



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.LC CASE NO. 26 OF 2016

JOHANA KIPKEMOI RONO.....PLAINTIFF

VERSUS

PAUL KIPSIGEI RONO.....DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Plaint dated 4th May 2016 which was amended on 13th August 2018 the Plaintiff instituted this suit against the Defendant who is his brother seeking the following reliefs:

- a) An order that the Defendant do surrender the title deed for L.R No. 8939/31 to the Land Registrar for cancellation thereof and two separate titles be issued in the names of the Plaintiff and the Defendant.
- b) Costs of this suit and interest thereon.
- c) Any other relief that this Honourable court may deem fit to grant.

2. The Defendant filed an Amended Defence and Counterclaim dated 4th December 2017 seeking the following reliefs:

- a) The Plaintiff's suit be dismissed with costs and judgment be entered for the Defendant against the Plaintiff.
- b) Orders evicting the Plaintiff and his servants from that parcel of land known as parcel No. 8939/31 Bomet.
- c) The Plaintiff herein be directed to abate his nuisance by removing structures that he erected on the suit property
- d) A permanent order of injunction restraining the Plaintiff, his servants, agents or any other person acting under his instructions from trespassing, occupying, harassing or interfering with the ownership, quiet possession and occupation by the Defendant of all that parcel of land known as title No. 8939/31 Bomet.

3. On 1st March 2018 the Plaintiff filed a Reply to the Amended Defence and Defence to the Counterclaim denying the allegations in the Amended Defence and Counterclaim. In particular, he denied that the Defendant was entitled to orders of eviction and prayed that the Defendant's Counterclaim be dismissed with costs.

4. Additionally, the Plaintiff filed a Notice of Preliminary Objection dated 20th March 2018 on the ground that the Defendant's Amended Statement of Defence and Counterclaim is res judicata and the same ought to be struck out.

5. The court directed that the Preliminary Objection be subsumed in the main hearing and the suit was set down for hearing on 13.6.2018. The Plaintiff testified and closed his case. The Defendant subsequently testified on 15.5. 2019 and called one witness.

PLAINTIFF'S CASE:

6. The Plaintiff testified that land parcel L.R 5157 also known as L.R No. 8939/31 was registered in 1990 in the joint names of the Plaintiff and the Defendant. He stated that he and the Defendant bought the suit property from one Vallabdas Mohandlal in 1989 at a price of Kshs. 75,000. It was his testimony that each of them contributed an equal sum of Kshs. 37,500. He stated that the Defendant had the original title and he produced a copy thereof. He stated that both the Plaintiff and Defendant are in occupation of the suit property and they have each put

up temporary structures thereon. He stated that issue of the ownership of the suit property had been determined in KERICHO HCCC No. 60 of 2004, KERICHO HCCC No. 58 of 2009 and KERICHO HCCC NO. 79 of 2011 (O.S) when the court held that the suits were time-barred. The Plaintiff stated that his only prayer was that the title to the suit property which is in their joint names be cancelled so that two separate titles could be issued in the names of the Plaintiff and Defendant accordingly. The Plaintiff produced the documents in his bundle of documents as his exhibits.

DEFENDANT'S CASE

7. The Defendant testified that he was the sole registered owner of the suit property which he bought from Vallabdas Mohanlalin 1990 at a price of Khs.75,000. He stated that the Defendant accompanied him to Webuye when he went to negotiate the purchase price of the suit property. He said he did not have the sale agreement or title deed as they had been confiscated by the police when he was arrested sometime in 1994. He produced a number of documents including correspondence relating to the suit property as well as receipts for payment of land rates. He insisted that the original title deed was issued in his sole name though he admitted that he never conducted an official search to confirm that position. He testified that the Plaintiff never paid a single cent towards the purchase price.

8. Upon cross-examination the Defendant admitted that he had filed three previous cases against the Plaintiff seeking to have the Plaintiff's name struck out from the title deed for the suit property. He said the first case KERICHO HCCC NO. 60 of 2004 was dismissed for want of prosecution while HCCC No. 58 of 2009 and HCCC No. 79 of 2011 were both dismissed for being time-barred.

9. The Defendant called one witness Paul Kipyegon Bett who testified that he accompanied the Defendant to the Lands Office in Nairobi when the Defendant went to pay stamp duty for the suit property.

ISSUES FOR DETERMINATION

10. From the pleadings and evidence on record, the following issues arise for determination:

- i. Whether the suit property is jointly registered in the names of the Plaintiff and Defendant as tenants in common.
- ii. Whether the Defendant's counterclaim is res judicata
- iii. Whether the court should order a rectification of the register and issue two separate titles.
- iv. Whether the Defendant is entitled to the orders sought in the counterclaim

