



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.106 OF 2012

MUSA KIPRONO NGETICH1ST PLAINTIFF

KIPLANGAT NGETICH.....2ND PLAINTIFF

VERSUS

CHEPYATOR CHERONO.....DEFENDANT

JUDGMENT

(Claim by the plaintiffs for land held by the defendant; plaintiffs alleging that their deceased father previously had title to the land and that the defendant caused a fraudulent transfer to himself for 10 Ha instead of 10 acres; the land being previously under the SFT; evidence that the deceased father caused the land to be subdivided and one portion of 10 Ha to be transferred to the defendant; no evidence that what was to be transferred was 10 acres; plaintiffs' case also time barred; plaintiffs' suit dismissed with costs)

1. This suit was commenced through a plaint which was filed on 21 July 2010. In the plaint, the plaintiffs pleaded that they are administrators of the estate of the late Kiptalam Ngetich and averred that in the year 1998, the defendant fraudulently acquired a portion of land measuring 15 acres which belonged to their father within the land parcel Baringo/Perkerra-101/232 (the suit land). Among the particulars of fraud pleaded is that the defendant acquired the suit land falsely while claiming that he was given the same as a gift by the late Kiptalam Ngetich. It is pleaded that what the defendant was entitled to was 10 acres of the suit land. In the plaint, the plaintiffs have asked for orders of cancellation of the defendant's title to the suit land, a declaration that the plaintiffs are owners of 15 acres of the suit land in trust for the family of the late Kiptalam Ngetich, and costs.

2. The defendant filed a statement of defence vide which he pleaded that he got title to the suit land, measuring 10 Ha (about 25 acres) on 2 September 1983 after purchasing it from the late Kiptalam Ngetich and after following due process. He denied the allegations of fraud.

3. In their evidence, the plaintiffs, who are sons of Kiptalam Ngetich, contended that their father owned the land parcel Perkerra 101/9 while the defendant owned a plot No. 87 in Mogotio area. Their father then entered into an agreement to exchange a part of his land in Perkerra with what the defendant owned in Mogotio. They averred that their father was to give the defendant 10 acres in Perkerra and in return, the defendant was to give their father 20 acres in Mogotio. It is alleged that what the defendant did, was to pay off the Settlement Fund Trustees (SFT) loan, for the Perkerra land was a settlement scheme, and changed the 10 acres that he was to get into 10 hectares (25 acres) but he did not give their father the 20 acres in Mogotio. Because of this, their father refused to allow the defendant call a surveyor. It was claimed that while their father was away on a trip, the defendant carved out for himself 10 Ha of the land and fenced it, but when their father came back, he removed this fence which led him to being arrested and jailed. It was said that while he was in jail, the defendant reinstated the fence. However, a first cousin of their father, one David Chepkieng, again pulled it down and he was also arrested and jailed for 6 months after which the defendant took possession by force and lived in it. It was claimed that the plaintiffs' father was not involved in the transfer of the land to the defendant and did not execute any documents of transfer and never appeared before the Land Control Board (LCB). He contended that the dates in the LCB fell when their father was in jail. They also averred that their father used to place a signature yet the transfer form is thumb-printed. They contended that the SFT discharge of charge is dated after the date of the title deed of the defendant. They also faulted the writing which noted that the land was being transferred to the defendant as a gift. The plaintiffs stated that what the defendant can keep is only 10 acres, in as much as he has not yet given the 20 acres in Mogotio, for the reason that he (defendant) paid off the SFT loan, and that the balance of 15 acres should be given to the plaintiffs.

4. On his part, the defendant testified that the late Kiptalam approached him and told him that he was having problems clearing the SFT loan of Kshs. 5,719.70/= and he wished to have someone pay it off and receive a part of the land. They then agreed that he can pay off this loan and add him Kshs. 11,000/= which he stated that he did. He claimed that there was a written agreement which he could not however trace. They then proceeded to the LCB and consent was given and they went a surveyor to carve out 10 Ha. He then got title in the year 1983. He took possession and has been on the land since. He stated that the deceased raised no issue and that they were friends. He denied that the deceased ever complained to the Chief, or elders, that he had illegally taken the land and asserted that they had no dispute. He stated that it is true that the late Kiptalam was at some point jailed, but he stated that this was because he assaulted a Mr. Sawe, and this had nothing to do

with the land. He testified that it is after their father died that the plaintiffs started complaining and they filed a case before the Land Disputes Tribunal which made an award that was quashed. He asserted that what he bought from the defendant was 10 Ha. He testified that the SFT loan was over the Plot No. 9, and upon him purchasing part of it, it was subdivided into the parcels No. 231 and 232 (the suit land). He stated that the plaintiffs own the parcel No. 231. He did mention that there was a time that the deceased showed interest in purchasing the land in Mogotio but this never materialized and he denied that they had any exchange agreement.

