



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 136 OF 2018

TURASHA OLE NEKIIPA SIMINKOR..... PLAINTIFF

VERSUS

LEKIRA OLE NKEENKI OSIRAY.....DEFENDANT

JUDGEMENT

By a Plaint dated the 15th August, 2018, the Plaintiff prays for judgement against the Defendant for:

- a) Revocation of title Nos. KAJIADO/ KAPUTIEI SOUTH/ 1312, KAJIADO/ KAPUTIEI SOUTH/ 1024 and KAJIADO/ KAPUTIEI SOUTH/ 1116 and the same be registered in the names of the Plaintiff.
- b) Costs.

The Defendant was duly served and filed a Memorandum of Appearance dated the 28th September, 2018 through Messrs Kipkenda & Company Advocates but failed to file a Statement of Defence in requisite time culminating in an interlocutory judgement being entered against him on 24th May, 2019. The matter then proceeded for hearing on 16th September, 2019 where the Plaintiff called two witnesses.

Evidence of the Plaintiff

The Plaintiff as PW1 testified that he is the legal owner of land reference number Kajiado/ Kaputiei South/ 1117 before it was irregularly subdivided to create Kajiado/ Kaputiei South/ 1312 and Kajiado/ Kaputiei South/ 1311. He denied selling land and insisted that he still resides thereon together with his siblings including family. It was his testimony that after subdivision from the Group Ranch, parties were required to pay Kshs. 3000 for processing of their respective titles, which the Defendant paid on his behalf. He explained that if one could not refund the Kshs, 3000, that had been paid on his behalf, then he would allow the party who had paid for him to graze on the land. He admitted that he allowed the Defendant who paid for him the Kshs. 3000 to graze on his land to recover the said monies. It was his testimony that when he went to request for the Certificate of Title from the Defendant, he refused to hand it over and he reported the matter to the local Chief. Further, the Defendant was requested by the Chief to surrender the said Certificate of Title but he refused. He testified that he later discovered that the Defendant had illegally subdivided his land into four portions and obtained registration of the three portions namely Kajiado/ Kaputiei South/ 1024; Kajiado/ Kaputiei South/ 1116 and Kajiado/ Kaputiei South/1312 in his name with only Kajiado/ Kaputiei South/ 1311 being registered in the Plaintiff's name. He denied consenting to the said subdivision of his land and reported the matter to the Police who failed to assist him.

PW2 TEYIAN TURASHA NEKIIPA testified that the Defendant who is their neighbour had paid for them the required Kshs. 3000 as registration fees. It was her testimony that the Defendant took their title from the Group Ranch and when they asked for it, he refused to hand it over to them. She claimed the Defendant told them he would forcefully take away their land. She further testified that there was no sale of land as she never saw a Sale Agreement. Further, she never authorized her husband to sell land. She further confirmed that they had resided on the land for almost twenty (20) years.

The Plaintiff produced the following documents as exhibits: Certificate of Title; Green Card for Kajiado/ Kaputiei South/ 1311; Green Card for Kajiado/ Kaputiei South/1312; Demand Notice and Area List.

The Plaintiff thereafter filed his submissions

Analysis and Determination

Upon consideration of the Plaint, Exhibits, Witnesses Testimonies and Submissions, the issue for determination is whether the Plaintiff is entitled to the orders sought in the Plaint.

The Plaintiff sought for revocation of Titles to land parcel numbers KAJIADO/ KAPUTIEI SOUTH/ 1312, KAJIADO/ KAPUTIEI SOUTH/ 1024 and KAJIADO/ KAPUTIEI SOUTH/ 1116 which are registered in the name of the Defendant and the same to revert to his names. The Plaintiff in his submissions reiterated his claim and contended that there was no evidence provided to prove the Defendant bought the land. He submitted that he never applied for subdivision of his land parcel number Kajiado/ Kaputiei South/ 1117 and produced Green Cards showing the parcels of land belonged to him before the same was transferred to the Defendant.

The dispute herein revolves around land parcel number Kajiado/ Kaputiei South/ 1117 which initially belonged to the Plaintiff but has since been subdivided with the majority of the resultant subdivisions now registered in the Defendant's name. The Plaintiff as PW1 testified that he is the legal owner of land reference number Kajiado/ Kaputiei South/ 1117 before it was irregularly subdivided to create Kajiado/ Kaputiei South/ 1312 and Kajiado/ Kaputiei South/ 1311. In his testimony he denied selling land and insisted that he still resided thereon together with his siblings including family.

