



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO.10 OF 2016

DANIEL DAVID MOMANYI NYARANGI.....PLAINTIFF

VERSUS

PRISCAH MISATI RATEMO.....1ST DEFENDANT

REBECCA KERUBO AYAKO2ND DEFENDANT

MARY MACHECHE OGOTI.....3RD DEFENDANT

MELLEN MORAA NYARANGO.....4TH DEFENDANT

J U D G M E N T

Introduction and background

1.The plaintiff instituted the present suit vide a plaint dated 11th January 2016 filed in Court on 18th January 2016. The plaintiff's claim against the 1st to 3rd defendants was that they fraudulently caused title to land parcel **Keroka Township/21 ("the suit property")** to be processed in their sole names whereas the suit property was co-owned by the 1st – 3rd defendants deceased father in law and the plaintiff's deceased father and another person. As against the 4th defendant, the plaintiff claimed that she had connived with the 1st to 3rd defendants with the object of defrauding the plaintiff. The plaintiff prayed for judgment against the defendants for:-

- (a) *Revocation of the lease and cancellation of the lease certificate issued on them on 11th September 2015.*
- (b) *Rectification of the lease register and the same to be registered in the name of the original lessees.*
- (c) *Costs of interest.*
- (d) *Any other relief that this Honourable court may deem fit to grant.*

2. The defendants filed a joint statement of defence dated 25th February 2016 and denied all the allegations of fraud by the plaintiff. They stated the 1st, 2nd and 3rd defendants were validly registered as owners of the suit property and that due process was adhered to before they were registered as owners. The defendants asserted that the suit property did not comprise part of the plaintiff's deceased father's estate and hence the plaintiff was non- suited as he had no cause of action against the defendants.

3. The suit was heard with the plaintiff and one witness testifying in support of the plaintiff's case. The 3rd, and 4th defendants testified for the defence and called one Biliah Bitutu Nyagena (DW3) a sister in law of the 1st – 3rd defendants as a witness. On the evidence tendered and adduced by the parties it is evident that the determination of the matter would be heavily reliant on the documents tendered in evidence. The 1st, 2nd and 3rd defendants purportedly acquired the suit property on account of being beneficiaries of their deceased father in law. The plaintiff claimed to be interested in the suit property by virtue of being a beneficiary of an alleged supposed Co-owner of the suit property. In the circumstances none of the claimants was an original owner of the suit property and hence the necessity to interrogate the available documents evidencing ownership.

The Plaintiff's Case

4. The plaintiff testified as PW1 and it was his evidence that Moris Nyakierema who died in 1998 was his father. He testified that his late father Co-owned plot No 21 Keroka Township with Nehemiah Nyachoka, and Absalom Rasugu .The plaintiff placed reliance on the various documents he had filed notably the documents he had filed contained in his further list of documents dated 21st March 2016. The plaintiff also relied on the document he had filed together with the plaint particularly the initial plot card for plot No.21 issued on 29th November 1965 which indicated the plot had been allocated to Nehemiah Nyanchoka, Absalom Rasugu & Morris Nyakierema for a Bakery & Hotel by the County Council of Gusii .The plaintiff explained that in 1987 there was dispute regarding the ownership of the suit property which the Keroka Town Council sought to arbitrate and Vide a letter dated 11th June 1987 the Co-owners were invited to a meeting to discuss the matter . The plaintiff produced an abstract of Min12/87 of the meeting of the Keroka Urban Council Town Planning Markets and Housing Committee held on 16th June 1987 at which the issue was discussed. As per the minute the meeting resolved the plot No.21 was Co-owned by the three allottees/persons. The plaintiff contended on the basis of these documents the suit property was owned by his late father and the 2 other persons.

5. The plaintiff stated that in May 2015 he got a report that the defendants, were in the process of selling the suit property without any reference to the beneficiaries of his late father's estate as Co-owners. He stated he wrote the letter dated 10th May 2015 attached as document 8 to the plaintiff's bundle of documents, to the defendants notifying the defendants that the property was Co-owned and that they needed to involve all the owners.

6. The plaintiff maintained the change of ownership of the plot to Nehemiah Nyanchoka and sons to the exclusion of his late father and Absalom Rasugu was fraudulent. He stated the card issued on 8th April 1981 to Nehemiah Nyanchoka & Sons was not genuine and further asserted the Council minute no.36/80 allegedly authorizing the change/transfer could not have been genuine. He further stated the various documents exhibited by the defendants made reference to plot No.20 Keroka Town and not plot No 21 which was the subject parcel of land. He indicated the lease issued to Nehemia Nyanchoka & sons had reference to plot No.20 altered to reflect plot No 21. He stated the letter of allotment related to plot No. 20 and not No.21 and hence the consequent documents prepared were altered to read plot No.21.

