



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ENVIRONMENT AND LAND CASE NO. 128 OF 2017

FRANCIS KIPNGENO LABOSO.....PLAINTIFF

VERSUS

KIMUTAI NGENO.....1ST DEFENDANT

JOTHAM K. NGENO.....2ND DEFENDANT

PHILIP KORIR.....3RD DEFENDANT

DAVID RUTO.....1ST THIRD PARTY/4TH DEFENDANT

TAPNYOBI W/O TORGOTI....2ND THIRD PARTY/5TH DEFENDANT

CORRIGENDA

1. Paragraph 31(c) of the Judgment delivered on 3rd April 2019 erroneously states that the costs of the suit and counterclaim shall be borne by the Defendant.

2. The correct position is that the costs ought to be borne by the Plaintiff as his suit was dismissed while the 1st Defendant's counterclaim succeeded.

3. Accordingly, paragraph 31(c) aforesaid is hereby corrected under Section 99 of the Civil Procedure Act to read as follows:

The costs of this suit and counterclaim shall be borne by the **Plaintiff**.

Dated, signed and delivered at Kericho this 20th day of May, 2019.

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J.M ONYANGO

JUDGE

JUDGMENT

Introduction

1. The Plaintiff who claims to be the registered owner of land parcel number KERICHO/SILIBWET/837 and 1040 filed this suit against the 1st, 2nd and 3rd Defendants claiming that the 1st and 2nd Defendants conspired to fraudulently and unlawfully transfer the said parcels of land to the 1st Defendant. He further states that the 1st Defendant has engaged the services of the 3rd defendant to construct a permanent building on the suit property thereby depriving him of the possession and use thereof. In his Plaintiff dated 23rd November 2017, he seeks the following reliefs:

a) *A declaration that the Defendants are trespassers.*

b) *An order of permanent injunction restraining the 1st, 2nd and 3rd Defendants jointly and severally, their agents and/or servants*

from entering, constructing buildings and/or dealing in any way with the Plaintiff's land parcels known as L.R NO. KERICHO/SILIBWET/837 and 1040.

c) *Costs of the suit.*

2. The 1st and 3rd Defendants filed their Defence in which they denied the Plaintiff's claim and lodged a counterclaim. In the said counterclaim the 1st Defendant alleges that he is the registered proprietor of land parcel number KERICHO/SILIBWET/4233 where he was carrying on some construction before the Plaintiff interfered with him. He seeks an order of permanent injunction restraining the Plaintiff from interfering with the 1st Defendant's quiet possession of the property known as L.R NO. KERICHO/SILIBWET/4233.

3. Subsequently on 11th June, 2018, the 1st and 3rd Defendants filed an application seeking the inclusion of the third parties herein in this suit. The application was allowed and the court directed that the 3rd parties be deemed as the 4th and 5th Defendants in this matter.

4. The Third Parties/4th and 5th Defendants on their part filed their Defence wherein they inter-alia pleaded that the Plaintiff acquired titles to L.R numbers KERICHO/SILIBWET/837 and L.R NO'S KERICHO/SILIBWET/1039 and 1040, resultant from the sub-division of L.R NO. KERICHO/SILIBWET/838, by way of fraud. The Plaintiff did not file a reply to controvert the allegations of fraud levelled against him.

5. The suit was subsequently set down for hearing and all the parties testified and called their witnesses.

Plaintiff's case

6. The Plaintiff's case is that he is registered owner of land parcels number KERICHO/SILIBWET 837 and KERICHO/SILIBWET1040/. He produced a copies of the title deeds and green cards in respect of the said parcel of land. He testified that the 1st Defendant had trespassed onto his land and started constructing a permanent building thereon. He stated that he found the 1st Defendant's workers at the site and reported the matter to the police who advised him to file a civil suit.

