



**Chebet & another v Chesang (Environment and Land Appeal
32 of 2022) [2022] KEELC 15211 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL 32 OF 2022
L WAITHAKA, J
DECEMBER 7, 2022**

BETWEEN

MARGARET JEMATIA CHEBET 1ST APPELLANT

JOSEPH KIPRUTO 2ND APPELLANT

AND

SUSANA KOMEN CHESANG RESPONDENT

*(Appeal against the Judgment of Hon. C. A. Kutwa (SPM)
in Iten Environment and Land Case No. 23 of 2020)*

JUDGMENT

Background

1. By a plaint dated June 21, 2013 the respondent herein instituted a suit in the lower court seeking a declaration that she is the lawful owner of the parcel of land known as Moiben/Chebara/562 (suit land); a declaration that the defendants actions complained of amount to interference to her proprietary rights; an order for immediate eviction of the defendants from the suit land and a permanent injunction to restrain the defendants from trespassing, cultivating, accessing and/or otherwise encumbering and taking possession of the suit land.
2. The plaintiff/respondent's suit was premised on the grounds that she is the registered owner of the suit land measuring 3.2 hectares; that the defendants have carried out destructive activities in the suit land and that despite, having been issued with notice to vacate the suit land, the defendants have refused to heed the notice rendering the suit necessary.
3. The defendants (appellants) filed a statement of defence and counter-claim dated May 5, 2021, through which they contended that the registration of the respondent as the proprietor of the suit land is subject of a trust in their favour; that they have stayed in the suit land for 43 years; and that the respondent



has come to court with unclean hands (with intention of defrauding them of their interest in the suit land). The defendants also claimed that the plaintiff/respondent represented their family in Land Disputes Tribunal case over parcel No.422 where she sought a share of the land from her father; that the Tribunal awarded 3.2 hectares to her; that the plaintiff/respondent and the 1st defendant's mother, Anacleta Chesang, (deceased) jointly owned the suit land and that the name of Anacleta Chesang was fraudulently struck out of the register.

4. In the counterclaim, the defendants/appellants sought an order of revocation of the registration of the plaintiff/respondent as the proprietor of the suit land and their registration as the joint owners of 4 acres of the suit land.
5. Upon considering the cases urged by the parties to the suit, the Trial Magistrate (TM) entered judgment in favour of the plaintiff/respondent. In so doing, the TM observed:-

“In the instant case, although the defendants' evidence was based on allegations that the plaintiff had illegally occupied the whole portion of the suit land after deleting her late mother's name from the transfer documents, she had not strictly speaking challenged the authenticity of the title held by the plaintiff. The award in case No.1 of 1993 which is the primary document shows that the land was awarded to the plaintiff. The 1st defendant's late mother was not party to the dispute neither did she participate in the proceedings.

I do therefore find that the plaintiff has proved her case on a balance of probabilities. I do allow the claim in terms of paragraph 9 of the plaint. The defendants are given sixty (60 days) to move from the suit land. I do also dismiss the defendants' counterclaim with costs to the plaintiff.”

6. Aggrieved by the judgment, the defendants appealed to this court on the grounds that the learned TM erred by:-
 1. Making a judgment based on his own speculation or imaginations and ignoring the facts and evidence that was placed before him during hearing of the case;
 2. Making findings without any basis in law and outside the scope of his jurisdiction;
 3. Finding that the respondent had proved her case on a balance of probabilities and allowing her claim while disregarding their evidence to the effect that the respondent's claim is tainted with irregularity, fraud and that she unprocedurally acquired the suit land;
 4. Holding that the appellants did not produce any evidence in support of their claim that the respondent unlawfully and unprocedurally acquired proprietorship of the suit land yet there was so much documentary evidence produced by the appellants during defence hearing;
 5. Rejecting the proceedings and award of the Tribunal produced by the appellant and at the same time admitting the respondent's award of the Tribunal without giving reasons thus taking obvious sides against the appellants, applying double standards and failing to discharge his judicial duties judiciously;
 6. Rejecting the proceedings and award of the Tribunal produced by the appellants which confirm the suit land is family land, that the respondent was claiming land that belonged to her mother and that the land did not exclusively belong to the respondent;



7. Refusing to give weight to the testimony of the Land Registrar, Elgeyo Marakwet County, to the effect that cancellation of entries in the land register is by making of new entries and not deleting by crossing off;
 8. Ignoring the evidence on record through testimony of the Land Registrar, Elgeyo Marakwet county, that cancellation of entries in the land register was not done by the land registrar, thus a work of fraud and/or irregularity;
 9. Failing to make proper findings based on the evidence on record; and
 10. Failing to consider the appellants' counterclaim.
7. The appellants pray that the appeal be allowed, judgment of the lower court be set aside or varied and judgment be entered in their favour in the appeal and in the case before the lower court.

