



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAROK

ELC APPEAL NO. 8 OF 2019

JOHN KIPTONUI KORGOREN.....APPELLANT

-VERSUS-

PAULINE CHELANGAT TALAM.....RESPONDENT

(Being an appeal from the Judgement and Order of Hon. D.K. MATUTU, PM

in the Senior Principal Magistrate's Court at Kilgoris MELC No. 88 of 2018

delivered on 4th June, 2019)

JUDGEMENT

A. INTRODUCTION

1. The appeal before this court is in respect to the Judgement and Order of Hon. D.K. Matutu (PM) delivered on 4th June, 2019 in **Kilgoris PM MELC Case No. 88 of 2018 Pauline Chelang'at Talam vs John Kiptonui Korgoren**.
2. At the heart of the dispute is Land Parcel No. **TRANSMARA/NJIPISHIP/14** measuring approximately 2.91 hectares (**hereinafter 'suit land'**).
3. By a plaint dated 2nd October, 2015 the plaintiff (**hereinafter the respondent**) filed suit claiming that she is registered owner of the suit land; that on or about the month of March 2013, the defendant (**hereinafter the appellant**) entered the suit land and started cultivating upon it without permission; that the appellant has his own parcel of land being **TRANSAMARA/NJIPISHIP/844**. The respondent prayed that an order of eviction and permanent injunction do issue against the appellant, his agents/servants from occupying the suit land.
4. The appellant filed a defence dated 27th November 2015 in which he denied the allegations of the respondent in her plaint and put her to strict proof. The appellant averred that the respondent is his sister; that the ownership of the suit land by the respondent was a result of a fraudulent and illegal acquisition of their deceased's mother property; that it's indeed true he owns land parcel number **TRANSAMARA/NJIPISHIP/844** but the land in dispute belongs to his deceased mother; that the land initially had been registered in the name of his deceased mother (Tamoi Talam) and the respondent to hold it in trust for her.
5. At the end of the hearing, the trial court found in favour of the respondent and issued an order of eviction and a permanent injunction against the appellant, his agents and servants upon entering the suit land together with costs to the respondent.
6. Being dissatisfied with the judgement and order of the trial court, the appellant preferred twelve (12) grounds of appeal which can be condensed to the following eight (8) grounds as follows:-

a. That the Learned Magistrate erred in law and fact in failing to take into account the well - established principle of law that tenancy in common hold their respective interests in undivided and distinct shares in the property, and there is no right of survivorships; thus when one tenant dies her shares or interests in the property will devolve to heirs/beneficiaries through a will or intestacy;

b. That the trial court erred in law and in fact in failing to appreciate that the respondent and the deceased's mother Taimo Chepkangara Talam, were registered tenants in common holding the property as trustees under customary law for the benefit of the heirs of the Estate of the Late Taimo Chepkangara Talam;

c. That the trial court erred in law and in fact in failing to appreciate that the alleged respondent's rights over Land No. Transmara /Njipiship/14, in the suit property does not override the interests under customary trusts pursuant to section 28 (b) of the Land Registration Act, 2012;

d. That the trial court erred in law in failing to appreciate the specific mandatory provisions under Section 78 (1) of the Land Registration Act, 2012 on registration of restrictions on land and in particular that the Land Registrar failed to give all parties an opportunity of being heard before ordering removal or variation of restrictions;

e. That the trial court erred in law and in fact in holding that the element of fraud was not established before the respondent was issued title to the suit land;

f. The trial court erred in law in failing to appreciate Sections 6, 8 and 9 of the Land Control Act, Cap 302 on obtaining mandatory consent of the Land Control Board;

g. That the trial court erred in law and in fact by holding that the appellant has no right to use the suit property yet the appellant has been uninterruptedly lived in the suit property since 1982;

h. That the trial court erred in law in issuing eviction order and a permanent injunction against the appellant without considering all the evidence and the correct principles of law.

7. Thus, the appellant prayed as follows: -

i. The appeal herein be allowed;

ii. The judgement and decree of the subordinate court delivered on 4th June, 2019 be set aside;

iii. This court substitutes the subordinate court's judgement and decree with its own decision on the suit property Land No. Transmara/Njipiship/14 and dismiss the suit commenced by the respondent's plaint dated 3rd October 2015 and filed on 5th October, 2015.

8. The court directed that the appeal be canvassed by way of written submissions and both parties complied.

B. APPELLANTS' WRITTEN SUBMISSIONS

9. The appellant filed their written submissions dated 3rd June 2020 and submitted on three issues for determination. On the first issue, the appellant submitted on whether the respondent had proved that she had a good title to the suit property. Under this head, the appellant submitted that the suit land was fraudulently transferred to the respondent on 4th November, 2010. It was further submitted that the land was initially registered in the name of their deceased mother and the respondent was to hold it in trust for the entire family; that the respondent had generally failed to demonstrate how the land was transferred or given to her by their deceased mother and therefore the title cannot be protected under Section 26 of the Land Registration Act .