5. I invited counsel to file written submissions which they duly did and I have taken these into account before arriving at my decision.

6. It is apparent to me, and it appears to be common ground, that the deceased, Kiptalam arap Ngetich, owned the land Perkerra-101/9. This land was then subdivided to bring forth the land parcels Baringo/Perkerra 101-231 and 232. The latter is owned by the defendant and measures 10 Ha which is about 25 acres. The plaintiffs claim that what the defendant is entitled to is no more than 10 acres, which they say he can keep, despite him not giving their late father 20 acres in Mogotio area. The claim of the plaintiffs is therefore to 15 acres of the suit land.

7. To begin, I have not seen any exchange agreement between the deceased and the defendant as claimed by the plaintiffs. When questioned, the plaintiffs stated that this agreement was oral and was not reduced into writing. On my part, I am not persuaded that there was any such exchange agreement, and I can only conclude that the claim is made to give some credence to the plaintiffs' case. It is not denied that the defendant paid off the SFT loan that the deceased had, but of course it is argued by the plaintiffs, that this only entitled him to 10 acres and not 10 Hectares (25 acres). The plaintiffs claim that the defendant fraudulently changed the acreage during the transfer. On this, I am again not persuaded. I have seen the LCB consent for subdivision of the plot No. Perkerra 101-9 and I have seen a note under the consent that the land is to be divided into 21.2 Ha and 10.0 Ha. It is this 10.0 Ha which is the disputed land. There is correspondence from the Director of Settlement, authorising title to issue to the defendant for 10.0 Ha, pursuant to the LCB consent, and a title was issued on 3 November 1998. I have absolutely no evidence that the correct acreage that was to be delivered to the defendant is 10 acres and not 10 Ha. Indeed, save for the plaintiffs' word of mouth, there is no document that supports their assertion that the defendant was only entitled to 10 acres of land. If indeed the defendant was not entitled to 10 Ha, you would expect the deceased to straight away, or soon thereafter, raise a complaint about it. I have no evidence of any complaint having been raised by the deceased. The plaintiffs tried to insinuate that their father did resist the defendant's occupation and that he was jailed for it, but yet again, save for their word of mouth, I have no evidence of such arrest or conviction. If indeed this happened, there would have been nothing easier than for the plaintiffs to present to this court the charge sheet and the proceedings of the alleged case. There is no evidence of the deceased having written any letter of complaint or having gone to court while he was still alive to contest the title of the defendant. There was allegation that the deceased never signed nor placed a thumb-print on the transfer documents. If the plaintiffs wished to press this point, they would have tabled an expert report to prove that the signatures therein are not of the deceased, but they have not presented any.

8. My own view of the matter is that probably, being pressed for land, the plaintiffs now want to find a mischievous way of getting some additional land from the defendant. They have made up a story that there was an exchange of land where indeed there is none, and also tried to insinuate that the defendant converted 10 acres into 10 Ha in the transfer form. I have already pointed out that this 10 Ha, did not emerge from the blues in the transfer form, but is the same acreage that is contained in the LCB consent and in the letters of the Director of Settlement. I do not see how the defendant can be deprived of land based on the contrived story of the plaintiffs. In essence the plaintiffs have failed to prove their case on merits.

9. I would still have dismissed the case based on the principle of limitation. The defendant became registered as proprietor on 2 September 1983. This suit was filed on 21 July 2010, which is about 27 years later, and certainly after 12 years. A claim for land, pursuant to Section 7 of the Limitation of Actions Act, Cap 22, needs to be made within a period of 12 years. This suit would also be incompetent by virtue of it being statute barred.

10. My core finding however is that even on the merits of it the plaintiffs have failed to prove their case. Given the foregoing, I have no option but to dismiss the plaintiffs' case with costs to the defendant, and it is so dismissed with costs.

11. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 1st day of October 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Ms. Mungai holding brief for Mr. Rodi for the plaintiffs.

Mr. Ombati present for the defendant.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU