



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC No. 123 OF 2014

HELLENA CHESEREM and CHARLES KANGOGO CHESEREM

(Suing for and on behalf of the Estate of the late

AUGUSTINE KIPTOO CHESEREM).....PLAINTIFFS

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION.....1ST DEFENDANT

GODFREY MBUURI GACHURA.....2ND DEFENDANT

JUDGMENT

1. Proceedings herein commenced through plaint filed on 9th May 2014. The plaintiffs averred in the plaint that in 1999, the late Augustine Kiptoo Cheserem (deceased) applied to the 1st defendant and was duly allocated 25 acres of land identified as LR NO. 20591/329 on 1st July 1999. That through letter dated 16th September 2002, the 1st defendant confirmed that the offer was for 41 acres at a purchase price of KShs 20,000 per acre. They further averred that on 14th November 2002, the deceased paid KShs 820,000 for purchase of the 41 acres and a receipt from the 1st defendant's subsidiary known as Lands Limited was issued to him. That it was indicated by the 1st defendant that the proper identification of the 41 acres had changed to LR No. 20591/55. The plaintiffs further averred that upon the payment, they and the deceased were shown the location of the land and they took possession and developed it. They added that the 1st defendant illegally and fraudulently transferred the parcel of land known as LR No. 20591/55 to the 2nd defendant and that the 2nd defendant instructed strangers to demolish their houses.

2. The plaintiffs therefore prayed for judgment against the defendants jointly and severally for: -

a) *An order of permanent injunction to restrain the defendants, their servants, workmen, licensees, agents or any other persons acting on their own behalf or on behalf of the defendants from howsoever trespassing, entering, encroaching, remaining in, selling, subdividing, allotting, taking over, dispossessing, alienating, reclaiming, fencing, cultivating, returning into and or harassing the plaintiffs or interfering with their peaceful entitlement and possession of LR. NO. 20591/55.*

b) *An order of inhibition restraining any dealings of any nature whatsoever on LR. NO. 20591/55 without the express approval and consent of the plaintiffs.*

c) *An order for specific performance compelling the 1st defendant to forthwith process title documents in respect of LR. NO. 20591/55 in favour of the plaintiffs.*

d) *An order directed to the Registrar of Titles or any person with requisite authority for the cancellation of any certificate of title issued in respect of the LR. NO. 20591/55 to the 2nd defendant and a reissue of the same to the plaintiffs.*

e) *Special damages of Kshs.344,470.00 for the destroyed houses and structures together with interest and rent of Kshs.2,400.00 per month from March, 2014 till payment in full.*

f) *General damages for trespass.*

g) *Costs of the suit plus interest.*

h) *Any other or further relief as this court may deem fit and just to grant.*

3. In its statement of defence, the 1st defendant denied the plaintiffs' averments and stated on a without prejudice basis that the plaintiffs' property is plot No. 20591/329 measuring approximately 25 acres which "*is still intact and available on the ground*". It denied the plaintiffs' other averments and urged the court to dismiss the suit with costs.

4. The 2nd defendant also filed his statement of defence in which he averred that he acquired the suit property for valuable consideration from the 1st defendant and that a certificate of title was issued to him on 7th November 2007. He added that in December 2013 he found illegal structures on the property and that he demolished them upon issuing notice to the plaintiffs. He denied the plaintiffs' other allegations and urged the court to dismiss the suit with costs.

5. The matter then proceeded to hearing. One of the plaintiffs Mrs Hellena Cheserem testified as PW1. She stated that she is the widow of the late Angustine Kiptoo Cheserem (deceased) who passed away on 15th October 2007 and that she together with her co-administrator Charles Kangogo Cheserem who is her son, obtained letters of administration in respect of her late husband's estate on the 12th May 2008. She testified that the deceased applied for land at Ndabibi and was allocated plot No. 20599/329 measuring 25 acres at the price of KShs 20,000 per acre by the Managing Director of the first defendant through letter dated 1st July 1999. That through a subsequent letter dated 16th September 2002 the 1st defendant confirmed that the land which had been offered earlier was increased to 41 acres and that the price would remain at KShs 20,000 per acre. That her late husband paid a sum of KShs 820, 000/= for the 41 acres to Lands Limited as was instructed by the 1st defendant and a receipt dated 14th November 2002 was issued to him.

