



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 49 OF 2017

SARAH CHESIELE BARTA.....PLAINTIFF

VERSUS

KIPLANGAT BARTA.....1ST DEFENDANT

LAND REGISTRAR BOMET.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff instituted this suit against the Defendants alleging that the first defendant connived with the 2nd defendant and sub-divided her land parcel known as KERICHO/KIMULOT/514 into two land parcels namely KERICHO/KIMULOT/1551 and 1552 after which he had himself registered as the owner of land title no. 1551 while the plaintiff was registered as the owner of land parcel no. 1552. He prays that an order of rectification of the register be issued and the two titles be cancelled so that the land can revert to its original title in her name.

2. The 1st defendant filed his defence denying the Plaintiff's claim and stating that the suit was res judicata. He subsequently filed a Preliminary Objection on the issue of res judicata but the same was dismissed and the case was set down for hearing.

PLAINTIFF'S CASE

3. The Plaintiff who is well over 90 years old testified and called 3 witnesses. She adopted her witness statement dated 28th April 2017. The gist of her case was that she was the registered owner of land parcel no. KERICHO/KIMULOT/514. The title deed for the suit property got lost and she reported the matter to Bomet Police Station and the Bomet Office Lands. She later learnt that her name had been fraudulently struck off the register and her land had been divided into two and given the numbers KERICHO/MULOT/1551 and 1552. She was then registered as the owner of land parcel no. 1551 while the defendant was registered as the owner of land parcel no. 1552.

4. Upon cross –examination the plaintiff stated that she was aware that there were previous suits relating to the suit property but she did not know whether the said suits had been concluded as she never attended court. The plaintiff's three witnesses corroborated her evidence that she was the registered owner of the suit property. Upon cross-examination, PW1 who is the plaintiff's son stated that Kericho HCCC No. 32 of 96 was concluded through arbitration and it was held that the plaintiff, who is the defendant herein, was entitled to an equal share of the land with the plaintiff. He confirmed that the court declared that land parcel no. KERICHO/KIMULOT/514 be divided into two portions though he said that he found the award harsh, unprocedural and oppressive.

DEFENDANT'S CASE

5. The defendant adopted his witness statement dated 9th May 2018. He further testified that he sub-divided L.R No KERICHO/MULOT/514 in accordance with the court's decision in HCCC No. 32 of 1996. Upon cross-examination he said that land parcel no. 514 was originally registered in his father's name and it was supposed to be divided between him and his late brother who was the plaintiff's husband. He said that by the time the land was divided into two, his brother had already died, that is why his share was registered in the plaintiff's name. He said that the plaintiff was aware of the sub-division though she refused to accompany him to the Lands office for purposes of sub-division.

After the close of the defendant's case both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

6. The following issues arise for determination:

- i. Whether this suit is res judicata
- ii. Whether the sub-division of land parcel no. KERICHO/MULOT/514 was done fraudulently.
- iii. Whether Plaintiff is entitled to the reliefs sought.
- iv. Who should bear the costs of this suit?

ANALYSIS AND DETERMINATION

7. With regard to the first issue, it is common ground that the 1st Defendant sued the plaintiff in **HCCC No. 32 of 1996 Kiplangat A Barta v Sarah Chesiele Barta**. In the said suit the 1st defendant herein sued the Plaintiff for a declaration that the plaintiff was the rightful owner of half a share in the parcel of land known as KERICHO/MULOT/514. By consent of the parties therein the matter was referred to arbitration and was concluded by an award whereby the arbitrator directed that the suit property be divided into 2 equal portions between the plaintiff and the defendant who are the same parties in this suit. The award was upheld by the court on 26th March 2011. The said decision was never overturned.

8. In **Joshua Ngartu v Jane Mpinda & 3 Others (2019) eKLR** Lucy Mbugua J relying on the case of **Attorney General & Another v ET (2012) eKLR** held as follows:

*“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of **Omondi v National Bank & Others (2001) EA 177** the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit” In that case the court quoted Kuloba J (as he then was) in the case of **Njanju v Wambugu & Another HCCC No. 2430 of 1991** (unreported) where he stated “If parties are allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because one gives his case some cosmetic face lift in every occasion when he comes to court then I don’t see the use of the doctrine of res judicata...”*

9. In the instant suit the plaintiff has sued the defendant in respect of the same subject matter claiming that the defendant fraudulently had the plaintiff’s title cancelled and caused the suit property to be divided into two portions and registered as parcel no 1551 in the plaintiff’s name and parcel no. 1552 in the 1st defendant’s name.

10. The only difference between the two suits is that in the instant suit the plaintiff has added two more defendants and she has based her suit on fraud while in the earlier one, the plaintiff sought declaratory orders. In so far as this suit relates to the same parties and the same subject matter in that it touches on the ownership of L.R No KERICHO/MULOT/514, it is no doubt res judicata. On this ground alone, this suit must fail.

11. Be that as it may, even assuming that the suit was not res judicata, the plaintiff alleged fraud against the defendants but fell short of proving the allegations of fraud. By her own admission she conceded that the sub-division of land parcel no 514 was done pursuant to the court’s decision in HCCC No. 32 of 1996. So where is the fraud? It matters not that she was dissatisfied with the said decision. Having failed to appeal against the said judgment, she cannot now turn around and complain and allege that the sub-division was fraudulent. In any case, it is trite law that allegations of fraud must be proved to a standard slightly beyond proof on a balance of probabilities.

12. The Court of appeal in the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** in considering the issue of fraud observed 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 (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308**).*

*The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see **Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (**Davy V Garrett (1878) 7 ch.D. 473 at 489**). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.*

13. In the instant case, even though the plaintiff pleaded fraud and outlined the particulars of fraud in the plaint, her evidence was insufficient to prove fraud.

14. In view of the foregoing, the plaintiff has failed to prove her case on a balance of probabilities and I have no choice but to dismiss the suit with costs to the defendant.

Dated and Signed at Kisii thisday of January 2020.

J.M ONYANGO

JUDGE

Dated, signed and delivered at Kericho this 10th day of February,2020.

ANTONY KANIARU

JUDGE