7. Pw2 Justace Anyona Rasungu was the son of Absalom Rasugu (deceased). He stated his late father and one Moris Nyakierema and Nehemia Nyanchoka were allocated plot No.21 Keroka Town in 1952 and during the 1950s were operating a butchery business jointly. The witness stated in 2015 when they carried out a search on the property they discovered the defendants were registered as owners on 11th September 2015. He stated the defendants (1st – 3rd) were the daughters in law of Nehemiah Nyanchoka and were registered as beneficiaries as the wives of Nehemiah Nyanchoka's sons.

8. The witness stated that he had no knowledge that there was a change of ownership of the plot removing his late father's name and the plaintiff's late father's name. The witness further denied any knowledge that Nehemiah Nyanchoka was issued a letter of allotment for the suit property in 1986 or that he (Nehemiah) had been paying rent for plot No.21 Keroka. He stated it was Nehemiah Nyanchoka's family who had been collecting rent from the plot from 1980. He explained that after Nehemiah Nyanchoka's death the 1st – 3rd defendants were registered as the Co-owners of the plot.

The Defendants Case

9. The 3rd defendant, Mary Mocheche Ogoti testified as DW1. In her evidence she admitted that indeed her late father in law Nehemiah Nyanchoka and both Absalom Rasungu and Moris Nyakerema were business partners. It was her evidence that the other Co- partners withdrew their interest in the business and that they consequently transferred their interest in plot No. 21 Keroka to her deceased father in law as evidenced by the plot card issued in the name of Nehemiah Nyanchoka & sons on 8th April 1981. The earlier plot card issued in the joint names of the 3 partners in 1965 was cancelled. She stated that the clerk to the Town Council vide a letter dated 31st January 1985 communicated to the commissioner of Lands regarding the particulars of the allotment of the surveyed plots and that the list showed plot No.21 was allocated to Nehemiah Nyanchoka & sons and that it was for a bakery and hotel. She stated that a letter of allotment dated 15th August 1986 was issued to her father in-law and later a lease was issued for the property by the commissioner of lands in her father in law's name and those of her sons. She stated the reference of the plot as No.20 instead of 21 was an inadvertent error.

10. DW1 stated after the death of her father in law and their respective husbands, they (1st- 3rd defendants) did succession vide succession cause No.125 of 2012 and the plot was transferred to them as the beneficiaries. The witness stated that after they were registered as the owners, they sold the plot to the 4th Defendant for the consideration of Kshs.6,000,000/=.

11. The 4th defendant testified as DW2. She explained that she was a businesswoman and that in 2015 she got a notice to vacate the premises where she was carrying on business. She stated that she determined to seek out land to buy to accommodate her business. She stated that she got information that the 1st – 3rd defendants had a plot they were selling which was 50 Feet by 100 Feet. She stated that she went to the council offices where she confirmed the plot was owned by Nehemiah Nyanchoka & sons. The 1st – 3rd defendants informed her they were the beneficiaries and a search at the Lands office confirmed the 1st, 2nd and 3rd defendants were the registered owners. The 4th defendant stated that she entered into a sale agreement for the purchase of the property at the consideration of Kshs 6 million. She stated that she obtained a loan of Kshs.9.5 million from Kenya Commercial Bank Ltd which she utilized to pay for the plot and was to use the balance to buy building materials for construction. She stated she was restrained from constructing when the present suit was filed. It was the 4th defendant's position that she carried out the appropriate due diligence before purchasing the suit property and that she was an innocent purchaser for value without any notice of any defect in the title to the plot.

12. The 4th defendant upon being cross examined affirmed that the letter of allotment issued in 1986 referred to plot No.19 and not No.21 and as per the letter the size of the plot was 0.0511Ha while the lease showed the size as 0.511 Ha. She also stated there were various documents where the plot was referred to as plot No.20 and not 21.

13. DW3 Billah Bitutu Nyagena was a brother in law to the 1st- 3rd defendant . He testified that his father owned the plot at Keroka where

he was operating a butchery and bakery business. He denied that his father co-owned the plot with anybody. He stated that before his father died he gave him documents relating to the suit property which he gave to his brothers. He stated the documents were the ones that had been produced in court.

Submissions Analysis and Determinations

14. The parties following the closure of the trial filed written submissions as directed by the court. Having reviewed the pleadings and considered the evidence adduced by the parties both orally and by way of documents and further having considered the submissions filed by the parties, the following issues emerge for determination.

