



Biwott & another v Cherogony (Sued as the Administrator of the Estate of Chepkwony Kibiwott Cherogony) & another (Environment & Land Case 43 of 2022) [2023] KEELC 20232 (KLR) (2 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20232 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 43 OF 2022**

L WAITHAKA, J

OCTOBER 2, 2023

BETWEEN

THOMAS BIWOTT 1ST PLAINTIFF

JOSEPH BIWOTT 2ND PLAINTIFF

AND

WILLY K. CHEROGONY (SUED AS THE ADMINISTRATOR OF THE ESTATE OF CHEPKWONY KIBIWOTT CHEROGONY) 1ST DEFENDANT

VINCENT KARHAYU 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 21st May 2015, the plaintiffs instituted this suit seeking judgment against the defendants for a declaration that the title deed issued to the 1st defendant on 19th March 2013 is illegal and fraudulent; an order for cancellation of the title deed issued to the 1st defendant on 19th March 2013; an order for rectification of the register and registration of the plaintiffs as the sole registered owners by transmission of the whole of that parcel known as Baringo /Kapropita/1517 measuring 4 acres and 6.7 acres respectively; an order of injunction restraining the 2nd defendant from registering any dealings in respect of Baringo/Kapropita/1517 pending the hearing and determination of the suit (spent); a mandatory order compelling the 1st defendant to execute transfer forms by transmission in favour of the plaintiffs in respect of Baringo/Kapropita/1517; an injunction restraining the 1st defendant from alienating, disposing, sub-dividing and/or wasting Baringo/Kapropita 1517 pending the hearing and determination of the suit (spent); a mandatory injunction compelling the 2nd defendant to register the plaintiffs as the sole registered owners of land parcel number Baringo/Kapropita/1517 by way of transmission; Costs of the suit; any other relief this honourable court may deem just and fit to grant.



2. The plaintiffs' suit is premised on the grounds that they are the beneficial owners of the estate of Chepkwony Kibiwott Cherogony (deceased) comprised in Baringo/Kapropita/994 (hereinafter referred to as the suit property); that the 1st defendant who was the administrator of the estate of the deceased fraudulently and illegally caused the suit property to be registered in his name and thereafter to be subdivided and one of the subdivisions therefrom to wit Baringo/Kapropita/1517 to be registered in his name.
3. The particulars of fraud and/or illegality in the registration of the suit property in the name of the 1st defendant are provided in paragraph 10 and 11 of the plaint thus:-

Particulars of fraud of the 1st defendant

- a. Causing himself to be registered as the sole proprietor of Baringo/Kapropita/1517 notwithstanding the fact that the plaintiffs are the beneficial owners of 4 acres and 6.7 acres comprised in the whole of that parcel vide the certificate of confirmation dated 10th December 2010;
- b. Causing the 2nd defendant to register him as the proprietor of Baringo/Kapropita/1517 in blatant disregard of the certificate of confirmation of grant dated 10th December 2010;
- c. Causing the register to be altered without the plaintiffs' consent;
- d. Causing the register to be altered without a court order;
- e. Causing the 2nd defendant to issue an illegal title deed to him;
- f. Misrepresenting to the 2nd defendant and obtaining title deed fraudulently;
- g. Fraudulently selling the plaintiffs' land parcels.

Particulars of fraud and illegality of the 2nd defendant

- a. Registering the 1st defendant as the proprietor of Baringo/Kapropita/1517 contrary to the certificate of confirmation of grant dated 10th December 2010;
- b. Acting on instructions contrary to the certificate of grant dated 10th December 2010;
- c. Acting outside the scope of his powers;
- d. Affecting the interest of the plaintiffs;
- e. Fraudulently facilitating illegal transfer;
- f. Materially affecting the plaintiffs as the registered owners despite the plaintiffs producing a certificate of grant of letters of administration;
- g. Refusing to register the plaintiffs as the registered owners despite the plaintiffs producing a certificate of grant of letters of administration;
- h. Colluding with the 1st defendant to dispossess the plaintiffs of their lawful land parcel;
- i. Failing to register the plaintiffs as the registered owners of land parcel number Baringo/Kapropita/517 by transmission.



4. The 1st plaintiff who testified as P.W.1, relied on his witness statement recorded on 21st May 2015 after it was adopted as his evidence in chief. He informed the court that the 1st defendant filed a succession cause for the estate of his late father vide Eldoret High Court P.A Cause No. 4 of 2005; that a confirmed grant was issued in the cause wherein the suit property, 994, was subdivided as outlined in paragraph 1 of his statement.
5. The 1st plaintiff further informed the court that the 1st defendant did not distribute the land as per the grant. He produced the grant as Pexbt 1.
6. The 1st plaintiff further informed the court that the 1st defendant subdivided the suit property into 9 portions and parcels which he registered in his name. He produced green cards of the subdivisions as Pexbt 2 (a) to (h), that is to say 1517 (original parcel) and 1691 to 1694; 1995, 1966, 1997.
7. The statement of P.W.1 that was adopted is in pari materia to the averments contained in the plaint. In that statement P.W.1 states as follows:-

“ That the estate of his deceased father comprised in the suit property/994 was distributed as follows:-

