



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E&L CASE NO. 118 OF 2015

PHYLIS T. KIBET.....1ST PLAINTIFF

MARTINA J. KIPCHUMBA.....2ND PLAINTIFF

VERSUS

NICHOLAS KIPROTICH TARUS.....DEFENDANT

JUDGMENT

By a plaint dated 19th March 2015 the plaintiffs herein sued defendant seeking for the following orders:

- a. A declaration that the plaintiffs are the rightful owners of LR. NO. KIPLOMBE/KIPLOMBE BLOCK 10 (GROWEL)/411
- b. An order authorizing the Land Registrar Uasin Gishu County to rectify the register in respect of LR. NO. KIPLOMBE/KIPLOMBE BLOCK 10 (GROWEL)/411 by removing the name of NICHOLAS KIPROTICH TARUS and replacing it with the name of the plaintiffs.
- c. Costs of the suit as well as interest
- d. Any further orders

PLAINTIFF'S CASE

PW1 testified that they were gifted the suit property by their mother who had bought the suit property vide a sale agreement with David Kimutai Rotich dated 27th October 2005. The suit property had provisional number 62 and the same is demonstrated by the member register, PExh 3a and 3b.

PW1 produced the sale agreement, survey fees receipt dated 27th October 2005 and transfer receipt dated 27/10/2005 and 21/1/2006 as PExh 2(a) and PExh 2(b). That the register was amended to remove the name of the vendor and replace it with that of their mother as demonstrated by PExh3a and b. PW and PW2s names were entered in the register after their mother gifted them the land as demonstrated by PExh 3a and b.

PW1 stated that after reporting the discovery that the land had been registered in the defendant's name, the Land Registrar issued letters summoning the defendant (PExh 9(a)-(c)) to explain how he acquired the land but the defendant never honoured any of the summons.

PW1 produced the plaint, decree and warrants in Eldoret CMCC No. 244 of 2018 where the plaintiff had sued the defendant for recovery of kshs. 750,000/- as the purchase price paid for the suit land.

Counsel filed submissions and relied on the case of **Mary Wangui Muthoga v Samuel Ndung'u Chege & Another ELC 486 of 2010 [2016] eKLR** where the court held:

“As I have stated earlier in this judgment, the 1st Defendant did not defend the suit. All the allegations made against him have not been rebutted. The plaintiff having proved that she was the one entitled to be registered as the owner of the suit property, the onus was on the 1st defendant to show how he acquired the suit property and that he acquired the suit property lawfully. In the absence of any evidence as to how the 1st Defendant acquired the suit property, this court has no option but to conclude on the basis of the

overwhelming evidence on record that the 1st defendant acquired that suit property fraudulently..... as I have stated at the beginning of this judgment, this court has power to cancel a title and make an order for the rectification of the register of land where the title was acquired fraudulently. I am persuaded that this is an appropriate case in which an order for rectification of the register should be made. In conclusion, I hereby enter judgment for the Plaintiff against the 1st Defendant as prayed in paragraph (a) and (b) of the plaint as amended.”

Counsel therefore submitted that the failure of the defendant to offer a rebuttal to the plaintiff’s case shows that he acquired the title fraudulently. Counsel also relied on the case of **Alton Homes Limited & another v Davis Nathan Chelogoi & 2 others (2018)** that costs follow the event and therefore the plaintiffs are entitled to costs. The plaintiffs urged the court to grant the orders as prayed in plaint together with costs.

ANALYSIS AND DETERMINATION

The defendant was duly served with the summons to enter appearance, plead and accompanying documents which he acknowledged receipt but neither entered appearance nor filed a defence within the stipulated period. Despite service of mention and hearing notices he did not attend court to defend the claim against him. This matter therefore proceeded by way of formal proof.

The issues for determination are as to whether the defendant fraudulently acquired title to the suit land and whether the Plaintiffs are the rightful owners of the suit land.

The plaintiffs led evidence on the background to the acquisition of the suit land having been gifted by their mother Josephine Sote Kipchumba in 2006. The plaintiffs reported the matter to the Uasin Gishu Land Registrar when they realized that the land had been fraudulently transferred to the defendant. This necessitated the Land Registrar to issue summons to the defendant of which he did not honor.

It is also on record that the defendant sold the land to a third party on 22nd May 2012 who on realizing that the land did not belong to the defendant sued for a refund of the purchase price vide Eldoret CMCC No 244 of 2018. The judgment was in favour of the purchaser. This alone shows that the defendant fraudulently got the land to be registered in his name and further defrauded the third party of his money.

Section 26 of the Land Registration Act provides;

(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.

The section deals with indefeasibility of title but when it is proven that the same was acquired fraudulently through corrupt schemes then the court has powers to impeach such title. In the case of **Arthi Highway Developers Limited – Vs – West End Butchery Limited and Others** Civil Appeal No. 246 of 2013 where the Court of Appeal expressly stated that the law on fraud and indefeasibility of title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs – Justice Moiwo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997** where the court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

In the case of **Kibiro Wagoro Mukumu – vs – Francis Nduati Macharia & Another [2018] eKLR**, Judge J.G Kemei ordered the cancellation of title over the suit land that was registered in the name of the 1st defendant in favour of the plaintiff after establishing that the defendant acquired title over the suit land fraudulently and failed to appear in court to defend his title.

The court is empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

I have considered the pleadings, the evidence tendered, the submissions and the relevant authorities and find that the plaintiffs have proved their case against the defendants on a balance of probabilities. I therefore make the following orders:

a. A declaration is hereby issued that the plaintiffs are the rightful owners of LR. NO. KIPLOMBE/KIPLOMBE BLOCK 10 (GROWEL)/411

b. An order is hereby issued authorizing the Land Registrar Uasin Gishu County to rectify the register in respect of LR. NO. KIPLOMBE/KIPLOMBE BLOCK 10 (GROWEL)/411 by removing the name of NICHOLAS KIPROTICH TARUS and replacing

it with the name of the plaintiffs.

c. Costs of the suit as well as interest to be paid by the defendant.

DATED and DELIVERED at ELDORET this 25TH DAY of FEBRUARY, 2020

M. A. ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Kibii for the Plaintiffs and in the absence of the Defendant.

Mr. Yator – Court Assitant