



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC NO. 67 OF 2015

JOHN CHELIMO (Suing as the administrator of the Estate of JOSIAH

KANDIE CHELIMO (deceased)PLAINTIFF

VERSUS

AFRICA INLAND CHURCH KENYA TRUSTEES 1ST DEFENDANT

NAKURU DISTRICT LANDS REGISTRAR.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced through plaint filed on 11th March 2015. Subsequently, an amended plaint was filed on 12th June 2015. The plaintiff averred in the amended plaint, that he was the beneficial proprietor of the parcel of land known as Miti Mingi Mbaruk Block 3/826 Barut (the suit property), which property belonged to the estate of Josiah Kandie Chelimo (deceased). He further averred that in the year 1985, the deceased bought 25 shares from Kalenjin Enterprises Limited, a company that was buying land and selling it to its registered members. That the deceased was registered as a shareholder, was issued with a share certificate and paid survey fees in 1986. That the deceased later became ill and was not able to follow up on the allocation and registration of the land in his name until he passed away.

2. The plaintiff further averred that the defendant fraudulently acquired the deceased's share certificate and presented it to the company's committee which rejected it but the defendant went ahead and fraudulently acquired a title deed in respect of the suit property. The plaintiff therefore prayed for judgement against the defendants for:

- a. A declaration that the registration of the suit property MITI MINGI MBARUK BLOCK 3/826 BARUT in the name of the 1st defendant is null and void and should be cancelled.
- b. The 1st (sic) do execute the necessary and relevant conveyance documents to effect registration in favour of the Estate of Josiah Kandie Chelimo (Deceased) as the lawful proprietor of parcel of land MITI MINGI MBARUK BLOCK 3/826 BARUT and/or in alternative the deputy registrar do execute the necessary and relevant conveyance document in case the 1st defendant declines to execute.
- c. An eviction order against the 1st defendant.
- d. An order of permanent injunction restraining the 1st defendant from interfering with the plaintiff's quite possession of the suit land.
- e. *Costs of the suit.*
- f. Any other relief the Honourable Court deems fit to grant.

3. The 1st defendant filed its statement of defence through which it denied all the allegations in the plaint and urged the court to dismiss the suit. The 2nd and 3rd defendant filed a joint statement of defence through the office of the Honourable Attorney General. They similarly denied all the allegations contained in the plaint and urged the court to dismiss the plaintiff's suit with costs.

4. The matter then proceeded to hearing. The plaintiff testified as PW1 and adopted his witness statement. He stated that he is a son of the late Josiah Kandie Chelimo (deceased) and that he obtained letters of administration on the 20th January 2015. He testified that his father was a member of the Kalenjin Enterprises where he had one share and that his father died in the year 1998. That in the 1970s, while he was still a minor, he used to know that the deceased had bought a parcel of land at Barut within Nakuru. That recently in the year 2014, he inquired from his mother Rael Kandie on the whereabouts of the deceased's parcel of land in Barut in Nakuru and he travelled to Nakuru and asked Kalenjin Enterprises Ltd where the deceased's land was located. That the company confirmed that the defendant had taken possession of the suit property herein Miti Mingi Mbaruk Block 3/826 Barut. That upon further inquiry from the said company as to who gave the defendant the suit property, the company informed him that it did not understand why and how the defendant acquired the land since the defendant was not its member. That even the defendant's officials had no idea how the church had acquired the suit property.

5. Under cross examination and re-examination, he stated that he was not aware that the 1st defendant had obtained title to the suit property as it had never been sold. He then admitted that he did not have a share certificate to show that his father was a member of the Kalenjin Enterprises nor did he have any allotment letter or sale agreement to show whether his father was allocated plot No. 826. He also admitted that the 1st defendant is in occupation of the suit property. He produced copies of the following documents as exhibits: Limited Grant of Letters of Administration *Ad Litem* issued to him on the 20th January 2015 and a copy of a list of Kalenjin Enterprises members.

6. Kipkwony Muriror testified as PW2. He stated that he knew the late Josiah Kandie Chelimo from the 1950s since he was his neighbour. He testified further that in the year 1969, Kalenjin Enterprises announced that they had plots for sale and he therefore approached the company together with the late Josiah Kandie Chelimo and bought one share each. He also testified that he was given plot number 1124 and that the deceased was given plot number 1125 which were a quarter acre plots and thereafter in 1972, the company allowed them to build their houses on those plots. He also testified that the company then gave each one of them an acre for farming and they were then moved from the quarter an acre farms. He added that in the year 1988 he was given a farm in Lanet while the deceased was given a plot near the Kapkures Centre and that later the late Kandie Chelimo fell ill and passed away. He testified further that he was not aware that the deceased had sold his plot to the 1st defendant.