7. Upon being shown the 1st Defendant's title deed for land parcel number KERICHO/SILIBWET/4233 and being cross-examined, he stated that he did not call a surveyor to confirm if the 1st Defendant was constructing on his land. He stated that he sued the 2nd defendant who is the Land Registrar, Bomet because he refused to issue him with a certificate of official search. He confirmed that according to the green card, land parcels number KERICHO/SISLBWET/837and KERICHO/SILSIBWET/1040 were first registered in the name of Tapnyobii Torgoti (5th Defendant). He claimed he had sale agreements showing that he had purchased the said parcel of land from Tapnyobii W/O Torgoti though he did not produce them in court. He also did not produce any transfer instruments in respect of the said titles. He stated that he took possession of the said parcels of land but he was chased away by the 5th Defendant's sons and daughters. He stated that he was not aware that the said parcels of land had since been sub-divided. He admitted that he had not given the particulars of fraud between the 1st and 2nd Defendants nor had he prayed for cancellation of title no. KERICHO/SILIBWET/4233.

8. The Plaintiff called one witness, Stephen Kipkemoi Chemanyei (PW2) who testified that sometimes in 1985 while working as a clerk in the firm of Mitey & Co Advocates he took instruction from the Plaintiff regarding the sale of land parcels number KERICHO/SILIBWET/837 and 838 between the Plaintiff and the 5th Defendant after which he ushered them into the advocate's office for signing of the agreement. He stated that the said law firm was not involved in the transfer of the said parcel of land to the Plaintiff.

Defendants' Case

9. The 1st Defendant testified that he purchased land parcel number KERICHO/SILIBWET/4233 from David Ruto (4th Defendant) who is the son of the 5th Defendant for Kshs. 2,500,000. He stated that before entering into a sale agreement for the purchase of the said parcel of land with 4th Defendant, he conducted an official search and established that the title was registered in the name of the 4th Defendant. He produced a copy of the title deed, sale agreement, green card and letter of consent and transfer instrument as his exhibits. After he had the title registered in his name he obtained a loan from Mwalimu SACCO and started constructing a permanent building on the suit property but the Plaintiff alleged that he was the owner of the suit property and later obtained an order of injunction against him forcing him to stop the construction. He denied that he colluded with the Land Registrar (2nd Defendant) to transfer the title to his name. He stated that he purchased the suit property in good faith without any notice of fraud.

10. Upon being cross-examined by the Plaintiff he stated that he bought a portion of land measuring 0.046hectares though the 1st Defendant's title indicates that his land measures 0.045 hectares. He could not explain the difference. He said he did not attend the meeting of the Land Control Board though he sent someone to represent him. He stated that according to the mutation form, land parcel no. 4233 was curved out of land parcel no. 837 in 2016. He said he was not involved in the sub-division though he did the necessary due diligence and confirmed that the 1st Defendant's title was genuine.

11. Emily Torgoti Ruto (DW2) who is the daughter of the 5th Defendant testified on behalf of the 5th Defendant by virtue of a Power of Attorney donated by the 5th Defendant. She produced the said Power of Attorney as the 5th Defendant's Exhibit 1. She stated that the 5th Defendant was 107 years old and she could neither travel nor testify in court. She relied on her witness statement which was adopted her as her evidence in chief. In cross examination, she stated that the 5th Defendant was the registered owner of land parcel number KERICHO/SILIBWET/837 and 838 but she subsequently sub-divided it into several portions some of which she gave her 4 daughters and 2 sons. She stated that her brother David Kibet Ruto (4th Defendant) was given land parcel number KERICHO/SILIBWET/4233 which he later sold to the plaintiff. She denied that her mother had sold any land to the Plaintiff. She stated that the Plaintiff had never fenced nor taken possession of land parcel number 837. She said that the said parcel had some temporary rental structures from which she had been collecting rent since 1972.