11. On the first issue, it is clear that the copy of title deed and certificate of official search produced by the Plaintiff as Plaintiff's exhibits 1 and 2 show that the suit property is registered in the joint names of the Plaintiff and the Defendant as tenants in common in equal shares. It is instructive to note that in the previous suits filed by the Defendant against the Plaintiff to wit, KERICHO HCCC NO. 60 of 2004 and HCCC No. 58 of 2009 the Defendant expressly pleaded that the suit property was jointly registered in the joint names of the Plaintiff and the Defendant. His amended defence which denies the joint registration is therefore contradictory. Furthermore, the Defendant's evidence that the first title deed that was issued was in his sole name is not supported by any documentary evidence. Even if he did not have the said title with his sole name, he ought to have produced an extract of the title from the Lands Office to prove his allegation. The Defendant did not produce sufficient evidence including the sale agreement and receipts for payment of the purchase price to prove that the Plaintiff did not contribute to the acquisition of the suit property nor did he prove the allegations of fraud pleaded in his counterclaim. It is trite law that allegations of fraud must be pleaded and proved to a standard higher than 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”.

see Insurance Company of East Africa vs. The Attorney General &3 Others HCCC 135/1998.

Whether there was fraud is, however, a matter of evidence.”

13. In the instant suit, the Defendant did not prove that the Plaintiff fraudulently had the suit property registered in the joint names of the Plaintiff and the Defendant.

14. On whether the Defendant's counterclaim is res judicata, it is important to note that the Defendant filed three previous suits against the Plaintiff. The first suit KERICHO HCCC No. 60 of 2004 sought a declaration that the Plaintiff was not a joint purchaser of the suit property and therefore his name should be cancelled from the register as a tenant in common in equal shares with the Defendant and the Plaintiff be refunded his contribution in the sum of Kshs. 9,000. The said suit was dismissed for want of prosecution on 27th May 2009.

15. The Defendant then filed KERICHO HCCC No. 58 of 2009 seeking the same prayers. Additionally, he filed KERICHO HCCC No. 79 of 2011 (O.S). In its ruling dated 24th September 2014 in respect of the two suits Justice Waithaka observed as follows:

“KERICHO HCCC No. 60 of 2004 having been dismissed for non-attendance on 27th May 2009 falls in the category contemplated by Order 12 rule 6. KERICHO HCCC No. 58 of 2009 cannot therefore be deemed to be res judicata as the suit was not heard and decided on its merits. The plaintiff's remedy lay in instituting a fresh suit, which is what I believe the filing of KERICHO HCCC No. 58 of 2009 addressed. It is however not clear why the same plaintiff decided to file another suit KERICHO HCCC No. 79 of 2011. The second question is whether the cause of action was time barred at the time the plaintiff filed KERICHO HCCC No. 58 of 2009. Section 7 of the Limitation of Actions Act provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person”

The transaction between the parties occurred in 1989. By the time the plaintiff filed KERICHO HCCC No. 58 of 2009 and KERICHO HCCC No. 79 of 2011 12 years had passed since the sale agreement was signed. The plaintiff did not avail himself under the exceptions provided for in section 27 of the same Act. I therefore find that the suit is time barred.....For the above reasons, I find that my hands are tied and I have no choice but to dismiss HCCC No. 58 of 2009 and HCCC No. 79 of 2011 as both are time barred.”

16. In the above ruling, the court pronounced itself on the issues raised by the Defendant herein in his counterclaim and held that the cause of action was time- barred. Nevertheless, the Defendant now seeks to raise the same issues by way of counterclaim. This is the reason that the Plaintiff has submitted that the Defendant's counterclaim is res judicata. Even though I agree with the Defendant's argument that the issues raised in the counterclaim were not determined on the merits, it is not in dispute that the reason they were not determined on merit is that the claim was time-barred. Consequently, the court having determined that the Defendant's claim was time-barred, the same cannot be re-opened in the instant suit as the court's ruling of 24th September 2014 makes it res judicata. The Defendant's contention that the counterclaim is not a suit does not hold any water.

17. Finally, the court will consider whether the Plaintiff is entitled to reliefs sought. The Plaintiff's main prayer is for cancellation of the title in the joint names of the Plaintiff and the Defendant so that separate titles can be issued to the Plaintiff and Defendant to reflect their respective shares. Having considered the evidence on record as well as the submissions of both counsels, I am satisfied that the Plaintiff has proved his case on a balance of probabilities and he is therefore entitled to the reliefs sought. On the other hand, the Defendant's counterclaim fails and it is hereby dismissed with costs.

18. Accordingly, I enter judgment for the Plaintiff and make the following final orders:

a) An order is hereby issued that L.R No. 8939/31 currently registered in the joint names of JOHANA KIPKEMOI RONO and PAUL KISPSIGEI RONO be cancelled and sub-divided into two equal portions, one portion to be registered in the name of JOHANA KIPKEMOI RONO and the other one in the name of PAUL KISIGEI RONO, the Plaintiff and the Defendant herein respectively.

b) The Defendant is hereby ordered to surrender the original title deed for cancellation and execute all the requisite documents in order to effect the sub-division of the property. In default, the Deputy Registrar of this honourable court shall execute the necessary documents to ensure implementation of (a) above.

c) The costs of the sub-division shall be shared equally between the Plaintiff and Defendant.

d) Since the parties herein are brothers, each party shall bear his own costs.

Dated, signed and delivered by email this 28th day of May, 2020.

J.M ONYANGO

JUDGE