(i) Whether Nehemiah Nyanchoka, Absalom Rasugu and Moris Nyakierema were allocated plot No.21 Keroka Town as Co-owners?

(ii) Whether there was a change in the ownership of plot No.21 Keroka where Absalom Rasugu and Moris Nyakierema ceded their interest in the property to Nehemiah Nyanchoka & sons?

(iii) Whether Nehemiah Nyanchoka & sons and subsequently the 1st, 2nd & 3rd defendants obtained registration of plot No.21 Keroka Town fraudulently?

(iv) Whether the plot variously described as LR No.8727/19 Keroka and plot No.20 and 21 Keroka in the documents tendered in evidence refer to the same property?

(v) What order and/or reliefs should the Court make and/or grant?

15. As observed earlier in this judgment none of the claimants was an original allottee of the suit property and consequently ownership of the suit property can only be deduced and ascertained by considering and reviewing the ownership documents availed by the parties in evidence in support of their respective claims. On the evidence adduced by the parties there is irrefutable evidence to show that prior to 1980 the suit property plot No.21 Keroka market was in the joint names of three persons namely, Nehemiah Nyanchoka, Absalom Rasugu and Morris Nyakierema. The plaintiff produced in evidence a plot card relating to plot No.21 Keroka market dated 29th November 1965 which clearly indicted the three named persons were the registered owners of the plot. A letter dated 25th February 1965 from Gusii County Council to all 3 Co-owners exhibited as document (1) in the defendants bundle of documents dated and filed on 1st August 2016 affirms that the County Council of Gusii had approved the 3 owners application for change of business from “**Bakery**” to “**Bakery and Hotel**” Further correspondences dated 17th February 1975 and 24th February 1975 addressed to all 3 co-owners indicated differences respecting ownership had arisen between the Co-owners which the council wished to arbitrate on. Considering the evidence adduced by the parties, I am satisfied that plot No.21 Keroka market was initially allocated to M/s Nehemiah Nyanchoka, Absalom Rasugu and Morris Nyakerema as Co-owners.

16. Having held that the plot was Co-owned by the 3 Co-owners, I now turn to consider the second issue whether or not there was change in ownership as claimed by the 1st, 2nd and 3rd defendants. The defendants have submitted that the ownership of plot No.21 Keroka Market changed in 1980 when Absalom Rasugu and Morris Nyakierema relinquished their interest in the plot in favour of Nehemiah Nyanchoka. The Defendants place reliance on “DEX4” being the letter from the Council dated 8th April, 1981 which was communicating to the 3 Co-owners that the request to change ownership to remove Absalom Rasugu and Morris Nyakierema from ownership of plot No.21 Keroka Market was approved by the council on 4th September 1980 vide minute No.36/80 (1). Following this communication a new plot card was issued on 8th April 1981 “DEX5” indicating Nehemia Nyanchoka & sons were the owners of plot No.21 Keroka Market. This card was duly signed by the Chairman Gusii County Council and the Clerk to the Council.

17. The Keroka urban council vide a letter addressed to plot owners, Keroka Township notified the plot owners that 89 plots within the Township had been surveyed and invited the plot owners to attend a public baraza on 23rd October, 1984 with their allocation cards and/or allotment letters from the Commissioner of Lands for purposes of compiling a list for issue of leases. Pursuant to the verification and validation exercise the Clerk to Council Gusii County Council compiled a list of all the plot allottees which was forwarded to the commissioner of Lands vide the council’s letter dated 31st January 1985. The letter to the Commissioner of lands and the list of allottees were produced as “**DEX849**” respectively. The list prepared by the County Council identified the plot Number as per the council register, the names of the allottees, the type of business, the cadastral Number of the plot and carried any appropriate remarks/comments. Against plot No 21, the allottee was indicated as Nehemiah Nyanchoka & sons; the type of business was shown as Bakery & Hotel and the cadastral Number of the plot was shown as 8727/19. Consequent to the list of allottees furnished to the Commission of Lands a letter of allotment in respect of LR.No.8727/19 Keroka Township dated 15th August 1986 was issued to Nehemiah Nyanchoka & sons and that culminated in the issue of the lease in favour of Nehemiah Nyanchoka, John Abbot Ratemo Nyanchoka, Isaac Ayako Dureck Nyanchoka and Gerald Elijah Ogoti Nyanchoka after the Commissioner of Lands vide a letter dated 31st March 1987 to Nehemiah Nyanchoka & sons sought to be supplied either a copy of the certificate of incorporation or the full names of the sons to enable the preparation of the lease.

