



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 42 OF 2014

PAULO KIPSEREM A. CHEPKWONY alias

KIPSERREM CHEPKWONY (suing through his legal Attorney

RICHARD KIPKORIR SEREM).....PLAINTIFF

VERSUS

ANNAH CHEBET SEREM (Sued as the Administrator of the estate of

BERNARD KIPROTICH SEREM).....DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Plaint dated 24th September, 2014 the Plaintiff through his duly appointed attorney Richard K. Serem instituted this suit against the Defendant in her capacity as the administrator of the estate of Bernard Kiprotich Serem. In the said plaint the Plaintiff seeks the following reliefs:

- a) A declaration that the transfer of the suit land by the said Bernard Kiprotich Serem from the Plaintiff to himself was fraudulent and/or improper and equally that the subsequent transmission of the suit land to the Defendant herein is fraudulent.
- b) An order of rectification of the register so as to restore the Plaintiff as proprietor of the same. In the alternative, the parcel of land namely KERICHO/KPCHIMCHIM/756 be registered in the names of Anna Chebet Serem, Richard Kipkorir Serem and Joel Kipkoech Serem as proprietors in common.
- c) Costs of this suit

2. The Defendant filed her defence dated 17th November, 2014 in which she denied the Plaintiff's claim and stated that the suit property was legally transferred to her late husband by the Plaintiff. After her husband's demise, she had the suit property transferred to her to hold the same in trust for her children.

The matter proceeded for hearing and both parties testified and called their witnesses.

PLAINTIFF'S CASE

3. Richard Kipkorir testified as PW1. He produced a Power of Attorney dated 17th April, 2014 donated by his father Paulo Kipserem Chepkowny, the Principal Plaintiff herein who was aged 97 years. He testified that the suit property was initially registered in the name of his father before it was transferred to his late brother Bernard Serem. The suit property was subsequently transferred to his sister-in-law Annah Chebet Serem (defendant). He stated that his father had sub-divided the suit property among his three sons but his late brother fraudulently transferred the property into his name without the knowledge or consent of their father. He testified that he lives on the suit property with the Defendant and her children while his father and his brother Joel Kipkoech Serem live in Londiani. He said that the Defendant has demanded that he vacates the suit property.

4. Upon cross-examination, he stated that his brother died in 2010 though he had transferred the land to his name in the 80s. He stated that when he discovered that his late brother had registered the suit property in his name, he filed a case at the Land Disputes Tribunal. He told the court that even though his father did not complain when he discovered that Bernard had registered the land in his name, he asked him why he had done so. He stated that the land measures 4.6 hectares which translates to approximately 12 acres and each of them was given 4

acres. He stated that the 3 portions are fenced with Mauritius thorn trees and he had constructed a permanent house and planted tea bushes on one acre. He produced the documents in the Plaintiff's list of documents as the Plaintiff's exhibits. The documents include a Power of Attorney, a copy of the title deed for Land parcel No. KERICHO/KIPCHIMCHIM/756 dated 4th February 1988, a certificate of official search dated 6.2.2011, a demand notice dated 7.4. 2014, a certificate of official search dated 28.8.2014 and a copy of a ruling in respect of Kericho HC Misc Application No. 14 of 2011(JR).

5. Joel Kipkoech Serem who is the brother of PW1 testified as PW2. He adopted his witness statement dated 25th September 2014. He stated that the suit property was initially registered in the name of his father Paulo Kipserem Chepkwony and he had sub-divided it into 3 equal portions among his sons. He said that his father never transferred the suit property to his late brother Bernard and the said transfer by his late brother was fraudulent. He told the court that he wanted the title which was currently registered in the Defendant's name to be rectified so that the land could be divided into three in the names of his brother Richard, himself and the Defendant.

6. Upon cross-examination he stated that he moved to Londiani with his father in 1974. He said that even though he was given a portion of the suit land, he was not utilizing it. Asked why they did not sue their late brother when he was alive, he said they did not have a problem with him but after his death, the Defendant started claiming that the land was hers and demanding that Richard (PW1) vacates the land. He said their father was aware of the dispute between them and the Defendant, but his position was that he had given a portion of the suit property to each of his three sons. He told the court that the sub-division was done by the elders and the three portions are separated by Mauritius thorn trees. He confirmed that his brother Richard had a house, cattle and crops on the suit property.

DEFENDANT'S CASE

7. The Defendant testified that the suit property was currently registered in her name. She explained that it was initially registered in the name of her father-in-law Paulo Kipserem Chepkwony who subsequently transferred it to her late husband in 1988. She told the court that her father-in-law gave Richard and Joel different parcels of land in Londiani. She stated that after her husband's death, Richard instituted a case against her at the Land Disputes Tribunal before he filed the instant suit. She stated that when she got married in 1981, she found Richard living on the suit property after which he moved to Londiani briefly then he came back to the suit property as he claimed that the land in Londiani was not productive. She stated that Richard occupies about 3 acres of the suit property. She denied that her late husband fraudulently registered the land in his name. She stated that Richard had sued her without her father-in-law's consent as he had told her that he was not aware of this case.

8. After the Defendant had testified the court summoned Paulo Kipserem Chepkwony, the Principal Plaintiff to come and shed light on the issues in controversy. He denied that he had sued the Defendant and stated that he was not aware that his son Richard had filed the instant suit. He stated that each of his three sons each had a share of the suit property. He confirmed that he had transferred the suit property to his late son Bernard. He stated both Richard and the Defendant live on the suit property as it is big enough.