Duty of first appellate court

8. This being a first appeal, it is the duty of this court to reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses and make due allowance in that respect. See the case of *Selle & another v. Associated Motor Boat Co. Ltd & others* (1968) EA 123.
9. In discharge of that duty, I have carefully evaluated the case before the lower court.

Evidence adduced before the lower court

10. The plaintiff/respondent who testified as P.W.1 relied on her statement dated 21st June 2013 after it was adopted as her evidence-in-chief. She also relied on her list of documents of an even date and a further list of documents dated June 22, 2021. The documents namely, copy of search dated June 26, 2012; copy of title deed; receipt for payment in respect of search; copy of elders' arbitration proceedings dated March 11, 1992 and copy of endorsed award by the Resident Magistrate's court dated April 16, 1993 were produced as Pexbt 1 to 5 respectively.
11. The plaintiff/respondent informed the court that she applied for and got issued with a title deed in respect of the suit land in 1995 and that the 1st defendant/appellant is her niece, her sister's daughter.
12. In cross examination, the plaintiff/respondent informed the court that the 1st defendant/appellant is her niece while the 2nd defendant/appellant is the 1st defendant/appellant's husband; that her father had two wives; that she sued her father to give her a share of her mother's share of the family land; that her mother, Kemoi (deceased) had four children; that she is the one living in the suit land; that the 1st defendant/appellant also lives in the suit land; that she came to the suit land in 1990s; that the name of the 1st defendant was at some point included in the green card and that on the consent to transfer there were two names, hers and that of her sister.
13. In re-examination, the plaintiff/respondent stated that the title deed for the original parcel of land was in her father's name; that she is the only one who went to the Land Control Board and that she had never seen the green card with the two names. Further, that she does not know how the other names were cancelled.
14. The 1st defendant/appellant who testified as DW1, relied on her statement dated 5th May, 2021 after it was adopted as her evidence-in- chief. She also relied on her list of documents of an even date. The documents listed in the list of documents to wit; limited grant of letters of administration ad litem in respect of the estate of Anacleta Chesang issued on 31st May 2018; certificate of death of Anacleta



Chesang; Green Card dated November 11, 2014; Green Card dated November 19, 2014; Official search dated February 7, 2018; mutation form dated May 5, 2014; application for land control board consent dated January 12, 1995; letter of consent dated December 22, 1993; arbitration and resolution by area chief and Chebiemit Division Arbitration case dated March 11, 1992 and award adopted on April 16, 1993 after they were admitted in evidence as Dexbt 1 to 10 respectively.

15. The 1st defendant/appellant informed the court that her late mother was a witness in the Tribunal case; that her mother's name was included in the proceedings of the land control board; that the green card shows her mother's name and that she lives in the suit land. She has lived in the suit land for over 5 years and is asking for an equal share of the suit land (4 acres).
16. In cross examination, she stated that she was not born on the land, that her father is not on the land; that her mother's name is cancelled in the green card and that her mother did not have an identity card. She further stated that she does not know how her mother's death certificate was given; that the case before the Land Disputes Tribunal was between the plaintiff/respondent and her grandfather; that the land was given to the plaintiff and she does not know why the green card was altered.
17. In re-examination, she stated that the Tribunal case was on behalf of other children and that her mother was a witness in the case.
18. The Land Registrar, Robert Sanduki, who testified as DW2 informed the court that he knows the suit land; that according to records held in the lands office the plaintiff/respondent is the registered proprietor having been registered on January 24, 1995; that the 1st defendant/appellant's name featured in the green card but was deleted; that no explanation was given for the cancellation; that registration to the plaintiff/respondent was by way of transfer; that Chesang Ego transferred the land to the plaintiff and that the defendant's name is deleted in the application for transfer.
19. In cross examination, he stated that a Registrar has to countersign on an entry. He could not tell why the defendant's name was deleted. According to him, it is not the Registrar who deleted the entry.
20. Noting that the plaintiff is the registered proprietor of the suit land, he stated that the plaintiff/respondent has all the rights over the suit land. He also acknowledged that it is the Registrar who keeps the records at the registry but stated that the consent to transfer is misplaced.
21. He reiterated his statement that the 1st defendant/appellant's name is deleted from the transfer and clarified that from the documents, Chesang Ego transferred the land to the plaintiff/respondent.
22. It is on the basis of the foregoing evidence that the Trial Magistrate entered the impugned judgment in favour of the plaintiff/respondent.
23. Having evaluated the evidence, I find the sole question for determination to be whether the Trial Magistrate erred by holding that the plaintiff/respondent had proved her case on a balance of probabilities.