18. Though there was no evidence of a certificate of lease having been issued to the lessees, there is uncontested evidence that all the lessees died and the widows of John Abot Ratemo Nyanchoka, Isaac Ayako Dureck Nyanchoka and Gerald Elijah Ogoti Nyanchoka took out succession proceedings and were registered as the owners of the suit property for being the beneficiaries. The said widows who are the 1st, 2nd and 3rd defendants respectively were issued a certificate of lease in respect of the suit property on 11th September 2015. The 1st, 2nd and 3rd defendants sold the suit property to the 4th defendant pursuant to an agreement of sale dated 16th June 2015 entered into between them (as beneficial owners) and the 4th defendant. Owing to the institution of the present suit the transaction is yet pending completion.

19. The Plaintiff in his evidence and submission has faulted the manner the 1st, 2nd and 3rd defendants acquired title to the suit property. The plaintiff in particular has contended that the change of ownership by the three of them (Nehemiah Nyanchoka, Absalom Rasugu and Morris Nyakierema) was not validly done. The plaintiff contended that the documents tendered in evidence in support of ownership of the suit property by the defendants did not establish that Nehemiah Nyanchoka & sons were the owners of plot No.21 Keroka Market. The plaintiff pointed out various documents including the certificate of confirmation of grant in Kisii High court succession cause No.125 of 2012, receipt, the lease and agreement dated 16th June 2015 which referred to the plot as No.20 and not No. 21. The plaintiff submitted that in some of the documents reference to plot No.20 had been altered to read plot No.21 and asserted this constituted fraud in an effort to show that the plot was No.21.

20. The plaintiff further submitted there was evidence of there having been a dispute relating to the ownership of plot No.21 Keroka Market long after the alleged change of ownership in 1980. The plaintiff referred the Court to the letter dated 11th June 1987 from Keroka Township Committee addressed to Nehemiah Nyanchoka & sons inviting the latter to a meeting to discuss the disagreement on ownership. The plaintiff further referred the Court to Min12/87 plot No21 Keroka (“**PEX7**”) arising from the council meeting and stated that the council after deliberations resolved that the plot No.21 Keroka belonged to the three persons. The plaintiff thus argued this constituted evidence of fraud in regard to the change of ownership. The plaintiff consequently submitted that the certificate of Title issued to the 1st, 2nd and 3rd defendants, on 11th September 2015 was not indefeasible and was liable to challenge under section 26(1) of the Land Registration Act, 2012 on account of having been obtained fraudulently and or through misrepresentation.

Section 26(1) of the Act provides as follows:-

(1)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 the ground 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.

21. The plaintiff further as captured in his evidence has pointed to the inconsistencies in the plot Number as depicted in the documents produced by the defendants where the plot was variously referred to as plot No.20, 21 and 8727/19 to buttress his claim that the defendants acted fraudulently. According to the plaintiff, the plot Nehemiah & sons were dealing with was plot No.20 and not plot No.21.

22. It is not in dispute that the plot that Nehemia Nyanchoka, Absalom Rasugu and Morris Nyakierema Co-owned at Keroka was plot No.21 Keroka market as evidenced by the plot card dated 29th November 1965 issued jointly in their names. The issue of contention was whether there was a change in the manner ownership.

23. There is evidence that a request for change of ownership had been made to the Gusii County council and deliberated and approved by the Council vide minute No.36/80 (1) as per the letter dated 8th April, 1981 addressed to all the 3 owners (“ **DEX 3**’). The resolution as per this minute was given effect and the ownership of the plot was effected to Nehemiah Nyanchoka & sons and a new plot card issued designating Nehemiah Nyanchoka & sons as the owner of plot No. 21 Keroka market. The plaintiff has contended these documents were not genuine and submitted they were fraudulent. However the plaintiff apart from alleging fraud, he did not prove these documents were fraudulent. The Gusii country council as the allottee of the plots was the custodian of the records and there was no demonstration that they acted fraudulently. The Gusii County Council, when the time came to provide the list of plot allottees to the Commissioner of Lands for purposes of processing of the lease documents, it is the name of Nehemiah Nyanchoka & Sons that it furnished to the commissioner of Lands in regard to plot No.21 Keroka as per the letter of 31st January 1985 together with the list of allottees attached thereto. As at the date the particulars were furnished to the Commissioner of Lands the change of ownership of the plot had taken place. The Commissioner of Lands acted on the information supplied and caused a letter of allotment and later a lease to be issued in the names of Nehemiah Nyanchoka and his sons (whose names had been furnished to the commissioner of Lands). This was in conformity with the information and particulars furnished to the Commissioner of Lands. Upon being issued the letter of allotment on 15th August 1986, Nehemiah Nyanchoka & sons accepted the offer and paid the allotment charges of Kshs.4,860/= on the same date vide receipt No.A631281 of 15th August 1986. The payment was in respect of plot No.8727/19 Keroka Township. Henceforth M/s Nehemiah Nyanchoka & sons became the beneficial owners of L.R 827/19 and for the resultant plot thereof.