6. Mrs Cheserem further testified that she obtained a copy of the 1st defendant's letter dated 16th September 2002 which had a handwritten note by the 1st defendant's managing director stating that the 41-acre offer was for plot No. 20591/55. That thereafter together with her late husband they were escorted by the 1st defendant's surveyor one Thomas Kirui who showed them the 41-acre parcel of land with its four beacons. That they then took possession of the land, fenced it and put up four iron sheet houses that she was renting out at KShs 600 per month each.

7. She also stated that she wrote a letter dated 12th August 2009 to the 1st defendant in which she informed it of the death of her husband and asked it to process title for plot No. 20591/55 in her name. That the 1st defendant responded through a letter dated 27th August 2009 in which it told her that plot No. 20591/55 was not available for allocation since it had been paid for by someone else in 1998 and that the 1st defendant was unable to grant her request. That despite following up she did not get title to the land and thus instructed her advocates who wrote a demand letter dated 23rd November 2009 to which the 1st defendant responded on 4th January 2010 stating that her late husband was allocated plot No. 20599/329 measuring 25 acres which later turned out to be a forested area hence it was retained by the 1st defendant for conservation. That the 1st defendant denied that her late husband was ever allocated plot No. 20591/55.

8. Mrs Cheserem stated that on 3rd April 2014, some people came and destroyed the houses. That she complained to the 1st defendant and upon conducting a search at lands registry, she found that the land had been allocated to the 2nd defendant and a title issued to him in 2007. She added that the 2nd defendant was a stranger to her, that he had never stepped on the farm and she was still in occupation.

9. Job Kimitei Siror testified as PW2. He stated that he worked for the 1st defendant for over 30 years and that he was its managing director from October 1998 to April 2003. That the deceased made a verbal request for land and was offered plot No. 20591/329 measuring 25 acres in 1999 and that the plot number on the ground became 20591/55 after survey with a new size of 41 acres. That due to the change of plot number and acreage, the deceased was given a fresh offer for the 41 acres on 16th September 2002. That when he noticed that the letter dated 16th September 2002 did not specify that the offer was for plot No. 20591/55, he made a handwritten endorsement on it and gave the original to the deceased. That thereafter he sent Thomas Kirui who showed the deceased the beacons of the plot.

10. Next on the stand was Thomas Kirui. He stated that he had been a land surveyor since 1981 and that around November or December 2002, PW2 who was then the managing director of the 1st defendant rang him and told him that the 1st defendant was selling land known as LR No. 2059/55 situated at Ndabibi Naivasha to the deceased. He added that the land had been surveyed by then and it had a deed plan number. That he went to Survey of Kenya and bought survey plan FR 285/1 which had the beacons and dimensions of the plot LR. No. 20591/55 whose deed plan was No. 219970. He then went to the ground around November or December 2002 with PW1 and the deceased and showed them the beacons. That his charges were paid by the deceased.

11. The plaintiffs also called two other witnesses John Micere Kagesha who testified as PW4 and Bernard Baraza Wanjala who testified as PW5. Their testimonies revolved around construction of the houses on the property, erection of a fence and farming activities thereon.

12. The plaintiff case was thus closed.

13. When its turn came, the 1st defendant's sole witness was Samuel Birgen, its Legal Assistant. He stated that the deceased was allocated plot No. 20591/329 measuring approximately 25 acres and not plot No. 20591/55. That plot No. 20591/55 measuring approximately 42 acres was allocated to one Joseph Kipsang Towett on 30th April 1998 and was therefore not available for allocation as at 1st July 1999. He confirmed that the deceased paid KShs 820,000 for 41 acres on 14th November 2002 and added that the receipt issued to him did not indicate the plot number or its acreage. That there was no record showing that the first offer of 25 acres was ever revoked and the position of plot No. 20591/55 as at the date of his testimony was that the 2nd Defendant was the registered owner.

