



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 753 OF 2017

MOHAMMED SHAHID MOUGHAL.....PLAINTIFF

VERSUS

MICHAEL MOOKE KIKAYE.....1ST DEFENDANT

THE LAND REGISTRAR KAJIADO.....2ND DEFENDANT

THE NATIONAL LAND COMMISSION.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

THE ESTATE OF LEKERRA OLE KIKAE.....5TH DEFENDANT

THE ESTATE OF LEKERRA KIKAE REIPA.....6TH DEFENDANT

JUDGMENT

By a Further amended Plaintiff dated the 5th July, 2018, the Plaintiff sought for the following prayers:

aa. An order to invalidate and cancel subdivision of Title No. Kajiado/ Il damat/ 3 into parcels numbers known as Title No. Kajiado/ Ildamat/ 4870, 4871, 4872, 6502, 6503 or any other parcels by the 2nd Defendant.

a. A declaration that the Plaintiff is entitled to a portion of land measuring 79 Acres or thereabouts from either Title No. Kajiado/ Ildamat/ 4870, 4871, 4872, 6502, 6503 (formerly Title No. Kajiado/ Ildamat/3)

b. A permanent injunction restraining the Defendant (whether by themselves, employees, servants, agents and/or persons authorized by him or otherwise howsoever) from entering, from trespassing into, constructing upon, alienating, transferring with the proprietor's quiet possession of suit property known as Title No. Kajiado/ Il damat/ 3 measuring Seventy Nine (79) Acres to be excised/curved from the Defendant's portion known as Title No. Kajiado/ Ildamat/ 6502 & 4872 (formerly known as Kajiado/Il damat/3)

c. An order compelling the Defendants to render vacant possession of the encroached portion of the suit property measuring (79) Acres to the Plaintiff forthwith and, in default, to be forcefully evicted therefrom.

d. An order for survey and placement of beacons for a portion of land measuring 79 acres to be curved out from suit property known as Title No. Kajiado/Il damat/6502 and 4872 (formerly known as Title No. Kajiado/Il damat/3) and the 1st Defendant ordered to surrender original title No. Kajiado/ Il damat/3) registered in the name of the 1st Defendant to the Court.

e. An order directed to the 2nd Defendant and 1st Defendant at the Registrar Kajiado District Lands Registry to transfer and vest portion of Land measuring 79 acres from the suit property known as Title No. Kajiado/ Il damat/ 6502 and 4872 (formerly known as Title No. Kajiado/ Il damat/ 3) to the Plaintiff and the Deputy Registrar to execute all the necessary transfers.

f. General damages

g. Costs of this suit

h. Any other Order on or relief that this Honourable Court may deem fit to grant.

The 1st and 6th Defendants filed their Amended Statement of Defence and Counterclaim on 22nd June, 2016 in which the Defendants denied the allegations in the Complaint and sought for the following prayers in the Counterclaim:

- a. A permanent injunction to issue against the Plaintiff prohibiting him from laying any claim whatsoever on Land Parcel No. Kajiado/ Ildamat/ 3.
- b. Damages for trespass and mesne profits to issue against the Plaintiff to be assessed by Court.
- c. A declaration to the effect that the subdivision and transfers of land parcel number Kajiado/ Ildamat/ 3 was lawful and valid.

