



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO 70 OF 2015

DANIEL KIPKEMOI TERER.....1ST PLAINTIFF

THOMAS KIPKOECH SOL.....2ND PLAINTIFF

VERSUS

LUCAS LANGAT.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiffs filed this suit vide a plaint dated 31st December 2010, against the Defendant praying for an order of eviction and a permanent injunction to be issued restraining the Defendant from encroaching upon the Plaintiff's parcel of land known as KERICHO/CHEMAGEL/4026 and KERICHO/CHEMAGEL/4027 (hereinafter referred to as "the suit properties").
2. The Defendant filed his Defence on 24th January, 2011 and later filed an amended Defence on 4th February, 2019 denying the Plaintiff's claim and stating that he was in occupation of the suit property in his capacity as a beneficiary of the estate of Benard Sitienei Kotut.
3. The matter proceeded for hearing on 9th October, 2020 when both parties testified and called their witnesses. They were thereafter directed to file their written submissions and they both complied.

PLAINTIFFS' CASE

4. The 1st Plaintiff testified that he is the registered owner of land parcel **KERICHO/CHEMAGEL/4026** while the 2nd plaintiff is the registered owner of land parcel **KERICHO/CHEMAGEL/4027**. The 1st Plaintiff purchased his portion from Stephen Buisinei, Peter Buisinei and Joseph Towet all of whom are sons of Marcella Chepkurui Kotut vide agreements dated 16th October, 2000, 6th November, 2001, 30th July, 2001 and 11th September, 2001 respectively all forming 0.708 HA.
5. The 2nd Plaintiff purchased his portion from Marcella Chepkurui Kotut vide a sale agreement dated 13th June, 2011. They bought the said portions when they still were under the original title; parcel no. **KERICHO/CHEMAGEL/434** which was registered in the name of Bernard Kotut who was the father to Marcella Chepkurui Kotut.
6. The said Marcella Chepkurui Kotut from whom the Plaintiffs bought the suit properties, was one of the administrators of the estate of her late father Bernard Sitienei Kotut together with Thomas Kiprono Busienei and Gabriel Ledama Busienei representing the 1st, 2nd and 3rd house in a succession process that was commenced vide NAKURU HC SUCC NO 262 OF 1994.
7. According to the Grant of Letter of Administration, Land parcel **KERICHO/CHEMAGEL/434** was to be shared only between the 1st and the 2nd houses who were represented by Marcella Chepkurui Kotut for the 1st house and Thomas Kiprono Busienei for the 2nd House.
8. The certificate of Grant of Confirmation was later amended through a court order dated 7th March 2006 whereby Marcella Chepkurui Kotut was given 18 acres while Thomas Kiprono Busienei got 14 acres from which, **KERICHO/CHEMAGEL/3664** and **3665** were the resultant portions. Marcella Chepkurui Kotut was registered as the owner of land parcel **KERICHO/CHEMAGEL/3664** while **KERICHO/CHEMAGEL/3665** was registered in the name of Thomas Kiprono Busienei.
9. After acquiring parcel **KERICHO/CHEMAGEL/3664**, Marcella made an application for consent to sub-divide parcel no.

KERICHO/CHEMAGEL/3664, and the consent was approved on 15th October, 2009 after which she went ahead to subdivide the same into 14 portions among them being the suit properties. She thereafter transferred land parcel **KERICHO/CHEMAGEL/4026 and 4027** to the 1st and 2nd Plaintiffs respectively. Parcel **KERICHO/CHEMAGEL/3665** was registered in the name of Thomas Busienei, for the benefit of the second house where the father of the Defendant comes from.

10. Marcella who testified as PW1 claimed that the Plaintiffs were given their rightful share of the property which they acquired through purchase. She also claimed that indeed the Plaintiffs purchased the two properties and as the registered owner of **KERICHO/CHEMAGEL/3664** she transferred to them their rightful portions. She acknowledged that the Defendant was in occupation of the suit properties before the Plaintiffs bought and sub-divided the same but he has refused to move from the share given to his uncle after the subdivision.

DEFENCE CASE

11. The Defendant in his Defence averred that the suit properties resulted from the original title **KERICHO/CHEMAGEL/434** registered in the name of his grand-father Bernard Sitienei Kotut deceased who died 1990.