10. The appellant further submitted that Section 6 of the Land Control Act, Cap 302 Laws of Kenya requires mandatory consent in any transaction of land which is agricultural but the respondent had not obtained the same. On the issue of tenancy in common, the appellant submitted that in tenancy in common scenarios, the holders, hold the property in equal undivided shares and that each tenant has a distinct share in the property which is not yet divided thus the share of one of the co-owners is not affected by the death of one of the co-owners. Hence it does not devolve but reverts to the estate of the deceased co-owner.

11. On the second issue, the appellant submitted that there exists a customary trust in respect to the suit property. That the respondent being the co-proprietor of the suit property alongside their deceased mother, she held the same in trust for the deceased's estate; that Section 28 (b) of the Land Registration Act recognises the overriding interest of a customary trust; that the customary trust need not be registered in a title as it is an overriding interest that subsists on land; that the respondent's registration of title does not make her an absolute owner as the registration is encumbered by a customary trust.

12. On the third issue of determination, the appellant submitted that costs will normally follow the event and their appeal ought to be allowed with costs of the appeal and the suit awarded to them.

C. RESPONDENT'S SUBMISSIONS

13. The respondent filed submissions dated 29th June 2020. On the issue of the allegations of tenancy in common, the respondent submitted that their deceased mother died in 2013 but the suit land was transferred in her name in the year 2010; that the issue of survivorship in tenancy in common does not arise since the transfer was done in the lifetime of the deceased; that the appellant lacks locus standi to prosecute the claim since he has not obtained letters of administration.

14. On whether the respondent held the suit pursuant to Section 28 (b) of the Land Registration Act, the respondent submitted that the appellant did not particularise the issue of customary trust during the trial; that the issue is coming up for the first time in this appeal; that it is not also clear whether the suit land was initially a clan or a family land or one purchased by the respondent and the deceased; that the appellant has not told this court whether the land was initially a clan land for it to meet the threshold of being a trust land; that none of the other children of the deceased has given evidence before this court; that the appellant did not call a Kipsigis Customary Law expert to verify

the allegations that women once married according to their customs are not entitled to inherit land. The respondent submitted in any event; those customs are inconsistent with the constitution which outlaws discrimination.

15. It was the respondent's further submissions that the appellant did not particularize fraud in his defence or have a counterclaim to that effect; that the Land Registrar was not a party to the suit for him to now claim that the Land Registrar was in contravention of Section 78 (1) of the Land Registration Act before removing the restriction.

16. Further to the foregoing, the respondent submitted that the appellant doesn't have requisite locus standi to plead contravention of the sections 6, 8 and 9. The respondent's claim was one of trespass over a land belonging to her; it is only the representative of the estate of the deceased having proper letters of administration who can plead contravention of the above sections. Moreover, the appellant did not ask for cancellation of the title and further this issue is coming at the first time in appeal.

17. In conclusion, the respondent submitted that the appellant did not establish his rights, if any, over the suit land. The respondent's explanation that she was given the land by her deceased mother was not contravened, the appellant did not particularize allegations of fraud, the inference to customary trust could not be proved before the trial court and the allegations that he has been in the land since 1982 are unverifiable. The respondent urged the court to dismiss the appeal with costs.

D. DISCUSSION AND DISPOSITION

18. I have carefully considered the memorandum of appeal, the record of appeal, and the respective rival submissions. On that account, it is this court's opinion that the issues for determination arising therefrom are:-

i. Whether the appeal as filed is competent in law.

ii. Whether there was a tenancy in common and/or a joint tenancy between the respondent and the deceased.

iii. Whether the suit land is trust land.

iv. Whether the transfer of the suit land was fraudulent.

19. Turning to the first issue, the respondent strenuously submitted that the appellant has introduced new issues on appeal which were not addressed in the trial court being that their deceased mother had three (3) sons, the issue of customary trust and the law on inheritance by married women in the Kipsigis community and the issue of production of land consents and transfers.

20. The *locus classica* on appeals is the case of **Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123** it was held:-

“.....this court is not bound necessarily to accept the judgment of fact by the court below. An appeal to this court therefore is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

21. **Order 42 Rule 4 of the Civil Procedure Rules** is instructive on memorandum of appeals. It provides as follows:-

“The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:-

Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.” (emphasis mine)

22. My understanding and the plain reading of the above provision is that; except with the leave of court, a party may not be heard on grounds other than those which have already been raised in the memorandum of appeal if the other party has not been given a chance to respond to the new issues. That is to say, the appellate is prohibited from addressing any new issue (s) apart from those in the memorandum of appeal provided that the other party has been given an opportunity to address the court on the new grounds.

23. Given that the respondent had already scrutinized the appellant's submissions and responded to the new issues raised the memorandum of appeal in her submissions, I do not see any prejudice which the respondent shall suffer. I therefore find that despite there being new issues being raised on appeal, the respondent has sufficiently had time to respond to them and the appeal as it is, is competently filed.