7. On cross examination and re-examination PW2 testified that in the year 1988, he was allocated a plot in Moronyo where he relocated to and that he used to meet the late Kandie Chelimo who never complained to him that AIC had taken his plot. He further stated that he did not know the late Kandie Chelimo's plot number but he could physically identify it on the ground.

8. Rael Kandie testified as PW3. She stated that the late Kandie Chelimo was her husband who had a plot at Kapkures which he had bought from a company whose name she could not remember and that she cultivated it for a year and then her late husband also cultivated it for another year before leasing it out. It was her further testimony that the 1st defendant is in occupation of that land and that she did not know whether her late husband sold the suit property to the 1st defendant and that she was also not aware of any agreement to that effect. She testified further that the ID Number given on the agreement as 0995275/67 did not belong to her and that her ID number is 4542326 and that she did not go to the Chief Kapnorok Soi location to sign any agreement.

9. On cross examination and re-examination, she stated that her late husband, never complained to her about any dispute with AIC and that she didn't know when AIC entered the plot. She also testified that she together with the deceased were members of Kalenjin Enterprises but did not have a share certificate to show that she was a member.

10. Jacob Kipkurui Konga testified as PW4. He adopted his witness statement wherein he stated that he is a member of the committee of Kalenjin Enterprises Limited which is a land buying company. That he has been a committee member of the said company since the year 1985 to the date of his testimony. He added that in the year 1972, the said company gave temporary plots to its members as they awaited the process of subdivision. That the deceased was then given ballot number 1125 and he settled on the said parcel. That in the year 1985, the said company started recording the details of its members for the purposes of subdividing the entire parcel of land to its members according to their shares. In 1986, the said company required the members to pay the requisite survey fees. The deceased's name was amongst that recorded in the company register as serial number 332 with 25 shares. The deceased also paid KShs 50 as survey fees. In April 1987, while the said company wanted to allocate to the deceased his parcel of land, it realized that the defendant had the share certificate of the deceased without the knowledge of the committee as was usually the case. The defendant claimed that it had bought the land from the deceased. However, there was no evidence at all that the deceased and the defendant had signed any agreement nor appeared before the committee for approval of the sale. In that regard, the company decided to reserve the suit land for the deceased. The company told the defendant to bring the deceased before the committee but it failed to do so. He added that in the year 2014, the deceased's wife went to the company office to inquire about the registration of the suit land in the name of the defendant. The company advised her to go to the defendant church and inquire on how it managed to register the same in its name.

11. On cross examination he stated that in 1987 they discovered that the 1st defendant had the share certificate of the deceased and they then called its church elders. He testified further that he knew the late Josiah Kandie Chelimo and that he had passed away in the year 1998 and that the deceased did not lodge any case against the 1st defendant during his lifetime. He also testified that the church has been in occupation of the suit property since 1980.

12. The plaintiff's case was then closed.

13. Elijah Kiplagat Kipkemei Chelaita testified as DW1. He stated that he is the current chairman of Kalenjin Enterprises and that the 1st defendant was issued with a title deed in respect of the suit property on the 9th August 1993. That Kalenjin Enterprises bought the Barut plot in 1971 and that in 1972, members were allocated farming and residential plots as they awaited the final plots. That the late Josiah Kandie Chelimo was allocated plot no. 1125 for residence while the 1st defendant was allocated plot Number 2452 and that the 1st defendant constructed on the plot as they awaited allocation of final plots. That in 1987 the land was surveyed for the members to get their final plots and that upon the survey the company found that the 1st defendant was occupying 1.8 acres which was equivalent to one share. The 1st defendant was then allocated another plot at Kapkures Trading Centre but the 1st defendant was not ready to demolish the church that they had already constructed on plot number 2452 which was now given a new number as Miti Mingi/Mbaruk Block 3/826 (Barut). That the

church elders requested for time so that they could acquire a share for plot no. 826. He further testified that the 1st defendant was given from 1987 to 1988 when they went back to Kalenjin Enterprises with a share certificate that they had bought from the late Chelimo Kandie. In addition to the share certificate, they also produced to the company a receipt for survey. Accordingly, the church was allocated plot 826 by the committee on the 24th October 1988.