Analysis and determination

24. It is common ground that the plaintiff/respondent is the registered owner of the suit land. The circumstances surrounding her registration as the owner of the suit land is that she sued her father, Gregory Chesang Ego, claiming her mother's share of the suit land. As attested by the proceedings of the Arbitration case produced by the defendants/appellants as Dexbt 10, the Tribunal awarded the plaintiff/respondent 3.2 acres from parcel number 422 that belonged to her father.
25. The award of the Tribunal was subsequently adopted as an order of court leading to subdivision of parcel number 422 into 561 and 562 with 562 being registered in the name of the Plaintiff/respondent.



26. The totality of evidence adduced in the case before the lower court comprised in the oral testimonies of the plaintiff/respondent; the 1st defendant/appellant and the Land Registrar as well as the documents adduced in evidence suggest that the plaintiff/respondent's registration of the suit property is subject of a trust in favour of herself and the estate of her mother. This is so because the claim before the elders was premised on her mother's share of the family land as opposed to personal entitlement to it. The 1st defendant's mother participated in the proceedings and from her testimony, it is clear that, though not a complainant, she supported the plaintiff/respondent claim on the ground that she had rights to claim their mother's share. Wondering why their father had changed his mind, she stated that their father had promised that he would give them their mother's share of the family land. The application for land control board dated January 12, 1995, signed by the plaintiff/respondent and thumb printed on behalf of the 1st defendant/appellant's mother (Anacleta by an undisclosed person) as well as entries in the green card showing that the suit land was initially registered in the name of the Plaintiff/respondent and her deceased sister, in my considered view, are evidence that the registration of the plaintiff/respondent was not absolute but subject to a trust in favour of the estate of her mother.
27. The evidence adduced in the case before the lower court shows that the plaintiff/respondent's mother had four children, among them Anacleta Chebet, the 1st defendant/applicant's mother.
Irregular/fraudulent alteration of documents relied on to transfer the suit land and the register of the suit land
28. The evidence adduced in the lower court also points to a case of irregular or fraudulent alteration of the documents relied on to effect transfer in respect of the suit property, in particular, the application for consent of the land control board was altered by deleting the 1st defendant/appellant mother's name. The register of the suit property was also altered by cancellation of the name of the 1st defendant/appellant mother. No explanation was offered by the plaintiff/respondent or the Land Registrar of the circumstances and/or reasons for the said alterations or changes.
29. In the absence of any explanation by the custodian of the records or the beneficiary of the cancellations, the plaintiff/respondent, this court determines that there was irregular or fraudulent interference with the registration of the suit property with the intention of painting the plaintiff/respondent as the absolute proprietor of the suit property yet the intention was to make her a trustee of the estate of her deceased mother.
30. The upshot of the foregoing is that the 1st defendant/respondent proved that the suit property is subject of trust in her favour. However, having determined that the registration of the plaintiff/respondent is subject to a trust in favour of the estate of her deceased mother; and noting that the estate had four beneficiaries, I am not satisfied that the 1st defendant/applicant has made up a case for being awarded half share of the suit land.
31. Having determined that the 1st defendant/applicant has not made a case for entitlement to the whole of the suit land, doing the best I can do in the circumstances, I find and hold that she is entitled to 2 acres of the suit land being an equal share of the estate of her grandmother. The plaintiff/respondent shall continue holding the remainder of the suit land in trust for herself and the undetermined estate of her mother.
32. This being a family dispute parties shall bear their own cost of the appeal and the case before the lower court.
33. Orders accordingly.

Dated, signed and delivered at Iten this 7th day of December, 2022.



L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Kigen for the Appellant.

Ms. Lagat for the Respondents

Christine Towett: Court Assistant