24. On the second issue, the appellant submitted that the suit land was registered in the name of both their deceased mother and their appellant in trust for the whole family therefore she cannot have good title; the suit land ought to have reverted back to the estate of their deceased mother to undergo succession. On the other hand, the respondent submitted that the suit land was already transferred to her in the year 2010 during the lifetime of their deceased who later on died in the year 2013. Both parties addressed this court on the principles regarding common and joint tenancies.

25. From the evidence on record, part of the list of documents the appellant produced in support of his evidence, was a green card dated 11th October, 2015. At the face of it, the suit land had an entry of **“proprietors in common each holding equal (1/2) share.”** It therefore goes without saying that the interest held in the land was a tenancy in common or rather, the land was held in common between the respondent that her deceased mother in equal undivided shares.

26. Briefly, a joint tenancy is where land is conveyed to two or more persons without any words to show that they are to take distinct shares and it carries with it the right of survivorship. That is to say, upon demise of one tenant, it cannot pass through a will or intestacy so long as there is a surviving joint tenant as the right of survivorship takes precedence. The opposite is true in tenancy in common. In tenancy in common, the one or more persons hold the property in equal undivided shares. Each tenant has a distinct share in the property. Unlike in joint tenancies, in common tenancies, the doctrine of survivorship is non-existent. The share of the deceased person in a common tenancy does not automatically go to the co-tenant rather it devolves to the estate of the deceased. See the findings in: *Isabel Chelangat vs. Samuel Tiro Rotich & 5 others (2012) eKLR*

27. In the instant appeal, it is clear from the green card document, the land was held by the respondent and the deceased in common. Ordinarily, the share of the deceased’s suit land ought to have devolved in her estate. However, it is noted that the suit land was registered in the name of the respondent and a title deed issues on 4th November 2010; and as submitted by the respondent, this was during the lifetime of the deceased who died in the year 2013. None of the parties before the court was diligent enough to produce a copy of the death certificate to ascertain that fact. The only objection that the appellant raises is that the same was done through fraudulent means and hence the respondent does not have a good title to the suit land.

28. This court notes that the respondent in its statement of defence, did not plead the allegations of fraud. It is trite law that when a party pleads fraud, the same be specifically pleaded and particularised. To this end, **Order 2 Rule 4 and 10 of the Civil Procedure Rules** provides that allegations of fraud among others must be specifically pleaded. I fully associate myself with the findings of the learned trial Magistrate that the appellant did not particularize and prove the allegations of fraud. In addition, it was the appellant’s case that the Land Registrar breached the provisions of Section 78 (1) of the Land Act prior to removal of the restrictions. The Land Registrar was not a party to the suit. If the court was to make a finding on the same, it would be directing an order to a party who is not aware of the court proceedings in breach of their right to be heard on the allegations raised against them.

29. The claim of the respondent in the trial court was one of trespass. All the appellant ought to have done was demonstrate to the court his interest in the land. If indeed the land belonged to his late mother who died in 2013, it would have been prudent as a beneficiary, to commence succession proceedings against the said estate and obtain letters of administration to have the requisite locus standi to place claims on the suit land. Even if the issue was one of trust land, the appellant was best placed to raise the issue in his capacity as an administrator of the estate of the deceased; that the respondent was holding the land in trust for the family in a counter claim which he did not.

30. **Section 26 of the Land Registration Act** provides as follows :-

26. (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.**

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original. **(emphasis supplied).**

31. **Section 26 of the Land Registration Act** guides the courts to take the person named on the Certificate of Title to land to be the owner of the land unless the contrary is proven. I should reiterate that the appellant failed to do so by proving fraud or that the suit land was trust land or otherwise.

32. I therefore find that the respondent has a good title to the suit land.

33. The other issues of determination need not be addressed, they fall by the way. Save that the respondent had a chance to respond to the new issues being brought up in the appeal, the appeal itself as it is, is a game of chance. It is akin to playing a judicial lottery where if the appellant fails to prove his case on one point, he would have another bite of cherry on other new grounds.

34. For the foregoing reasons, I do hereby find that the appeal is frivolous, vexatious and an abuse of the court process. It is hereby dismissed.

35. As this is a dispute between family members, I see no need to fuel further acrimony and there shall be no orders as to costs which in any event, is a discretion of the court. The Judgement and Orders of the trial Magistrate Hon. D.K. Matutu be and is hereby upheld in its entirety.

36. Orders accordingly.

DELIVERED SIGNED AND READ ONLINE AT MIGORI THIS 8th DAY OF NOVEMBER 2021.

MOHAMED KULLOW

JUDGE

Judgement delivered in presence of:-

Mr. Evayo for Appellant

Mr. Langat Respondent

Tom Maurice - Court Assistant