14. DW1 testified further that the church elders had gone to Baringo to the late Kandie Chelimo and made an agreement dated 16th September 1988 where he sold his share certificate to the 1st defendant and that the late Kandie Chelimo never complained that his plot had been taken. He produced copies of the following documents as exhibits: title deed for Miti Mingi Mbaruk Block 3/826 Barut, a certificate of ordinary shares from Kalenjin Enterprises Limited issued to Chelimo Kandie, receipt number 204349, list of members of Kalenjin Enterprises, an agreement dated the 16th September 1988 and a copy of title deed for Miti Mingi Mbaruk Block 3/826 Barut that was re-issued on 3rd November 2016.

15. Next on the witness stand was Samuel Kibiyegomen Kangwony who testified as DW2. He stated that he is the chairman of the 1st defendant, that the 1st defendant is the registered owner of the suit property and that the 1st defendant has been in occupation of the suit property since 1975. He adopted his witness statement wherein he stated that he was baptized in 1975 at the 1st defendant church. That the suit property has always belonged to the 1st defendant and that the church was built in 1975. That initially, the land belonged to Kalenjin Enterprises that and when Kalenjin Enterprises started subdividing the land in 1987, the 1st defendant searched for the deceased in Baringo and found him. That in the year 1988 the deceased agreed to sell to the 1st defendant his receipt which showed that he was entitled to 25 shares which was equivalent to 1.8 acres of land. That the 1st defendant thereafter took the receipt to Kalenjin Enterprises Company Ltd and it was verified. The directors of Kalenjin Enterprises Company Ltd therefore issued the land to the 1st defendant which fenced it off and later started the process of building a permanent church structure in 1998 and finished in 2005. He added that the 1st defendant also developed a primary school and a nursery school on the suit property.

16. On cross examination he stated that the 1st defendant bought the share from the late Josiah Kandie Chelimo in the year 1988 for KShs 15,000 after the directors of the Kalenjin Enterprises had advised them to look for a shareholder with genuine documents if they hoped to retain the same land. He also testified that after the 1st defendant bought the shares, they became shareholders of the Kalenjin Enterprises. On re-examination he stated that they could not buy a plot from the late Chelimo as the land was yet to be subdivided and so they only bought the share certificate from him.

17. Michael Chepkewel testified as DW3. He adopted his witness statement wherein he stated that he had been an active member of the 1st defendant church since 1975 and that in 1975, they were worshipping under a tree. That later on the directors of Kalenjin Enterprises Ltd advised the 1st defendant to acquire receipts from a shareholder to enable the church get the land since the area had been reserved for members of the company. That one Ezekiel Kendagor and Richard Chelimo who was the first-born son of the deceased connected the church to the deceased and the church bought the receipt from the deceased in 1988. That the church then took the receipt to Kalenjin Enterprises Ltd which confirmed that it was genuine. The directors then agreed to allocate the land to the 1st defendant.

18. On cross examination he stated that Kalenjin Enterprises had shown the 1st defendant where to build in 1975 and they were allowed to stay on the land so long as they bought shares from a genuine shareholder. That after they were advised to buy shares they began to inquire and then came to know of the late Josiah Chelimo and that they had no dispute with the late Chelimo until he passed away.

19. The 1st defendant then closed its case. The 2nd and 3rd Defendants also closed their case, without calling any witness.

20. Parties then filed and exchanged written submissions. The Plaintiff identified four issues for determination; whether the suit is time barred, whether there was transfer of shares from the late Josiah Chelimo Kandie to the 1st defendant as a shareholder of Kalenjin Enterprises, whether the allocation of the suit property to the 1st defendant by Kalenjin Enterprises Ltd was legally done and whether the prayers sought can be granted.

21. On the first issue of whether the suit is time barred, the plaintiff submitted that the issue had already been dealt with by the court in its ruling delivered on the 22nd day of March 2016. On the second issue it is argued that although the 1st defendant alleges that the late Josiah Chelimo sold his shares to it and even produced an agreement to that effect, the alleged vendor did not execute the agreement and nowhere does it indicate that the 1st defendant is the purchaser. The plaintiff also cited the testimony of PW4 to the effect that when the 1st defendant approached Kalenjin Enterprises with the late Chelimo Kandie's share certificate, they were sent to go back with his family but they never went back and therefore the transfer was done illegally without the consent of the company. The plaintiff further submitted that PW3 who is the late Josiah Chelimo's widow testified that she did not sign the said agreement and that the identification number appearing on the alleged agreement did not belong to her and that consequently the three essentials of offer, acceptance and consideration required in a valid contract have not been established.