14. He added that the ownership of plot No. 20591/55 changed to the 2nd Defendant when the government gave the 1st defendant a directive in the year 2004 that any land allocated and not paid for or partially paid for be revoked and be re-allocated. That it was unprocedural for a

surveyor not employed by the 1st defendant to show someone land. That the position on the ground on plot No. 20591/329 as at the date of his testimony was that the 1st defendant repossessed it and converted it into forest land under guardianship of Kenya Forest Service. He added that the 1st defendant does not have any land at Ndabibi Farm in Nakuru as they are fully allocated and that the 1st defendant can refund the money the deceased paid. He added that the 1st defendant does not have any records in its office of the handwritten endorsement on the letter dated 16th September 2002.

15. The 1st defendant's case was closed at that point. The 2nd defendant closed his case without offering any evidence. Parties then filed and exchanged written submissions.

16. The plaintiffs submitted that the 1st defendant's witness admitted the payment made to Lands Limited which is a subsidiary of the 1st defendant, that possession was given to the deceased and his family and that the 1st defendant did not repossess the land or cancel the allocation. Consequently, the 1st defendant is estopped from claiming that the payment was made out of time as stipulated in the letter of offer. It was further argued that the deceased was first allocated 25 acres identified as 20951/329 but when they went to the land itself and upon survey, it became plot number 20591/55 which measured about 41 acres. The court was referred to the map which PW3 produced.

17. The plaintiffs further argued that 2nd defendant gave no evidence to counter their claim for cancellation of his title. They relied on the cases of **Charterhouse Bank Limited vs Frank N. Kamau [2016] eKLR** and **Karuru Munyororo vs Joseph Ndumia Murage & another Nyeri HCCC No. 95 of 1988** and argued further that they adduced credible and believable evidence that should stand in the absence of rebuttal by the defendants. They also placed reliance on **sections 107, 108, 112 of the Evidence Act** and the case of **Peris Wanja Cini & Another vs Paul Murithi Njau & others [2016] eKLR**.

18. They also argued that since the 2nd defendant's title is challenged, he had an obligation to go beyond the title to prove the legality of how it was acquired. They relied on the cases of **Munyu Maina vs Hiram Gathiha Maina C. A No. 239 of 2009** and **Kenya Medical Supplies Agency (Kemsa) vs Mavji Kanji Hirani & Others [2018] eKLR**. They further argued that the 2nd defendant's title is not first registration and that the 1st defendant did adduce evidence on how transfer of the property was effected to the 2nd defendant. They relied on the cases of **Esther Ndegi Njiru & Another vs Leonard Gatei [2014] eKLR** and **Joseph Kagunya vs Boniface K Muli & Others [2018] eKLR** and urged the court that judgment be entered in their favour as pleaded in the plaint.

19. On the 1st defendant's part, it was argued that the plaintiffs had failed to show how plot 20951/329 measuring about 25 acres suddenly became plot number 20591/55 measuring about 41 acres and yet both parcels of land remained in existence. It posed the question whether mere payment for 41 acres would entitle the plaintiffs to plot number 20591/55 and argued that the plaintiffs failed to prove their case. It further argued that the plaintiffs failed to plead any particulars of fraud and added that the 2nd defendant's claim to plot number 20591/55 is superior by virtue of having a title. It urged the court to dismiss the suit with costs.

20. The 2nd defendant argued that the plaintiffs have no legal capacity to apportion to themselves land without the consent of the Land Control Board and that the plaintiffs have failed to demonstrate how LR No. 20591/329 evolved into LR. 20591/55 without pursuit of a title since 2002. He further contended that the plaintiffs did not plead fraud or misrepresentation and did not offer any evidence pointing to fraud or misrepresentation. He placed reliance on **Section 6 (1) of the Land Control Act, Section 23 of the Registration of Titles Act (repealed)** and the cases of **H.N. Gathire vs Wanjiku Munge [1979] KLR 50** and **Harambee Co-operative Savings & Credit Society vs Mukinye Enterprises Limited [1983] KLR 611**. In conclusion he urged the court to dismiss this suit with costs.