ISSUES FOR DETERMINATION

9. 1. Whether the Power of Attorney registered on 28th April 2014 and donated to Richard K. Serem is valid
2. Whether the suit property was fraudulently transferred to Bernard Kipkoech Serem and subsequently to the Defendant.
3. Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

10. Throughout the hearing, the Defendant maintained that the Principal Plaintiff who is her father-in-law was not aware of this suit as he had not given authority to his son Richard to file the case on his behalf. She therefore objected to the Power of Attorney produced by the Plaintiff as she doubted its authenticity. Learned counsel for the Plaintiff submitted that Power of Attorney was lawful as it was donated by the Principal Plaintiff 5 years before the hearing date when his memory was still good and it gave authority to the Plaintiff to institute this suit. Counsel relied on the case of **Grace Wanjiru Munyinyi & Another v Gedion Waweru Githunguri & 5 Others (2011) eKLR** where the Court of Appeal stated as follows at Paragraph 19.

“That the starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption otherwise no one would be held responsible for their actions. It is also the position in law and we find persuasive authority for it in the Wilshire case (supra), the burden of proof lies on the person who asserts the incapacity”

Paragraph 21

“The presumption is therefore that Mbogo was in control of his faculties when he appeared before an advocate & Commissioner for Oaths, one Githiru N. M on 22nd February and executed a Power of Attorney”

11. Counsel further submitted that the Defendant was estopped from challenging the Power of Attorney as it was duly registered with the Land Registrar under section 116 of the Registered Land Act Cap 300 (repealed) and it was registered without any notice of revocation from the Defendant or any other person as required by section 117, and therefore it is deemed to be subsisting with respect to Richard K. Serem who acquired the same and exercises the powers conferred thereunder in good faith.

12. He submitted that the Paulo Kipserem Chepkwony testified that he had sub-divided the suit property among his three sons so when he discovered that the suit property had changed hands and was now registered in the name of the Defendant, he donated a Power of Attorney to

his son Richard Serem to challenge the same. It was his contention that Power of Attorney reflected the context within which it was donated.

13. At the time the suit was heard, the Principal Plaintiff was 97 years old. Even though he denied having authorized Richard to file this suit, he was emphatic that he had divided the suit property among his three sons. I must point out that even though he appeared to remember some things, he seemed to have a hearing problem and he may have misapprehended some questions. In the premises it is my finding that the Power of Attorney is valid.

14. I shall now turn to the second issue which is whether fraud against the Defendant was proved.

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 Hccc135/1998.

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

15. Similarly in the case of **Paul Muira & Another v Jane Kendi Ikinuya & 2 Others (2014) eKLR** the court cited with approval the Court of Appeal case of **Musonga v Nyati (1984) KLR 425** where it was observed that:

“Allegations of fraud must strictly be proved and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud”.

16. Counsel for the Defendant submitted that the Plaintiff failed to prove the allegations of fraud. He submitted that the Defendant testified that the Principal Plaintiff had transferred the suit property to the Defendant’s deceased husband and this evidence was not controverted by the Plaintiff or PW2. He submitted that Plaintiff had instituted a case at Ainamoi Land Disputes Tribunal which was adopted by the Kericho Chief Magistrates’ Court. From the said case it was clear that the Plaintiff and each of his brothers had their own parcels of land.

17. He referred to the provision of section 26 of the Land Registration Act which provides as follows

“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 grounds 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”.

18. On the other hand, counsel for the Plaintiff submitted that the Plaintiff had complied with Order 2 rule 4 of the Civil Procedure Rules which provides as follows:

“A party shall in any pleadings subsequent to the plaint plead specifically any matter, for example performance, relief payment, fraud, inevitable accident act of God, any relevant statute of limitation or any fact showing illegality”

19. He submitted that the Plaintiff had pleaded the particulars of fraud at paragraph 5 of the plaint. He further submitted that the Plaintiff proved the allegations of fraud through his testimony which was supported by the evidence of the Principal Plaintiff when he stated that he had divided the suit property into three portions among his three sons. It was his contention that the Defendant conceded that the Plaintiff has been living on a portion of the suit property with his family and he has constructed a permanent house and planted tea thereon. It was counsel’s submission that the Defendant did not produce any transfer forms executed by the Principal Plaintiff nor did he produce any documents to show that the deceased had obtained the consent of the Land Control Board. He referred to section 109 of the Evidence Act which provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is

provided by law that the proof of that fact shall lie on any particular person.

20. Counsel submitted that in furtherance of the deceased's fraudulent conduct, the Defendant filed succession proceedings after which she transferred the suit property to herself but this did not confer good title to her.

21. Although the Plaintiff pleaded fraud and gave the particulars of fraud in paragraph 5 of the plaint, the evidence of fraud did not meet the required standard which is higher than a balance of probabilities. The Defendant was not cross-examined on what process her late husband undertook in order to have the suit property transferred to him and the issue of the transfer documents and consent of the Land Control Board was only raised by counsel in his submissions. The evidence of the Principal Plaintiff was to the effect that he divided the suit property among his three sons but he did not seem to have a problem with the fact that the deceased registered that suit property in his name. This is because he did not bother to intervene when his sons had a dispute before the elders in respect of the suit property. Similarly, the Principal Plaintiff took a neutral stand in the instant suit as he stated that he had not sued the Defendant and he was not aware of this suit. As far as he is concerned, the suit property is big enough to be shared between his son Richard and the Defendant.

22. In view of the foregoing, it is my finding that the Plaintiff has not proved fraud to the required standard and he is therefore not entitled to the reliefs sought. Consequently, the Plaintiff's suit is dismissed.

Since the suit involves members of the same family, each party shall bear his own costs.

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

J.M ONYANGO

JUDGE