Evidence of the Plaintiff

The Plaintiff as PW1 stated that he entered into a Sale Agreement dated the 18th May, 2009 with the 1st Defendant on behalf of the family to purchase 69 acres to be carved out of land parcel number Kajiado/ Ildamat/ 3. PW1 contended that the vendor was the 5th Defendant but represented by the 1st Defendant. He further entered into another Sale Agreement dated 10th February, 2011 to purchase 10 acres out of the said parcel of land. He stated that the Defendants have colluded and despite paying the full purchase price, they have failed to transfer the 79 acres to his name. He claimed to have taken possession of the 69 acres and developed it. He referred to Kajiado Chief Magistrate's Court Criminal Case No. 169 of 2014 where he had been the Complainant while the 1st Defendant was charged with obtaining money by false pretence but acquitted as the Plaintiff was in occupation of the land. Further, that the 1st and 6th Defendants have colluded with the 2nd Defendant and proceeded to subdivide the property of the 5th Defendant as well as registered the resultant subdivisions despite the existence of a caution he had registered thereon. He insists the 1st Defendant has failed to produce Letters of Administration Intestate in respect to the 5th Defendant's estate. Further, that 1st Defendant has used the Certificate for Confirmation of Grant in respect of 6th Defendant's estate to subdivide the 5th Defendant's land. He sought for cancellation of the resultant subdivisions of Kajiado/ Il damat/ 3 and for the Court to direct the Land Registrar to effect transfer of 79 acres of land therefrom to him. In cross examination, he confirmed that he never met Lekerra Ole Kikae and it is a land agent who invited him to purchase a portion of the suit land. Further, the searches he undertook and title deed all indicated Lekerra Ole Kikae as owner. He explained that he was introduced to the 1st Defendant and the local chief. Further, the 1st Defendant never told him he was the owner of the land but explained that he was representing him. He further contended that it is the 1st Defendant and the Chief Jonathan Nangana who prepared the Sale Agreement while he signed it on trust. He produced various documents including the Sale Agreement; Proceedings and Judgment in Kajiado Chief Magistrate's Court Criminal Case No. 169 of 2014; Copy of Title Deed as well as extract of Green Card for Kajiado/ Il damat/ 3; Copy of Certificate for Confirmation of Grant in the Nairobi High Court Succession No. 680 of 2010; Sale Agreement dated 10th February, 2011 and Map for Kajiado/ Il damat/ 3 as his exhibits.

Evidence of the Defendants

The 1st Defendant as DW1 stated that in 2009, the Plaintiff approached him to purchase land from him. He explained that the land in question was Kajiado/ Il damat/ 3 which belonged to his late father and by that time they had not applied for letters of administration intestate in respect to the said estate. He confirmed that he agreed to sell to the Plaintiff his share from the land parcel number Kajiado/ Il damat/3 and received a total of Kshs. 1.1 million from him. He explained that Lekerra Ole Kikae and Lekerra Kikae Reipa are one and the same person. He further confirmed that he was appointed the Administrator of his late father's estate and on 26th February, 2013, they were issued with a Certificate for Confirmation of Grant and proceeded to distribute the deceased estate which comprised Kajiado/ Il damat/ 3 to all the beneficiaries listed therein. He denied entering into the two Sale Agreements with the Plaintiff. He further denied that there was a family meeting ratifying the transaction between the Plaintiff and himself. He confirmed that he was ready to refund the Kshs. 1.1 million to the Plaintiff as he had no land to sell to him since he had sold a portion to a third party. It was his testimony that the Plaintiff harassed him and led to his being charged with a criminal case at the Kajiado Chief Magistrate's Court. Further, that the Plaintiff has entered their land and he wants him to move therefrom. It was his testimony that he never sold land 79 acres to the Plaintiff but only allowed him to feed his goats therein. In cross examination he confirmed being issued with a Certificate for Confirmation of Grant on 26th February, 2013. He denied entering into the Sale Agreements with the Plaintiff nor sending a Land Surveyor called Titus Munyao to the suit land. He also denied fencing the land. Further, that in the Nairobi High Court Succession cause No. 680 of 2010, Kajiado/ Il damat/3 is included in the List of Assets. He denied that he had promised to effect transfer of land to the Plaintiff. He contended that Kajiado/ Il damat/ 3 was lawfully subdivided.

The 2nd Defendant as DW2 presented a report in respect to land parcel number Kajiado/ Il damat/ 3 and confirmed that the same was owned by Lekerra Ole Kikae who passed away and there was a succession cause in respect to his estate. He explained that the said parcel of land had undergone various subdivisions as per the Certificate for Confirmation of Grant issued in Nairobi HC Succession Cause No. 680 of 2010. In cross examination he explained that the Grant related to the estate of Lekerra Kikae Reipa while in the Green Card it indicated that the said land belonged to Lekerra Kikae. He was emphatic that Lekerra Ole Kikae and Lekerra Kikae Reipa was one and the same person. It was his testimony that Michael Mooke Kikaye was the Administrator of the estate as indicated in the Nairobi HC Succession Cause No. 680 of 2010. He explained that there was a caution registered against the aforementioned parcel of land which was removed after the cautioner was notified and he failed to appear. Further, that the same was removed after the succession cause. He reiterated that the entries in Kajiado/ Il damat/3 were procedurally and lawfully done as there was no malice in making the said entries.

The Plaintiff, 1st, 2nd, 4th and 6th Defendants filed their submissions which I have considered.