21. Thereafter, when the matter came up on 23rd February 2021 for mention to schedule date of judgment, counsel for the plaintiffs notified the court that counsel for the 2nd defendant had written to her to the effect that the 2nd defendant had passed away on 11th July 2020. Counsel urged the court to nevertheless schedule date of judgment since the claim against the 2nd defendant was yet to abate. Counsel for the 1st defendant had no objection to the proposal. Counsel for the 2nd defendant did not attend court on the said date.

22. No material such as certificate of death has been availed to the court to confirm death of the 2nd defendant and the date of such death. Assuming that death occurred on 11th July 2020 and taking into account the provisions of **Order 24 rules 1 and 4 (3) of the Civil Procedure Rules**, the suit will not abate until 11th July 2021. I have also taken into account the provisions of **Section 2 (1) and (3) (a) of the Law Reform Act** which form a basis for keeping the claim against a deceased defendant alive for one year after death. I will therefore proceed to deliver judgment.

23. I have carefully considered the pleadings, the evidence and the submissions in this matter. The issues that arise for determination are whether the deceased was allocated the parcel of land known as L.R No. 20591/55 and whether the plaintiffs are entitled to the reliefs sought.

24. From the material on record, it is apparent that pursuant to letter dated 1st July 1999, the 1st defendant allocated to the deceased 25 acres of land. The letter advised the deceased as follows:

Further to your request for land allocation at Ndabibi, we now wish to inform you that you have been allocated plot No. 20591/329 of 25 acres or thereabout. The purchase price is KShs. 20,000/= per acre ...

25. Subsequently, the 1st defendant wrote to the deceased a letter dated 16th September 2002 which stated as follows:

We wish to refer to our letter of 1st July, 1999 regarding the mentioned subject. We now wish to confirm that the offer is for 41 acres. The purchase price remains the same at KShs. 20,000/= per acre Please pay to the account Lands Limited.

26. It is not in dispute that the deceased paid to the 1st defendant a sum of KShs 820,000 being the purchase price for the 41 acres. A receipt dated 14th November 2002 was issued to the deceased. The plaintiffs contend that they later obtained a copy of the 1st defendant's letter dated 16th September 2002 which now had a handwritten endorsement by Mr J K Siror, the 1st defendant's then Managing Director, that "*the current offer of 41 acres is plot No. 20591/55*". Mr Siror testified and stated that he made the handwritten endorsement, that he gave the original of the endorsement to the deceased and that he could not remember the date when he made the endorsement. The plaintiffs did not however produce the said original.

27. It is apparent that the formal documents produced by the plaintiffs support allocation of plot No. 20591/329 measuring 25 acres or thereabout to the deceased. It is also clear to me that the size of the land allocated was increased to 41 acres through letter dated 16th September 2002. What is not clear is the alleged change of the plot number to plot No. 20591/55. The purported change has not been supported by any formal document from the 1st defendant. I have great difficulty accepting the hand written endorsement as evidence of change of the plot allocated since Mr Siror who claims to have made the change stated that he gave the original of the endorsement to the deceased and that he could not remember the date when he made the endorsement. I doubt if such a significant change could have been handled so casually – handwritten and handed over to the allottee. Since the initial allocation was communicated in a formal letter, one only expects that a change in the details of the plot allocated would have been equally formal.

28. The plaintiffs claim that they were shown the 41 acres and its beacons by a surveyor by the name of Thomas Kirui. Mr Kirui who testified in support of the plaintiffs' case conceded that he was not an employee of the 1st defendant at the time he showed the plaintiffs the plot and the beacons. Indeed, payment for his services was made by the plaintiffs. It seems that the plaintiffs settled on the plot on the basis of having been shown by Mr Kirui. It has not been shown what authority Mr Kirui had as private surveyor to point out the plot. His authority if any, was as informal as the change of plot number by Mr Siror.