22. On the third issue, the plaintiff argued that the suit property allocated to the 1st defendant was meant for the deceased and that the transfer of shares from the deceased to the 1st defendant was done illegally and therefore the allocation and subsequent registration of the suit property in the 1st defendant's name was equally illegal.

23. On the fourth issue the plaintiff relied on **Section 26** of the **Land Registration Act** and submitted that the 1st defendant acquired the title to the suit property illegally and therefore its title ought to be cancelled. Reliance was placed on the cases of **Elijah Makeri Nyangwara vs. Stephen Mungai Njuguna & Anor Eldoret ELC Case No. 609 B of 2012** and **Alice Chemutai Too vs. Nickson Kipkurui & 2 Others [2015] eKLR**. The plaintiff also urged the court to grant him a permanent injunction.

24. The 1st defendant also identified four issues for determination: whether the plaintiff filed the suit out of time, whether an eviction order and permanent injunction should be granted, whether there was any property that the plaintiff lost to the 1st defendant and whether the 1st defendant committed any fraud in acquiring the title documents to the suit property.

25. On the first issue the 1st defendant relied on **Section 7 of the Limitations of Actions Act**, the cases of **Daniel Sebastian Angwenyi vs. Everex Travellers Ltd & another [2015] eKLR** and **Gathoni vs. Kenya Co-operative Creameries Ltd (1982) KLR 104** and submitted that the suit property was first registered in the name of the 1st defendant and that they have always been on the ground. They submitted further that the plaintiff's claim was filed after the lapse of the time frame of twelve years. On whether an eviction order and permanent injunction should be granted, the 1st defendant submitted that the plaintiff has not met the principles as set out in the case of **Giella Vs. Cassman Brown (1973) E.A 358** and **Nguruman Limited v Jan Bonde Nielsen & 2 others, CA No. 77 of 2012**. It submitted further that it has demonstrated how it acquired the suit property and added that it has not taken possession of the plaintiff's property.

26. On whether there was any property that the plaintiff lost to the 1st defendant it submitted that the property was first registered in its name before the death of Chelimo Kandie who had not been allocated any land. As to whether the 1st defendant committed any fraud in acquiring the title to the suit property, it submitted that the burden of proof lies on the plaintiff to prove fraud and in this case, he has not discharged the burden. In conclusion the 1st defendant argued that it has proved how it took possession of the property and that it should now be allowed to enjoy quiet possession.

27. The 2nd and 3rd defendants addressed the court on two main issues which are whether the 2nd defendant committed any fraud in respect to the transfer to the 1st defendant and whether the plaintiff is entitled to the reliefs sought. On the first issue, they argued that the plaintiff did not tender any evidence implicating the defendants in fraud. On the second issue they reiterated that the plaintiff has failed to prove any fraud against the defendants to the required standards.

28. I have considered the parties' respective pleadings, evidence and submissions. The issues that arise for determination are firstly whether this suit is barred by virtue of **Section 7 of the Limitation of Actions Act**; secondly, whether the plaintiff has established fraud and lastly whether the plaintiff is entitled to the reliefs sought.

29. On the first issue, I note that none of the defendants pleaded a defence of limitation in their defences. Ordinarily, a defendant seeking to rely on the defence of limitation is required by **Order 2 Rule** of the **Civil Procedure Rules** to specifically plead it. In this case however, the plaintiff and the 1st defendant have both raised and addressed the issue of whether this suit is barred by virtue of **Section 7 of the Limitation of Actions Act** in their submissions. In other words, they left it for the court's determination. The Court of Appeal reiterated as much in **Joseph Amisi Omukanda v Independent Elections & Boundaries Commission & 2 others [2014] eKLR** where it stated:

There is however a well known exception to the general rule when the court can determine an issue even though it was not pleaded. This applies where the parties have raised an unpleaded issue and left it for the decision of the court. The exception will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice.

30. Although the plaintiff has argued that the issue of limitation was resolved by the ruling delivered herein on 22nd March 2016 by Munyao J, a perusal of the said ruling reveals that it did not address limitation.

31. I will therefore consider whether this suit is barred by virtue of **Section 7 of the Limitation of Actions Act**. The said section provides as follows:

7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

32. The plaintiff seeks eviction of the 1st defendant from the parcel of land known as Miti Mingi Mbaruk Block 3/826 (Barut). That aspect of the claim is an action to recover land. There is evidence on record that the 1st defendant has been in continuous occupation of the suit property since 1975 and that title was issued to it on 9th August 1993. As at 11th March 2015 when this suit was filed, a period of over 21 years has passed after issuance of title to the 1st defendant. Thus, the plaintiff's right to sue for recovery of the land through eviction of the 1st defendant was extinguished by 10th August 2005. Prayer (c) of the plaint cannot be considered in the circumstances. Nevertheless, the rest of the prayers in the plaint will be considered.

33. There is no dispute that the 1st defendant became the registered proprietor of the suit property on 9th August 1993 and remains as such. As registered proprietor, the 1st defendant is entitled to the rights, privileges and benefits under **Article 40** of the **Constitution** and **Section 24** of the **Land Registration Act**. Further, **Section 26** of the **Land Registration Act** obligates the court to accept the certificate of title of such a proprietor as conclusive evidence of proprietorship, unless of course the provisos under **Section 26 (1) (a)** or **(b)** are alleged and established. The said sections provide as follows:

24. Interest conferred by registration

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land

together with all rights and privileges belonging or appurtenant thereto;

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...

34. The plaintiff's case is that the 1st defendant fraudulently acquired the deceased's share certificate and presented it to Kalenjin Enterprises and further that the 1st defendant fraudulently acquired title in respect of the suit property.

35. Any party that approaches the court on allegations of fraud knows that he has an uphill task since such allegations require strict proof. Fraud cannot simply be inferred from the facts. The Court of Appeal recently reiterated the law in that regard in Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR where it stated:

It is a principle of the law that the party who alleges must prove. The appellants alleged that the transfer of the suit land from the deceased all the way to respondent was fraudulent. Did the appellant prove to the required standard the allegations of fraud against Janet, Joseph and the respondent? In the case of Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR, this Court took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” Emphasis ours. ...

In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent. That the trio were parties to the fraud or had knowledge of it. We note just like the trial court that no criminal charges or proceedings were laid against Janet, Joseph and the respondent over the transfer and registration of the suit land. The learned Judge further held that there was no demonstration of fraud and that in fact the suit land had actually been transferred to Janet during the lifetime of the deceased who had not raised any complaint before he died. ... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities.

36. Such then is the onus facing the plaintiff. Has the plaintiff discharged the burden? Not at all! Just like in the decision of the Court of Appeal above, the 1st defendant became registered owner of the suit property on 9th August 1993, some 5 years before the deceased passed away on 24th December 1998. Prior to the 1st defendant becoming registered proprietor, it had been in possession of and developed the suit property by erecting church structures on it from as far back as 1975. There is absolutely no record of the deceased raising any complaint in his lifetime to the effect that the 1st defendant defrauded him of the suit property.

37. The plaintiff's claim to the suit property seems to be merely on basis that he claims to remember from childhood in the 1970s that the land belonged to his father. He has produced nothing to demonstrate that the land belonged to the deceased at that time. I note that PW3 who is the deceased's widow and the plaintiff's mother could not state the year the deceased acquired the plot. Despite claiming that she and the deceased cultivated the plot then leased it out, she couldn't state the year when those events took place. If anything, the evidence on record suggests that all that the deceased had was a share certificate but which did not attach to any particular parcel until after the 1st defendant acquired the share certificate.

38. Regarding the question of whether there was transfer of shares from the deceased to the 1st defendant, I am inclined to accept the testimony of DW1 who was chairman of Kalenjin Enterprises Limited as opposed to the testimony of PW4 who was just a member of the company's committee. I accept the testimony of the chairman since it tallies with the general flow of evidence in that the deceased never objected in his lifetime to the 1st defendant's proprietorship. In short, the plaintiff has failed to establish his allegations of fraud.

39. In view of the foregoing discourse, there is no basis for granting a permanent injunction or issuing a declaration that the registration of the suit property in the name of the 1st defendant should be cancelled as prayed by the plaintiff.

40. I find no merit in the plaintiff's suit. I dismiss it with costs to the defendants.

Dated, signed and delivered at Nakuru this 25th day of February 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Cherono holding brief for Mrs Ndeda for the plaintiff

Mr Kipkoech for the 1st defendant

No appearance for the 2nd and 3rd defendants

Court Assistants: B. Jelimo & J. Lotkomoi