12. He told the court that his grandfather had three wives and that his grandmother was the 2nd wife. His grandmother had three sons Lazarus, Alexius (his late father) and Thomas Kiprono Busienei, all of whom have since passed on.

13. A Grant of Letters of Administration was taken out by Marcella Chepkurui Kotut and Thomas Kiprono Busienei who were to represent the first and second houses respectively. After the Grant was issued a family meeting was held whereby the first and second houses decided to engage the services of the District Surveyor, Bomet to carry out sub division of the property. During the said meeting, it was also agreed that each family member was to stay on the portion of the land that he or she had been occupying before the death of their grandfather.

14. The Surveyor sub-divided the property into 14 parcels as clearly elaborated in the mode of distribution and the Surveyor's Sketch Map which was produced as a Defence Exhibit. The administrators then applied for the approval of the 14 sub divisions from the Land Control Board and the Board gave its approval on 29th September, 1999.

15. He testified that amongst the 14 parcels, his mother, Lucia Buisenei was allocated 1.28 HA which is the parcel of land he and his mother have been residing on to date. After the sub-division it was discovered that, one Denis, a son of the 3rd wife had placed a caution on the land.

16. The Defendant told the court that Marcella tried to evict all the members of other two other houses by filing a suit at Nakuru law courts, but the court denied her the eviction orders. The court instead ordered for removal of the caution placed by Denis and ordered that Marcella gets 18 acres instead of 19 acres on behalf of the first house while Thomas Kiprono Busienei was given 14 acres instead of 13 acres on behalf of the second house. He stated that the rectification of the Grant in 2006 did not interfere with the Defendant's occupation of the property.

17. He testified that Marcella thereafter brought in Surveyors who purported to subdivide the land afresh thus affecting his share and that of his mother.

18. The Defendant told the court that he later received a letter from the District Officer (D.O) dated 10th October, 2010 informing him that the 1st Plaintiff was claiming ownership of part of his land and that he was coming to the fence. He then went to the District Officer to clarify how the subdivision had been agreed on by the family. This is what prompted the Plaintiffs to file this suit.

19. It was the Defendant's testimony that he has been in occupation of the suit parcels of land which were given to him by his mother, who was a beneficiary of the estate of Benard Sitienei Kotut. He testified that he was a beneficiary of the estate of his grandfather and despite the suit property having been sub-divided and given new numbers, he was rightfully in occupation thereof.

20. He testified that the first sub-division of land parcel number **KERICHO/CHEMAGEL/434** resulted into 14 portions. Thereafter, the administrator of the deceased's estate moved the court to have the property divided into two. He stated that he objected to the second sub-division.

PLAINTIFFS' SUBMISSIONS

21. Learned counsel for the Plaintiff submitted that the Plaintiffs are the absolute registered owners of land parcels numbers **KERICHO/CHEMAGEL/4026** and **KERICHO/CHEMAGEL/4027**. She further submitted that because this is not a succession court and the Grant having been confirmed, this court cannot therefore be called upon to sit on appeal in a succession matter or be called to re-hear the succession cause afresh. She argued that the succession was done to its final conclusion and the estate was distributed in accordance with the directions issued in the succession court. It is her contention that due process was followed and Marcella Chepkurui Kotut being the beneficial owner of the estate acquired **KERICHO/CHEMAGEL/3664** upon subdivision of **KERICHO/CHEMAGEL/434**. She subsequently exercised her proprietary rights and transferred parcels number **KERICHO/CHEMAGEL/4026 and 4027** to the 1st and 2nd Plaintiff respectively.

22. Counsel referred the court to Sections 24 and 25 of the Land Registration Act, No. 3 of 2012 which she argued gave the Plaintiffs absolute ownership of land parcels number **KERICHO/CHEMAGEL/4026** and **4027**. She further contended that this right could be defeated except as provided by the said Act.

23. It was counsel's submission that land parcel number **KERICHO/CHEMAGEL/434** was sub-divided between two households, whereby

Marcella Chepkurui Kotut held 18 acres for benefit of the first household while one Thomas Busienei held 14 acres for benefit of the second household which the Defendant's father comes from. Therefore, the Defendant can only raise his claim against the share held by Thomas Busienei, because he is the one who holds the said portion on behalf of the second house. She contends that the Defendant cannot purport to claim the share of first house.