29. Additionally, there is evidence on record that the 1st defendant advised the plaintiffs through letter dated 27th August 2009 that plot no. 20591/55 was allocated to a different person who paid for it in 1998 and that it was therefore not available for allocation to the deceased in 1999. That position is not entirely strange considering the informal manner in which the purported change from plot No. 20591/329 to plot No. 20591/55 was handled.

30. In view of the foregoing, I am not persuaded that the deceased was allocated the parcel of land known as L.R No. 20591/55.

31. It is the plaintiffs' case that the 1st defendant illegally and fraudulently transferred the parcel of land known as LR No. 20591/55 to the 2nd defendant. The plaintiffs contend that the 2nd defendant became the registered owner of LR No. 20591/55 and that title was issued to him. Among other prayers, the plaintiffs seek cancellation of any certificate of title issued to the 2nd defendant in respect of LR. NO. 20591/55.

32. The plaintiffs neither produced a copy of the title nor a certificate of search to support their claim that the 2nd defendant was the registered owner. I am alive to the fact the 2nd defendant averred in his defence that a certificate of title was issued to him on 7th November 2007. Nevertheless, the 2nd defendant did not testify or call any witness. The allegations in his defence remain just that: allegations.

33. The law is that he who alleges must prove. That is the import of **Section 107 (1)** of the **Evidence Act** which provides:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

34. Evidence of ownership of registered land and the manner of defeating such ownership are all governed by law. **Section 26** of the **Land Registration Act** provides that a certificate of title shall be taken by all courts as prima facie evidence of ownership. The section provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(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.

35. Further, a party wishing to prove ownership of registered land may obtain and produce a certificate of search issued under **Sections 34** and **35** of the **Land Registration Act**.

36. In matters of ownership of land, the court cannot simply accept the plaintiffs' contention and the 2nd defendant's admission that he was the registered owner of LR No. 20591/55. Registered ownership of land must always be proven as otherwise the court's process may be abused by conniving litigants. Even where the litigants litigate in good faith, it may very well be that the status on the register has since changed without the litigants' knowledge. The court may end up making adverse orders against a registered proprietor who is not party to the

litigation. Thus, in terms of **Section 108** of the **Evidence Act**, the burden of proving registered ownership of land lies on that person who would fail if no evidence on that issue was given on either side, in this case the plaintiff.

37. Even assuming that I was persuaded that the 2nd defendant is the registered owner of LR No. 20591/55, the plaintiffs would have to demonstrate that the 2nd defendant's title was acquired illegally, unprocedurally or through a corrupt scheme.

38. Although the plaintiffs have alleged that the 2nd defendant obtained title illegally and fraudulently, no particulars of fraud or illegality were pleaded in the plaint. The Court of Appeal stated in the case of **Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others** [2015] eKLR as follows:

It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

'Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged ...

39. Fraud is a serious allegation which requires proof on a standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. The plaintiffs have not established their allegations of fraud. The same applies to the allegations of illegality.

40. In view of the foregoing, the plaintiffs have failed to prove their case. They are thus not entitled to the reliefs sought in the plaint. Although there is no dispute that the deceased paid KShs 820,000 to the 1st defendant and even though the 1st defendant offered in evidence to refund the said sum, the plaintiffs have not sought such a refund in their plaint. The court cannot grant relief which is not sought.

41. In the result, I dismiss the plaintiffs' case. Considering the circumstances of the dispute and the conduct of the 1st defendant in receiving money from the deceased, I order that the 1st defendant shall bear own costs of the suit. The plaintiffs shall however pay the 2nd defendant's costs of the suit.

Dated, signed and delivered at Nakuru this 17th day of June 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mrs Mbaabu for the plaintiffs

Ms Chelangat holding brief for Mr Ombui for the 1st defendant

No appearance for the 2nd defendant

Court Assistants: B. Jelimo & J. Lotkomo