Analysis and Determination

Upon consideration of the Pleadings filed herein including the testimonies of the witnesses and exhibits, the following are the issues for

determination;

- Whether the 1st Defendant had the legal capacity to enter into the two Sale Agreements with the Plaintiff in respect to land parcel number Kajiado/ Il damat/3.
- Whether the Plaintiff is entitled to the Orders sought in the Amended Plaintiff.
- Whether the 1st and 6th Defendants are entitled to the orders sought in the Counterclaim.
- Who should bear the costs of the suit.

As to whether the 1st Defendant had the legal capacity to enter into the two aforementioned Sale Agreements with the Plaintiff in respect of land parcel number Kajiado/ Il damat/3. It was the Plaintiff's claim that he entered into two Sale Agreements to purchase a total of 79 acres of land to be excised from title number Kajiado/ Ildamat/ 3. The first agreement is dated 18th May, 2009 while the second agreement is made on 10th February, 2011. It was not in dispute that land parcel number Kajiado/ Il damat/ 3 was owned by Lekerra Kikae who died on 19th December, 1982. The Plaintiff contends that the 1st Defendant represented the entire family and the Sale Agreements stated thus. Further, as PW1 he confirmed that he was well aware that the owner of the land had died but the 1st Defendant represented his estate and the family intended to apply for succession. The Law of Succession Act defines a personal representative as the executor or administrator, as the case may be, of a deceased person. A personal representative of a deceased estate can only be made so by an order of the Court and once he or she has applied for Letters of Administration Intestate in respect to a deceased persons' estate. Section 82 of the Law of Succession Act further makes provisions on the powers of a personal representative.

From the evidence before Court, the 1st Defendant was appointed administrator of the estate of Lekerra Kikae Reipa on 16th May, 2011. It is important note that the 1st Defendant entered into the two Sale Agreements with the Plaintiff in respect to the deceased estate before being made an administrator. This in effect means that he did not have the legal capacity to do so and his actions actually amounted to intermeddling with the deceased estate as envisaged in Section 45 of the Law of Succession Act.

As to whether the Plaintiff is entitled to the Orders sought in the Amended Plaintiff. The Plaintiff sought for several orders which included cancellation of resultant subdivisions of Kajiado/ Ildamat/ 3; declaration that he is entitled to his 79 acres, an injunction to restrain the Defendants from transferring the land or interfering with his occupation; establishment of beacons; general damages and for him to be registered as owner of the 79 acres. The basis of the Plaintiff's claim lies in the two sale agreements with the 1st Defendant. He claims the Defendants have colluded and committed fraud in denying him his land. Further, that the 2nd Defendant proceeded to remove the caution on the land and registered the resultant subdivisions therefrom. He contended that he took occupation of the 69 acres in 2009 and invested heavily on the land. The 1st Defendant who entered into a transaction with him insists he proceeded to legally distribute the 6th Defendant's estate as per the Certificate for Confirmation of Grant. The Land Registrar as DW2 confirmed that he removed the Caution placed by the Plaintiff after notifying him but he failed to appear. Further that he proceeded to make entries as per the Certificate for Confirmation of Grant. He denied that the entries were maliciously and fraudulently made. Plaintiff presented the Certificate for Confirmation of Grant and I note that he was not included as a beneficiary of the deceased estate. From a keen perusal of the two Sale Agreements, I note except for the 1st Defendant signing the same, the rest of the deceased beneficiaries indicated in the Certificate for confirmation of Grant did not sign the same nor were their names indicated therein. DW1 in his evidence confirmed receiving a total of Kshs. 1.1 million from the Plaintiff and stated that he is ready to refund the same. It was his testimony that he was selling to the Plaintiff a portion of his share in the deceased estate. Further that he did not have any other land to offer the Plaintiff as he had already sold to Flat International. The Plaintiff in his submissions relied on section 93(1) of the Law of Succession Act; the cases of **Giella V Cassman Brown & Company Limited (1973) EA 358; Inwards & Others V Baker (1965) 1All ER; William Muthee Muthoni V Bank of Baroda Civil Appeal NO. 21 of 2006; Moses C Muhia Njoroge & 2 Others V Jane W Lesaloi and 5 Others (2014) eKLR** and section 80 of the Land Registration Act to buttress his averments. In opposition to the suit, the 1st and 6th Defendants submitted that the Plaintiff had not established a prima facie case and relied on the cases of **Giella V Cassman Brown & Company Limited (1973) EA 358; ELC at Muranga No. 11 of 2018 Harrison Wachira Wanjohi V Bethwel Mwangi Githinji & 4 Others and CA No. 246 of 2013 and Arthi Highway Developers Ltd V West End Butchery Ltd** to support their arguments. The 2nd and 4th Defendants submitted that they were not privy to the agreement between the Plaintiff and 1st Defendant and relied on the decisions of **Agricultural Finance Corporation V Lengetia Ltd and Aineah Likuyani Njirah V Aga Khan Health Services (2013) eKLR**. They further submitted that since the land in dispute was agricultural, the transaction between the Plaintiff and 1st Defendant was void as no consent of the land control board was obtained and the only remedy available for the Plaintiff is to get his refund. On the allegations of fraud levelled against the Defendants, they submitted that the Plaintiff relied on the removal of the caution yet the same cannot subsist indefinitely. They relied on the case of **R.G Patel Vs Lalji Makanji (1957) EA 314** to support the argument that the Plaintiff failed to prove the allegations of fraud as against the Defendants. They further submitted that the Plaintiff was not entitled to costs as against them as he did not serve the Attorney General in accordance with section 13A (1) of the Government Proceedings Act and relied on the case of **Lawrence Onyiego & Another V Samuel Minika & Another (2017) eKLR** to support this argument. On the Plaintiff's claim for a declaration that he is entitled to the 79 acres of land. Since I have held that the 1st Defendant did not have capacity to dispose of the deceased estate without letters of Administration intestate. Further, noting that Lady Justice Achode in the aforementioned Nairobi High Court Succession Cause No. 680 of 2010 declined to include the Plaintiff as having a purchaser's interest over the suit land Kajiado/ Ildamat/ 3 and in associating myself with the said decision, I find that the 1st Defendant did not have capacity to sell the assets of the deceased estate. To my mind it seems the Plaintiff sought to bind all the beneficiaries of the deceased estate for the actions of the 1st Defendant. In the case of **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR** it held that; 'In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them **AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra), KENYA NATIONAL CAPITAL CORPORATION LTD V ALBERT MARIO CORDEIRO & ANOTHER (supra)** and **WILLIAM MUTHEE MUTHAMI V BANK OF BARODA, (supra)**.

Thus in AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

In associating myself with this decision, I find that the aforementioned two Sale Agreements only affected the Plaintiff and the 1st Defendant who were parties to it and not the rest of the beneficiaries of the deceased estate. In the circumstance, I am unable to make a declaration that the Plaintiff is entitled to 79 acres from land parcel number Kajiado/ Il damat/ 3 as the same has already been distributed to different parties. On the claim for a permanent injunction as against the Defendants from interfering with the suit land or the portion the Plaintiff was occupying. I note the Plaintiff claims to have taken possession of the portion he was occupying in 2009 prior to the distribution of the deceased estate. Further, that the deceased estate has since been subdivided to the different beneficiaries who hold title. Based on the facts presented above and relying on the principles enshrined in the case of **Giella Vs Casman Brown**, I hold that the Plaintiff has not established a prima facie case to warrant the grant of the injunctive orders sought as third parties already hold valid titles to the land he is claiming. The Plaintiff claimed for an order of vacant possession and for the Defendants to be evicted from his land. From the evidence of the Plaintiff, he confirmed that he was yet to receive a title to his portion of land. Section 24 (a) of the Land Registration Act stipulates as follows: '**subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....**'

Further section 26(1) of the Land Registration Act holds that a Certificate of title is conclusive proof of proprietorship.

In the case of **WILLY KIPSONGOK MOROGO v ALBERT K. MOROGO (2017) eKLR** where the Court held as follows: '**the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.**'