12. DW3 who testified that he was a village elder corroborated the evidence of DW2 with regard to the ownership of land parcel no. KERICHO/SILIBWET/837. He stated that the 5th Defendant had not sold her land to the Plaintiff even though he was aware that the Plaintiff was laying claim to the said parcel of land. He stated that in his capacity as a village elder, he was aware that the chief had summoned the Plaintiff sometime in 1994 regarding his claim to the 5th Defendant's land but the Plaintiff did not respond to the summons.

13. The 4th Defendant who testified as DW4 stated that land parcel number KERICHO/SILIBWET 4233 was derived from land parcel no. KERICHO/SILIBWET/837 which belonged to his mother (5th defendant). He denied that the Plaintiff had ever owned or occupied land parcel number 837. 14. He denied that his mother had ever dealt with the Plaintiff. He also denied that he fraudulently transferred the suit property to the 1st Defendant.

15. After the close of the Defendants' case each, each of the parties filed their submissions which I have considered.

Issues for determination

16. From the pleadings, evidence and rival submissions, the following issues fall for determination:

- i. Whether the Plaintiff is the registered proprietor of land parcels no. KERICHO/SILIBWET/837 and 1040
- ii. Whether the 2nd and 5th Defendants fraudulently sub-divided land parcels no. KERICHO/SILIBWET/837 and 1040 and transferred land parcel no. KERICHO/SILIBWET /4233 to the 4th Defendant
- iii. Whether the 1st and 2nd Defendants conspired and fraudulently transferred the suit property to the 1st Defendant
- iv. Whether the 1st Defendant is a bona fide purchaser for value without notice
- v. Whether the 1st and 3rd Defendants trespassed onto the plaintiff's land parcels no. KERICHO/SILIBWET/837 and 1040
- vi. Whether the Plaintiff is entitled to the reliefs sought against the 1st, 2nd and 2nd Defendants
- vii. Whether the 1st and 3rd Defendants are entitled to the reliefs sought in the counterclaim

Analysis and determination

17. I will tackle the first three issues jointly. The Plaintiff produced title deeds for land parcels number KERICHO/SILIBWET/837 and 1040 dated 26.3.1985 and 15.4.1998 respectively. He testified that he had purchased the same from the 5th Defendant in 1985. He claimed that after fencing the parcels of land, he was not able to occupy and make use of the said parcels of land as the 5th Defendant's children destroyed the fence and chased him away.

18. From the evidence of DW2 and DW4 it emerged that the 5th Defendant got back the title to the two land parcels whereupon she sub-divided them into several portions and gave the 4th Defendant land parcel no. KERICHO/SILIBWET/4233. The 4th Defendant then sold land parcel no. KERICHO/SILIBWET/4233 to the Plaintiff on 16.5.2017. This evidence is consistent with the 2nd Defendant's Defence which is to the effect that the Plaintiff's titles in respect of land parcel no. KERICHO/SILIBWET/837 and KERICHO/SILIBWET/1040 were cancelled and the titles reverted to the 5th Defendant. However, the green cards which were tendered in evidence by the 1st Defendant do not show when the title was cancelled. Unfortunately, the 2nd Defendant who is the Land Registrar Bomet and who would have shed light on what transpired did not come to court to testify.

19. In their joint statement of Defence, the 4th and 5th Defendants have alleged that the Plaintiff acquired title to the land parcels number 837 and 1040 in 1985 from the 5th Defendant through fraud. The particulars of fraud are particularized in their defence. They further state that the Plaintiff's title was lawfully cancelled by the Land Registrar in 2016. It is not clear why the Plaintiff did not find it necessary to controvert these serious allegations against him.

20. In his testimony, the Plaintiff mentioned that the 5th Defendant filed suit against the Plaintiff vide HCCC No. 68 of 2013 seeking to be declared the owner of land parcels no. KERICHO/SILIBWET/837, 839 and 1040 by virtue of adverse possession but the case was dismissed. I have studied the file for HCCC No. 68 of 2013 O.S and noted that indeed the suit was dismissed but there is a pending application seeking a review of the court's judgment delivered on 25.6.2014.

