



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L SUIT NO.273 OF 2016

“FAST TRACK”

BETHWEL KIPLAGAT KOSGEI.....PLAINTIFF

-VERSUS-

JACKSON CHEPKWONY.....1ST DEFENDANT

THE LAND REGISTRAR, UASIN GISHU COUNTY.....2ND DEFENDANT

JUDGMENT

By a plaint dated 17th August 2018, the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a. A declaration that the subdivision of the Cheptiret/Cheplaskei Block 1(Kipchamo)52 is fraudulent, unlawful, illegal, null and void and ought to be cancelled forthwith.
- b. A declaration that subsequent registration of the parcel number in Cheptiret/Cheplaskei Block 1(Kipchamo)129, Cheptiret/Cheplaskei Block 1(Kipchamo) 130, and Cheptiret/ Cheplaskei Block 1(Kipchamo)131 in the name of the 1st Defendant is illegal, null and void and ought to be cancelled forthwith.
- c. An order directing the 1st Defendant to execute a transfer of 9.0 Acres of land parcel Cheptiret/Cheplaskei Block 1(Kipchamo)52, into the Plaintiff's name and for the 2nd Defendant to register the said parcel of land into the Plaintiff's name.
- d. In alternative to order (c) above directing the 1st Defendant to execute a transfer of 9.0 Acres parcel Cheptiret/Cheplaskei Block 1(Kipchamo)52 into the Geoffrey Kosgei's name and for the 2nd Defendant to register the same parcel of land into the Plaintiff's name.
- e. An order of permanent injunction restraining the 1st Defendant from trespassing into constructing upon, transferring and/or otherwise encumbering the 9.0 Acres in land parcel number Cheptiret/Cheplaskei Block 1(Kipchamo) 52.
- f. Costs of the suit.

The plaintiff had been substituted after the death of Edrick Musimbi Kosgei as per the order of the court dated 24th July 2018. The 1st defendant did not file any response to the claim but the 2nd defendant filed a memorandum of appearance and on 10th March. When the matter came up for hearing, the AG stated that there was no cause of action against the 2nd defendant hence did not wish to participate.

This matter therefore proceeded by way of formal proof.

PLAINTIFF'S CASE.

It was the plaintiff's evidence that the 1st defendant is a brother to his father (uncle) Joseph Kosgei and that his grandfather the late Malakwen Arap Rutto owned land known as Cheptiret Cheplaskei Block 1(Kipchamo) 52 and the same was registered in the name of Jackson the 1st defendant as a trustee.

PW1 stated that the suit land had been distributed to Pauline Rutto 3.8 acres, Geoffrey Kosgei 9 acres, David Kogo 1 acre and Jackson Chepkwony 12 acres. PW1 further stated that the defendant was to give him title to the 9 acres but the same had not been effected as per a meeting held at the Human Rights office on 6th October 2014 which was produced as an exhibit.

It was PW 1's testimony that another meeting was held on 13th August 2014 whereby it was agreed that titles to respective parcels were to be processed to avoid further disputes. He stated that the defendant wrote to them letters to vacate the land which he had already subdivided into 4 plots namely Plot Nos.128,129,130 and 131. (certificate of official search pex no. 3a to d). PW1 further testified that the 9 acres is their inheritance and if the defendant is allowed to sell will render them homeless. He urged the court to allow the orders as prayed in the plaint.

PLAINTIFFS SUBMISSIONS.

Counsel for the plaintiff reiterated the evidence of the plaintiff and submitted that the 1st defendant had acknowledged that the 9 acres belonged to his brother when they held a meeting at the Human Rights office.

Counsel listed the following issues for determination by the court:

- a. Whether the plaintiff has been residing on parcel of land No. Chepterit/Cheplaskei Block1(kipchamo)52
- b. Whether the 1st Defendant was registered on the land as trustee on behalf of his siblings (sons and daughters of Mzee Malakwen Arap Ruto)
- c. Whether the 1st defendant fraudulently and illegally subdivided the land parcel number Cheptiret/Cheplaskei Block 1(Kipchamo)52 without due process.