In the current scenario, the Plaintiff is neither the registered proprietor of the portion of land he occupies and has not produced any evidence in court to that effect. In associating myself with the decision cited above, I am unable to find that the Defendants have encroached on the Plaintiff's land and will hence not make an order for their eviction therefrom. The Plaintiff further sought for survey and placement of beacons for a portion of land measuring 79 acres to be curved out from suit land and for the 1st Defendant ordered to surrender original title No. Kajiado/ Il damat/3) registered in his name and for the 2nd Defendant to transfer and vest portion of Land measuring 79 acres from the suit property known as Title No. Kajiado/ Il damat/ 6502 and 4872 (formerly known as Title No. Kajiado/ Il damat/ 3) to the Plaintiff and the Deputy Registrar to execute all the necessary transfers. PW1 did not provide any evidence in court to prove he currently occupies a portion of Kajiado/ Il damat/ 6502 and Kajiado/ Il damat. 4872. Further, since he entered into a contract with a party who did not have capacity to do so, I am unable to direct for survey and placement of beacons on a third party's land which the Plaintiff does not hold a title to. Further, as a court I cannot interfere with a third parties' title who were not privy to the contract between the Plaintiff and 1st Defendant. As to the Plaintiff's claim for damages against the Defendants. I note he already took possession of the land and has been using it. I opine that he had indeed benefited from the land that he did not own and the said claim cannot stand. From the said two Sale Agreements, it is evident the 1st Defendant indeed signed them and noting that DW1 admitted in Court that he is ready to refund the Plaintiff monies, since he does not have any land to sell, I find that the Plaintiff is entitled to the refund of Kshs. 2967,000 which the 1st Defendant acknowledged receipt of as per the Sale Agreement dated the 30th October, 2013 which refers to the Sale Agreement 18th May, 2009 and 10th February, 2011. Further, that the same be paid to him including interest at court rates from the date he paid the same until payment in full. I further hold that the subdivision and transfer of Kajiado/ Il damat/ 3 was lawful as it was done in accordance with the Certificate for Confirmation of Grant. On the Plaintiff's allegation of fraud against the Defendants. I note he claimed that the 2nd Defendant fraudulently removed the caution culminating in the registration of the resultant subdivisions. DW2 confirmed in court that the Plaintiff had been notified of the Land Registrar's intention to remove the said caution and failed to appear culminating in the same being lifted. As per the Land Registration Act, the Land Registrar is mandated to remove the caution once the cautioner it notified. Further, that a caution cannot subsist indefinitely. In associating myself with the case of **R.G Patel Vs Lalji Makanji (1957) EA 314**, where the Court held that allegations of fraud must strictly be proved, but based on the evidence before me, I find that the Plaintiff has failed to discharge his burden of proof on the same.

As to whether the 1st and 6th Defendants are entitled to the Orders sought in the Counterclaim. The 1st and 6th Defendants sought for a permanent injunction against the Plaintiff from the suit land, damages and mesne profits and a declaration that the subdivision of the suit land was lawful. Since I have already held that there was no valid contract for the sale of 79 acres to the Plaintiff but the 1st Defendant proceeded to let him occupy a portion of the suit land. It is my considered view that since the deceased estate has already been distributed, the Plaintiff cannot purport to possess land he does not own. In the circumstance, I find that he should be permanently restrained from the suit land as well as resultant subdivisions therefrom. On the claim for damages and mesne profits, I note it is the 1st Defendant that allowed the Plaintiff take possession of the suit land. I find that since the 1st Defendant received monies from the Plaintiff but was unable to effect transfer of land to him, he cannot turn around and claim damages and mesne profits from him. In the circumstance, I find that they have failed to prove this claim as against the Plaintiff.

On the issue of costs, I find that since the 1st Defendant was responsible for the dispute herein, he should bear the costs of the suit as against the Plaintiff, 2nd Defendant and 6th Defendants.

It is against the foregoing that I proceed to make the following orders:

- The Plaintiff's suit as against the 2nd to 6th Defendants be and is hereby dismissed with costs.
- Judgement be and is hereby entered for the Plaintiff as against 1st Defendant for the sum of Kshs 2, 967, 000.
- The 1st Defendant be and is hereby directed to refund to the Plaintiff the purchase price of Kshs. 2, 967, 000 which he paid with interest at court rates from the date he paid it until payment in full or within 90 days from the date hereof

- Upon receipt of the final payment, the Plaintiff be and is hereby directed to offer vacant possession of the portion of the suit land he occupies.
- Upon receipt of the final payment from the 1st Defendant, the Plaintiff be and is hereby permanently restrained from interfering with the resultant subdivisions of land parcel number Kajiado/ Il damat/ 3
- The costs of the suit to be borne by the 1st Defendant

Dated and delivered in Kajiado this 2nd day of March, 2020

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Plaintiff in person

Wambui holding brief for Guserwa for the 1st and 6th defendants

Court assistant- Mpoye