24. The plaintiff has argued that the fact that there were ownership issues being discussed, as evidenced by the Keroka Housing Committee meeting of 16th June 1987, it showed that there was no agreement regarding the ownership changes. It is noteworthy however that plot No.21 Keroka was allotted by the Gusii County Council and that it was the Gusii County council who recommended to the commissioner of Lands who were the lawful allottees and therefore liable to be issued leases. The Keroka Urban Council could not rescind and/or annual the decisions of Gusii County Council, the latter being the superior authority. At the time the Keroka Urban Council Town planning and Housing Committee met on 16th June 1987 to discuss the issue of ownership of plot No.21 Keroka Town, the Commissioner of Lands had already acted on the recommendation of Gusii County Council and issued a letter of allotment for the plot to Nehemiah Nyanchoka & sons who had already accepted the allotment and made the appropriate payments in regard to the same. The

Keroka urban Council could not annul an allotment made by the Commissioner of Lands. The resolution by the Keroka Urban Council through its Town planning market and Housing Committee of 16th June 1987 in regard to the suit property was therefore of no legal effect.

25. From my foregoing analysis and evaluation of the evidence it is my determination that there was a valid change of ownership of plot No.21 Keroka market from the initial 3 Co-owners namely Nehemiah Nyanchoka, Absalom Rasugu and Morris Nyakierema to Nehemiah Nyanchoka & sons and that the latter became the

legal owners of the suit property once the Commissioner of Lands issued a letter of allotment which they duly accepted and a lease was issued in their favour.

26. As I have determined the second issue affirmatively, the third issue becomes mute. There is no dispute that as at the date the present suit was instituted Nehemiah Nyanchoka and his 3 sons in whose favour the lease for the suit property was issued were all deceased. The widows of the sons of Nehemiah Nyanchoka who are the 1st, 2nd and 3rd defendants were declared as the beneficiaries of the plots owned by Nehemiah Nyanchoka & sons at Keroka Township and Gesusu Market. In the certificate of confirmation of Grant in Kisii succession cause No.125 of 2012 the plot at Keroka is given as plot No. 20 and not 21. The third defendant stated that this plot was altered to read plot No. 21 and that explained why the certificate of lease was issued for plot No. 21 and not plot No. 20. On the evidence both from the plaintiff and the defendants it was evident the parties were referring to the same plot at Keroka. There never was any suggestion that Nehemiah Nyanchoka & Sons had any other plot in Keroka other than the plot that they initially co-owned. The original plot card issued in 1965 indicated the plot was No.21. Following the change of ownership the plot card issued to Nehemiah Nyanchoka & sons on 8th April 1981 showed the plot was No.21.

27. The letter of allotment dated 15th August 1986 issued to Nehemiah Nyanchoka & sons showed the plot allocated as L.R No.8727/19 which as per the list of plot allottees – Keroka Township was the Cadastral plot Number for plot No.21. There can therefore be no doubt L.R. No.8727/19 referred to the same plot No.21 Keroka Township. The Plaintiff made issue regarding the area of 0.511Ha indicated on the certificate of lease prepared in favour of the 1st, 2nd and 3rd defendants in relation to the letter of allotment. A lease is derived from the particulars contained in the letter of allotment and in my view the variation in the area shown in the letter of allotment and the lease (0.0511Ha as opposed to 0.511Ha) could only have resulted from a typographical error. In the result it is my determination that the reference of the plot in issue variously in several documents as L.R.No.8727/19, 20 and 21 is not material as the reference is to the same plot being plot No.21 Keroka Township. It is noteworthy the plot the 4th defendant was purchasing from the 1st, 2nd and 3rd defendants measured 50 Ft by 100 Ft and that is consistent with the property being 0.0511Ha as indicated in the letter of allotment.

28. In conclusion after carefully considering and evaluating all the evidence I am not satisfied that the plaintiff has proved his case on a balance of probabilities to entitle him to obtain judgment on the terms prayed. I dismiss the suit and award the costs of the suit to the defendants.

29. Orders accordingly

Judgement dated and signed and delivered electronically at Nakuru this 20th day of May 2020.

J M MUTUNGI

JUDGE