THE DEFENDANT'S SUBMISSIONS

24. Learned counsel for the Defendant on her part submitted that the Plaintiffs' claim against the Defendant that he is illegally occupying the suit property was not proved. She argued that since the Defendant was a beneficiary of the estate of the late Bernard Kotut by virtue of being the son of Alexius Busienei and Lucia Busienei and a member of the 2nd house, the Plaintiffs could not lay claim on that part of the land. It was her contention that the Defendant who is an indirect beneficiary (through his mother Lucia) has a right to live on the land that he currently occupies as he has always been in occupation thereof.

25. It was counsel's submissions that the title deeds produced by the Plaintiffs were obtained by fraud and as such the same can be challenged as per the provisions of Section 26 of the Land Registration Act. She referred the court to Defence Exhibit. 4 (the list of beneficiaries from the subdivision of parcel No. 434) which showed that the Defendant's family was allocated parcel number 2834 which is the portion they had always occupied even when their grandfather was alive. It is her contention that the purported sale by P.W.1 of the said portion was fraudulent as she did not belong to the House No. 2 where Thomas Busienei hails from.

26. Counsel submitted that the Plaintiffs acquired their titles illegally and unprocedurally. She contended that if the Plaintiffs bought land from P.W.1 it must have been a portion other than the one occupied by the Defendant as the map he relies on clearly shows that him and his family are lawfully in occupation of their portion.

27. It was counsel's submission that the Defendant was not the right person to be sued since he is the grandson of Bernard Kotut, the original proprietor. It was her contention that it was the Defendant's mother who ought to have sued since she was still alive and lived on the suit property. Counsel argued that although the Defendant is a grandchild of Bernard Kotut he can only inherit from his parent not directly from his grandfather. She referred the court to the case of **The Matter of the Estate of Veronica Wakagoto (Deceased) [2013] KLR**.

ISSUES FOR DETERMINATION

28. Having considered the pleadings, evidence and exhibits presented by the parties in support of their cases together with the submission of their learned counsel, the singular issue for determination is whether the Plaintiffs acquired good titles to the suit properties and if so, whether they are entitled to the same.

ANALYSIS AND DETERMINATION

29. In as much as I agree with counsel for the Plaintiffs that this court has no jurisdiction to delve into the issues of succession involving the estate of Benard Kotut, this court will however not shy away from examining the transactions that led to the Plaintiffs' acquisition of the suit properties. It is common knowledge that the end does not justify the means. It does not matter whether the Plaintiffs have titles to the suit properties. The manner in which they obtained the said titles is important in determining whether the said titles should be protected.

30. Unfortunately, learned counsel for the Plaintiffs submitted only on the sanctity of the Plaintiffs' titles and ignored to submit on the validity of the sale agreement entered between them and the vendors of the said properties. For the Plaintiffs to establish that they are lawfully entitled to the suit properties they needed to prove that they entered into valid sale agreements with Marcella and her sons and that the said sons were clothed with capacity to enter into the sale agreements. I believe this is the reason the Plaintiff presented the various sale agreements as exhibits to prove that they bought the suit properties.

31. Although I agree with learned counsel for the Defendant that the law is protective of titles under section 26 of the Land Registration Act, it is imperative to note that the protection is not absolute. It can be removed and title impeached in two instances. The first is where the title is obtained by fraud or misrepresentation and the second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. This was emphasized in the case of **Elijah Makeri Nyangwra -vs- Stephen Mungai Njuguna & Another [2013] eKLR** where Munyao J, answered the question as to whether title is impeachable under section 26 (1) (b) of the said Act as follows;

“ First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

32. Can it be said therefore that the Plaintiffs acquired the titles procedurally hence the titles cannot be impeached by this court? During the hearing of this case, the 1st Plaintiff averred that he purchased his portion from Stephen Buisinei, Peter Buisinei, Joseph Towet all of whom were sons of Marcella Chepkurui Kotut vide agreements dated; 16th October, 2000, 6th November, 2001, 30th July, 2001 and 11th September, 2001 all forming 0.708 HA. The 2nd Plaintiff on his part averred that he purchased his portion from Marcella vide a sale agreement 13th June, 2001.

