respect of part of the suit land. The said title is registered as **Nakuru Municipality Block 29/52 (Rhonda)**. The said title is issued under the **Registered Land Act**. The plaintiff acknowledged that the parcel of land which he referred to as plot

No.52 Rhonda in Rift Valley Enterprises Ltd farm is now registered as **Nakuru Municipality Block 29/52 (Rhonda)**. The plaintiff did not make any effort to amend his plaint to reflect the change of status of the suit land. As it were, the plaintiff is now claiming a parcel of land which is no longer in existence. This court cannot grant orders in vain. Further, it is clear to this court that the plaintiff filed this suit in respect of a parcel of land of a deceased person without first having obtained letters of administration. In **Trouistik Union International & Anor. Vs Mrs. Jane Mbeyu & Anor. CA Civil Appeal No.145 of 1990 (Nairobi) (Unreported)** the Court of Appeal held that no person has legal authority to bring a suit in respect of a deceased person's estate before taking letters of administration. If such a suit is filed, then the suit is incompetent from the date of its inception.

Taking into consideration the totality of the evidence adduced in this case, it is clear that although the plaintiff has established that the 1st defendant used fraud to transfer the said suit land to the 2nd defendant, the plaintiff failed to establish to the required standard of proof on a balance of probabilities that the 2nd defendant was party to or was aware of the said fraudulent acts of the 1st defendant. I do hold that the 2nd defendant established that he was a purchaser for value of the suit land without notice of the fraud by the 1st defendant. Further, I do hold that the plaintiff, at the time he filed this suit in 1999, did not have authority to file any suit on behalf of the deceased's estate as he had not obtained the requisite letters of administration. Further, the parcel of land that the plaintiff mentions in his plaint, is not of the same description as the parcel of land that the 2nd defendant is currently occupying. This court cannot therefore issue any declaration in respect of a parcel of land that is not the subject matter of the current suit.

Further, as stated earlier in this judgment, when the 1st defendant died, the plaintiff made no effort to have the 1st defendant substituted as a party to this suit. It is the opinion of this court that the non substitution of the 1st defendant by the plaintiff was deliberate since the plaintiff desired to have this court decide the case without reference to any role that could have been played by the 1st defendant in the entire transfer saga. If the 1st defendant had been substituted as a party in this suit, this court would not have hesitated to make appropriate orders so as to compensate the estate of the deceased for the wrongful acts committed by the 1st defendant in depriving the estate of the deceased the suit property. The plaintiff took a calculated risk in failing to substitute the 1st defendant. The said gamble failed.

The upshot of the above reasons is that the suit filed by the plaintiff lacks merit. It is hereby dismissed with costs to the 2nd defendant.

DATED at NAKURU this 28th day of June, 2007.

L. KIMARU

JUDGE