 - a. Willy Cherogony-1 acre;
 - b. Kimuge Cherogony-2 acres
 - c. Joseph Biwott-6.7 acres
 - d. Thomas Biwott-4 acres.
8. PW1 further states that the 1st defendant ought to have registered him by transmission as the sole registered owner of 4 acres comprised in the parcel of land known as Baringo/Kapropita/1517 measuring 5.08 hectares but failed to do so and instead fraudulently and illegally registered himself as the owner of his share of the suit property.
9. The plaintiffs produced the following exhibits as part of their evidence:-
 - i. Certificate of confirmation of grant issued in Karbanet Succession Cause No.04 of 2005 to the 1st defendant in respect of the estate of Chepkwony Biwott Cherogony (deceased)-as Pexbt 1. The confirmed grant shows that the 1st plaintiff and the 2nd plaintiff were entitled to 4 and 6.7 acres respectively from the deceased’s estate comprised in Baringo/Kapropita/994.
 - ii. Pexbt 2(a)-green card in respect of Baringo/ Kapropita/1517. It shows that the parcel of land known as Baringo Kapropita/1517 is a subdivision of Baringo/Kapropita/994 (suit property). The property was registered in the name of Willy Kiprotich Cherogony (the 1st defendant) and subdivided into Baringo/Kapropita 1691 to 1697. Apart from 1694 and 1695, all the other subdivisions are registered in the name of the 1st defendant.
10. The 1st and the 2nd defendants filed statements of defence but did not come to court to give evidence in respect thereof when the case was called for hearing. Consequently, the court closed their cases.

Determination

11. There being evidence that Baringo/Kapropita/1517 is a subdivision of Baringo/Kapropita/994 in which the plaintiffs are entitled to 4 and 6.7 acres, in the absence of any explanation by the 1st defendant concerning the circumstances upon which he was registered as the proprietor of Baringo/ Kapropita/1517 arising out of Baringo/Kapropita/994 in which the plaintiffs had beneficial interest, I



am persuaded that his registration as proprietor was acquired fraudulently and illegally. Consequently, the title deed issued to him in respect thereof is liable for cancellation under Section 26 as read with Section 80 of the Land Registration Act, 2012. There being no change in the circumstances of this case, I adopt the judgment of Odeny J. delivered on 17th December 2018 in this suit as the judgment of this court. The judgment, at the relevant part, is as follows:-

“This is a case where the 1st defendant was entrusted with the administration of the estate of a deceased father on behalf of all the beneficiaries but failed to do so. The issues for determination are as whether the plaintiffs are entitled to the suit land as per the confirmed grant of letters of administration and whether the defendant has acted in contravention of his duties as an administrator to transfer the suit parcels of land vide transmission to the named beneficiaries.

On the first issue it is clear that the suit land belonged to the late Chepkwony Kibiwott Cherogony who was the father of the plaintiffs and the 1st defendant. It is also on record that the estate was distributed vide Eldoret High Court P & A No.4 of 2005 where a grant of letters of administration was confirmed and each beneficiary was given his portion of the suit land.

The 1st defendant as an administrator was under a duty to transfer the portions to each beneficiary vide transmission but in contravention of his duty refused or neglected to do so. It was the plaintiff's evidence that the 1st defendant has subdivided the land and sold it to other parties.

There is no evidence that the confirmed grant of letters of administration has been revoked therefore the distribution as per the grant stands and should be adhered to. The court cannot allow an administrator to abuse the powers bestowed on him on behalf of the beneficiaries by law. Any action outside the distribution of the estate and transfer of the portions as mentioned in the grant is null and void. If the 1st defendant sold any land to one James Nicholas Kiptoo then he must have sold his portion which measures 0.28 acres and if the portion sold is more than that then the same has to be cancelled to enable the beneficiaries get their share as per the grant.

The action by the 1st defendant of registering all the parcels in his name after subdivision is tainted with illegality and further the action of refusing to transfer the parcels to the respective beneficiaries and selling a portion is questionable.

I find the plaintiffs to have proved their case on a balance of probabilities against the defendants and therefore enter judgment in the following terms:-

- a. A declaration is hereby issued that the title deed issued to the 1st defendant on 19th March 2013 is illegal and fraudulent;
- b. An order compelling the 1st defendant to execute transfer forms by transmission in favour of the plaintiffs in respect of Baringo/Kapropita/1517 arising from sub-division of land parcel No. Baringo/Kapropita/994 as per their respective beneficial interests therein duly ascertained in the certificate of confirmation of grant issued on 10th December 2010 failure of which the Deputy Registrar of this court to execute the forms on his behalf
- c. An order is hereby issued directed at the 2nd defendant for cancellation of title deed issued to the 1st defendant on 19th March 2013 and rectification



of the register and registration of the the plaintiffs as registered owners by transmission of the whole of that parcel of land known as Baringo/ Kapropita/1517 measuring 4 acres and 6.7 acres respectively

d. Costs of to be paid by the 1st Defendant”

12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 2ND DAY OF OCTOBER, 2023.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of

No appearance for the plaintiffs

No appearance for the 1st defendant

Ms Cheruiyot for the 2nd defendant