33. They however averred that they bought the said portions when they were still under the original title that is, **KERICHO/CHEMAGEL/434** which was registered in the name of Bernard Kotut, the father to Marcella Chepkurui Kotut. They further

averred that they only obtained titles to the suit properties after Marcella caused parcel 434 to be divided into parcel 3664 and 3665. On the face of the agreements that have been presented before me as exhibits by the Plaintiffs, all the sellers therein sold the portions of the suit properties as owners of parcel number 434 which was not the correct position. The Plaintiffs' own exhibits PEX 3, 4, 5 and 6 indicate that as at the year 2000 when the 1st Plaintiff purported to buy a portion of land parcel no **KERICHO/CHEMAGEL/434**, the same did not exist as it had already been sub-divided on 18.4.2006 (see PEX 3). It is therefore not clear why the correct parcel numbers were not reflected on the sale agreements.

34. By this time, Marcella had already obtained a grant of letters of administration and she was the one who had the capacity to sell the suit property, not her sons. The purported sale agreement between the 1st Plaintiff and Marcella's sons is therefore invalid as the vendors were incapable of passing a good title to the 1st Plaintiff. The *nemo dat* principle provides that one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.

35. With regard to the 2nd Plaintiff, even though Marcella purported to sell him a portion of parcel 434, the said sale agreement was equally defective and unlawful as parcel 434 was no longer in existence, a fact that was known to Marcella, the administrator of the estate of her late father who was the registered owner of parcel 434. Purporting to sell the said portion to the 2nd defendant as parcel no.434 was therefore a deliberate misrepresentation and any resultant transfer to the 2nd Plaintiff was unprocedural and unlawful. In **Zacharia Wambugu Gathimu & another v John Ndungu Maina [2019] eKLR** the court held that;

“Having found that deceased Rudia Waruguru Mwarari was the proprietor of land parcel No. Nyandarua/Ndaragwa Block 4/Muricho No. 1007 even after her death, it therefore follows that the title of the Defendant was obtained by fraud or misrepresentation.165. Although there was no evidence adduced that pointed out to the Defendant as being party to the fraud or misrepresentation and that he might have been an innocent purchaser for value, yet I am satisfied that the conditions provided for impeachment of a title as per the provisions of Section 26 (1) (b) have been met.166. I find that the title of the defendant having been obtained illegally, unprocedurally and/or through a corrupt scheme, the same is liable to be cancelled. Regrettably, the doctrines of Estoppel and equity would not apply in the present instance to sanitize an illegality. Since this court has no jurisdiction to determine issues touching on succession, it would be prudent for the Defendant to raise issues raised herein in the appropriate court...”

36. I therefore find and hold that the agreements for sale of portions of parcel 434 entered between Marcella and her sons with the Plaintiffs are null and void hence invalid.

37. Can it be said that the purchasers were bonafide purchasers for value without notice and hence capable of escaping the strict application of the law? Certainly not. They have in their own testimony acknowledged they were fully aware that the property was in the name of the late Bernard Kotut and as such therefore they are estopped from claiming that they were not aware of the defects.

38. I find it strange that the Plaintiffs would enter into sale agreements to purchase the suit property which was occupied by the Defendant without his knowledge, pay consideration, fail to take possession of the said property, wait quietly for a succession process to be completed 10 years later, participate in the sub-division and transfer processes and then show up in court praying for an eviction order against a person who has all along occupied the suit property. My reading of the testimonies of the Plaintiffs, which was partly confirmed by the Defendant, is that the Plaintiffs hatched a plan which they intended to achieve through this suit. The 2nd Plaintiff during cross examination confirmed that the portion he bought from Marcella fell in parcel No. 3665 which after the rectification of grant in 2006 was allocated to Thomas Businei. Marcella therefore compensated him by allocating him a title on part of the land that is occupied by the Defendant whom she believes should move to parcel 3665. The 1st Plaintiff on his part claims that the property he bought before the rectification of Grant cuts across 3664 and 3667 thus his interest was taken care of by being allocated part of the portion being occupied by the Defendant. From these testimonies, it can easily be seen that the Defendant has found himself a victim of the second sub-division after rectification of the Grant because his land falls in parcel 3664 and all Marcella needs to do is evict him through the Plaintiffs who clearly acknowledge that they have never had any problem with Defendant's occupation of the land they now claim. It is unfortunate that the Plaintiffs have chosen not to pursue the persons who purportedly sold them land for compensation. Instead, they perceive the Defendant as an easy target for eviction and this court as the slaughter house.

39. The upshot is that the Plaintiffs have failed to prove their case on a balance of probabilities and I therefore dismiss it with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF MARCH 2021.

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J.M ONYANGO

JUDGE