On the first issue as to whether the plaintiff has been residing on the suit land, counsel submitted that the plaintiff is the son of the late Geoffrey Kosgei and Edrick Musimbi Kosgei (both deceased) and also a beneficiary of their estate. Further that the plaintiff is the administrator ad litem of the estate of Edrick Musimbi Kosgei who died on 24th March, 2017 vide a Grant of Letters of Administration Ad litem issued on 6th July 2018.

Counsel submitted that the plaintiff's late father Geoffrey Kosgei was allocated 9.0 Acres in the parcel of land registered under 1st Defendant Cheptiret/Cheplaskei Block 1(Kipchamo)52 and that he is in occupation of the 9.0 Acres which had been distributed by Mzee Malakwen to his children prior to his demise.

Counsel therefore submitted that there is uncontroverted evidence that the plaintiff and the entire family of the late Geoffrey Kosgei have been in occupation of the suit parcel.

On the second issue as to whether the 1st defendant was registered as a trustee on the suit land on behalf of his siblings, counsel submitted that a trust can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. Counsel cited the provisions of Section 28(b) of the Land Registration Act which provide as follows: -

“Unless the contrary is expressed in the register all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register

- a).....
- b) trusts including customary trusts.”**

Mr. Okan'go submitted that from the provision, it is clear that customary trust being an overriding interest need not be noted on the register and that all registered land is subject to the overriding interests. Counsel further submitted that it was the plaintiff's testimony that prior to Mzee Malakwen's demise he divided the property among his children as follows: -

- a. 3.8 acres to Pauline Rutto.
- b. 10.0 Acres to David Kogo.
- c. 12.0 Acres to Jackson Chepkwony Ruto.
- d. 9.0 Acres to Geoffrey Kosgei.

Counsel cited the case of **Charity Machaki Kaugi & Another –vs- Dickson Nyaga Kaugi [2019]eKLR** where the court stated that

“Although the Defendant is the registered proprietor of the suit property, his registration was not absolute but on his own behalf and in trust for the Plaintiffs and other family.”

Mr. Okan'go therefore urged the court to find that the 1st defendant held the suit land in trust on behalf of the plaintiff.

On the third issue as to whether the 1st and 2nd defendant fraudulently and illegally subdivided the suit land without due process, counsel cited the definition of fraud as per **Black's Law Dictionary** which defines fraud as follows:-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive intentional. As applied to contracts, it is cause of an error bearing on a material part of the contract, created or continued by Artifice, with design to obtain some unjust advantage to the one party or cause an inconvenience or loss to the other. Fraud in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed and are injurious to another or by which an undue and unconscientious advantage is taken of another.”

Mr Okan'go counsel for the plaintiff also relied on Section 26 of the Land Registration Act which provides as follows:-

(i) 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 the proprietor shall not be subject to challenge except:-

- a. On the ground of fraud or misrepresentation to which the persons is proved to be a party.
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Counsel therefore stated that the 1st Defendant breached the trust and failed to disclose during subdivision that the suit property Cheptiret/Cheplaskei Block 1(Kipchamo)52 that he held it in trust for the plaintiff. and his siblings. That the plaintiff produced the four certificates of official search for all the four plots which clearly indicate that the 1st defendant had transferred the land to himself.

Counsel urged the court to declare the subdivisions of the Cheptiret/Cheplaskei Block 1(Kipchamo) 52 fraudulent and illegal unlawful hence an order for cancellation of the same should issue.

ANALYSIS AND DETERMINATION

This case proceeded by way of formal proof as the defendants did not file any response to the claim. The 2nd defendant represented by the AG stated to the court that there was no cause of action against the Land Registrar therefore did not wish to participate in the suit.

The issues for determination are as to whether the 1st defendant held parcel No. Cheptiret/Cheplaskei Block 1(Kipchamo) 52 in trust, whether the plaintiff is entitled to his share and whether the subdivision and issuance of the new titles was legal.

On the first issue as to whether the 1st defendant held the suit land in trust for the plaintiff and his siblings, from the evidence on record and the testimony of the plaintiff which is uncontroverted, it is evident that the suit land was not meant to be owned by the 1st defendant alone. It was held in trust for the plaintiff and his siblings as per the schedule of apportionment by Mzee Malakwen before his demise as follows: -

- a. 3.8 acres to Pauline Rutto.
- b. 10.0 Acres to David Kogo.
- c. 12.0 Acres to Jackson Chepkwony Ruto.
- d. 9.0 Acres to Geoffrey Kosgei.