From the Plaintiff, the Plaintiff had itemized particulars of fraud as against the Defendant at paragraph 5 and pleaded as followings: Failing to enter into any agreement with the Plaintiff; Failing to pay any consideration; Failing to execute any conveyance for properties; Transferring the land without the consent of the Plaintiff; Failing to obtain consent to transfer; and colluding with Group Ranch officials to transfer the Plaintiff's land. The Defendant never filed a Defence to controvert these averments.

From the evidence in Court, the Plaintiff proceeded to demonstrate the allegations of fraud as against the Defendant when he testified that the Defendant had proceeded to subdivide land parcel number Kajiado/ Kaputiei South/ 1117 without his consent. As per the Green Cards which the Plaintiff produced in court, it is evident that land parcel number Kajiado/ Kaputiei South/ 1311 and Kajiado/ Kaputiei South/ 1312 are resultant subdivisions of Kajiado/ Kaputiei South/ 1117. It is indicated that initially the register to Kajiado/ Kaputiei South/ 1117 was opened 2nd June, 2004. Further, on 2nd June, 2004, Defendant was registered as proprietor of land parcel number Kajiado/ Kaputiei South/ 1312 on the same date the Plaintiff had been registered as its proprietor. To my mind the speed with which the said transaction was done is a clear indicator that the said subdivision of the Plaintiff's land including registration of the Defendant as proprietor of land parcel number Kajiado/ Kaputiei North/ 1312 was not only irregular but improper. Further, from the Green Cards, it is not clear whether it was a transfer as there is no consideration indicated therein. It was the Plaintiff's evidence that the Defendant owned Kajiado/ Kaputiei South/ 1312; 1024 and 1116 which titles he sought to be revoked.

Section 143 of the Registered Land Act (repealed) which was in place when the register to the suit land was opened stipulated that: '**(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.**'

The provisions in section 143 cited above are similar to section 80 of the Land Registration Act which provides that: '**(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**'

In the case of Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR, the Court of Appeal held as follows: '**To succeed in the claim for fraud, the appellant needed to not only plead and particularise it, but also lay a basis by way of evidence, upon which the court would make a finding.**'

Further, in the case of *Mary Ruguru Njoroge V John Samuel Gachuma Mbugua & 4 others (2014) eKLR*, the Court held that: '**It is upto the party seeking rectification, whether under the relevant statutory provisions or the equitable principles to satisfy the court or the Registrar, for that matter, that their intervention is justified. The evidence must in my view be convincing. Even though the ordinary standard of proof on a balance of probabilities applies the evidence ought to be sufficient to overcome the inherent probability that what is sought to be rectified was what was intended all along.**'

Based on the facts as presented and in associating myself with the decisions cited above, while relying on the quoted laws and in line with the equitable principles which are Constitutional principles, I am convinced that the Plaintiff has indeed proved the allegations of fraud as against the Defendant on the mode he acquired the suit lands. I find that the Plaintiff has indeed demonstrated to the court on the need to cancel the titles held by the Defendant in respect to the suit lands as the same indeed belong to him. In the circumstances and based on my findings above, I will direct the District Land Registrar, Kajiado to proceed to do so.

Who should bear the costs of the suit?

Since the Plaintiff is the inconvenienced party, I find that he is indeed entitled to the costs of the suit which should be borne by the Defendant.

It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will proceed to make the following final orders:

- a. A declaration be and is hereby issued that the Plaintiff is indeed the registered proprietor of land parcel number Kajiado/ Kaputiei South/ 1117 which has since been subdivided into Kajiado/ Kaputiei South/ 1311 and 1312 respectively.
- ii. A declaration be and is hereby issued that the Defendant is not the absolute and indefeasible proprietor of Kajiado/ Kaputiei South/ 1312; 1116 and 1024 respectively which emanated from land parcel number Kajiado/ Kaputiei South/ 1117.

iii. The District Land Registrar, Kajiado be and is hereby directed to rectify the register by cancelling any resultant titles which emanated from Kajiado/Kaputiei South/ 1117 to wit: Kajiado/ Kaputiei South/ 1312; 1116 and 1024 currently registered in the name of the Defendant and revert the same to the name of the Plaintiff TURASHA OLE NEKIIPA SIMINKOR and issue him with Certificates of Title to that effect.

iv. Costs of the suit is awarded to the Plaintiff.

Dated Signed and Delivered Virtually at Kajiado this 8th Day of February, 2021.

CHRISTINE OCHIENG

JUDGE