21. Although there appear to be some lapses in the way the titles no KERICHO/SILIBWET/837 and 1040 reverted back to the 5th Defendant, based on the material and evidence placed before the court, I am unable to conclude that the process was fraudulent. It is trite law that fraud must not only be pleaded and particularized but it must be proved to a standard that is higher than on a balance of probabilities. This was so held by the Court of Appeal in the case of **Filipo Fedrini v Ibrahim Mohamed Omar [2018] eKLR** specifically cited with approval the case of **Vijay Morjaria & Nansingh Darbar & Another [2000]eKLR** where the Court stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred for the facts.”

22. In light of the foregoing, it is my finding that the Plaintiff is no longer the registered proprietor of land parcels number KERICHO/SILIBWET/837 and 1040, the same having been registered in the name of the 5th Defendant in 2016. The Plaintiff failed to prove that the cancellation and subsequent registration of the two titles in the name of the 5th Defendant was fraudulent. Similarly, the plaintiff did not prove that the sub-division of land parcel number 837 into 4233 which was transferred to the 4th Defendant was fraudulent. He also failed to prove that the 4TH Defendant fraudulently transferred land parcel no. KERICHO/SILIBWET/4233 to the 1st Defendant.

23. I will now move on to the fourth issue which is whether the 1st Defendant is a bona fide purchaser for value without notice.

24. In the case of **Samuel Kamere V Land Registrar (2015) eKLR**, the Court of Appeal held that:

“In order to be considered a bona fide purchaser a person must prove that he had a acquired a valid title, secondly, that he carried out due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly, that he paid valuable consideration for the purchase of the suit property”

25. The 1st Defendant testified that he is the registered owner of land parcel number KERICHO/SILIBWET/4233. He produced a title deed in respect thereof together with a certificate of official search showing that the said title is registered in his name. He also produced the letter of consent and transfer form in respect of the said transfer.

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

“The certificate of title issued by the Registrar upon registration, ort 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 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 grounds of fraud, or misrepresentation to which 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.”

27. Since the Plaintiff failed to prove any fraud against the 5th, 4th and 2nd Defendants it my finding that the 1st defendant is a bona fide purchaser for value and he acquired a good title to land parcel no. 4233 from the 4th Defendant. The Plaintiff’s allegations of trespass against the 1st and 3rd Defendant are therefore unfounded.

28. In response to the sixth and seventh issues, it is my finding that in view of the foregoing, the plaintiff has failed to prove his case against the Defendants and he is therefore not entitled to the reliefs sought.

29. On the other hand, the 1st and 3rd Defendant’s Counterclaim succeeds as the Plaintiff has no legal basis to stop the 1st Defendant from carrying on with his construction on land parcel no. KERICHO/SILIBWET/4233. The Plaintiff has demonstrated that he has satisfied all the conditions in the case of **Giella v Cassman Brown Ltd**. He has proved that he is the registered proprietor of land parcel no. KERICHO/SILIBWET/4233 on which he is constructing a house.

30. He has also demonstrated that he took a loan of Kshs. 6,000,000 from Mwalimu SACCO to build a house and he has been greatly inconvenienced as the construction has been suspended. The balance of convenience therefore tilts in his favour. It is therefore my finding that his prayer for a permanent injunction against the Plaintiff is merited.

31. The upshot is that the Plaintiff’s suit is dismissed with costs to the Defendants. Judgment is entered for the 1st Defendant on the counterclaim and I make the following final orders:

a) The Plaintiffs suit against the defendants is dismissed

b) A permanent injunction is hereby issued restraining the Plaintiff by himself, his agents, servants or anyone acting on his behalf from interfering with the 1st defendant’s peaceful and quiet possession of the property under construction on land parcel no. KERICHO/SILIBWET 4233.

c) The costs of the suit and counterclaim shall be borne by the defendant.

Dated, signed and delivered at Kericho this 3rd day of April, 2019.

J.M ONYANGO

JUDGE