This proposition is corroborated by the minutes on record held on 13th August 2014 and another dated 6th October 2021 at the Human Rights office whereby the 1st defendant admitted that the land was ancestral land which had been registered in his name in trust for the plaintiff. It is also on record that he had agreed that 9 acres belonged to the plaintiff and was to transfer but he has not done so.

In the case of **Isack M'Inanga Kieba Vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015**, the Supreme Court held as follows;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **Kiarie v. Kinuthia**, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group”.

It is incumbent upon a person who claims that there exists a trust to prove such trust by bringing forth such evidence. In **Mbothu & 8**

Others vs. Waitimu & 11 Others (1986) KLR 171 the Court stated that:

“the law never implies, the court never presumes, a trust but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied

Further in the case of **Gichuhi v. Gichuhi (1982) KLR 285**, the Court held that:

“ a party relying on the existence of a trust must prove through evidence the existence and creation of such a trust----- ”

From the evidence and the documents produced it can be deduced that there was an intention to create a trust for the 1st defendant to hold the suit land on behalf of the plaintiff and his siblings according to the apportioned percentage of holding. The relationship between the plaintiff and that of the 1st defendant being established as that of uncle from the same ancestry. The land is therefore ancestral land which the grandfather gifted to his children. It follows that the plaintiff is entitled to his share of 9 acres.

On the third issue as to whether the 1st defendant illegally and fraudulently subdivided the suit land and got titles in his name, the plaintiff produced official searches which indicate that Jackson Chepkwony is the proprietor of Cheptiret/Cheplaskei Block 1(Kipchamo) 128 and 130 which measures 8.38 Ha and 0.80 Ha respectively. A caution was lodged on 11th March 2014 as indicated on the two searches. The 1st defendant knew that he was holding the suit land in trust and had no authority to subdivide the land without the consent of the rightful beneficiaries of the suit land. I find that this was done illegally and in bad faith to achieve an illegality.

The plaintiff has urged the court to cancel the 1st defendant's name from the title, Section 80 of the Land Registration Act provides for the same and it states as follows:

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

In the case of **Mary Ruguni Njoroge –vs- John Samuel Gachuma Mbugua & 4 Others [2014] eKLR Onguto, J. held:**

“In my view, the mistake referred to under section 80 (1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name. In short, the court wields powers equivalent to those donated by statute to the registrar under Section 79 of the Land Registration Act. A party seeking rectification may therefore elect to attend before the registrar or appear before the court and prompt the process of rectification of a title or a register.”

The current case is for rectification of wrongfully subdividing the land and registering in the 1st defendant's name. The court has powers under the above section to order for a rectification or a cancellation of a title.

I have considered the pleadings, the evidence on record, the submission by counsel together with judicial authorities and find that the plaintiff has proved his case against the defendant. I therefore make the following orders:

- a. A declaration is hereby issued that the subdivision of the Cheptiret/Cheplaskei Block 1(Kipchamo)52 is illegal and is therefore cancelled.
- b. A declaration is hereby issued that the subsequent registration of the parcel No. in Cheptiret/Cheplaskei Block 1(Kipchamo)129, Cheptiret/Cheplaskei Block 1(Kipchamo) 130, and Cheptiret/ Cheplaskei Block 1(Kipchamo)131 in the name of the 1st Defendant is illegal and is therefore cancelled.
- c. An order is hereby issued directing the 1st Defendant to execute a transfer of 9.0 Acres of land parcel Cheptiret/Cheplaskei Block 1(Kipchamo)52, unto the Plaintiff's name and for the 2nd Defendant to register the said parcel of land unto the Plaintiff's name.
- d. An order of permanent injunction is hereby issued restraining the 1st Defendant from trespassing into, constructing upon, transferring and/or otherwise encumbering the 9.0 Acres in land parcel number Cheptiret/Cheplaskei Block 1(Kipchamo) 52.
- e. The 1st defendant to pay costs of the suit.

DATED and DELIVERED at ELDORET this 23rd DAY OF JUNE, 2020

M. A. ODENY

JUDGE