



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT KERICHO
(FORMERLY CIVIL SUIT NO. 71 OF 2009)

ELC CASE NO. 199 OF 2015

BARNABAS MARITIM.....PLAINTIFF

VERSUS

MANYWELE KORGOREN 1ST DEFENDANT

KIPKOSKEI ARAP TANGUS 2ND DEFENDANT

AND

ROBERT KIPKOECH KOSKEY INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The Plaintiff's case as set out in his amended plaint is that he purchased a plot measuring 50 feet by 100 feet from Rusi Chepkirui Titany (herein after referred to as "Rusi" in January 1993. The plot was to be excised from **L.R. No. Kericho/Olokyin/315**. He averred that the 1st Defendant also purchased a portion of L .R. No. Kericho/Olokyin/315 from Rusi but caused the entire land, including the portion the Plaintiff had purchased, to be registered in his name. The Plaintiff averred that he discovered that the 1st Defendant fraudulently caused the entire parcel of land known as **L.R. No. Kericho/Olokyin /1086** to be registered in his name and later subdivided it and had a portion thereof being **L.R. No. Kericho/Olokyin/1108** transferred to the 2nd Defendant on 24th May 2007.

2. The Plaintiff claimed that L.R. No. Kericho/Olokyin/1108 which was subsequently transferred to the interested party by the 2nd Defendant included half his plot. He therefore sought judgment against the Defendants jointly and severally for;

- a. An order cancelling title deeds in respect of L.R. No. Kericho/Olokyin/1108 and new title deeds to be issued to the bonafide proprietors in respect of L.R. No. Kericho/Olokyin /1108;
- b. Permanent injunction restraining the Defendants from trespassing into the said plot measuring 25 feet by 100 feet;
- c. Costs of this suit;
- d. Interest on (b) above;
- e. Any other relief this Honourable court deems fit and just to grant.

3. The Defendants denied that they had acquired title to their respective parcels of land illegally. They claimed that the 2nd Defendant had been in full occupation of L.R. No. Kericho/Olokyin /1108 since 1999 and the Plaintiff had only been given a licence to put up a Jua Kali shed on a portion of the land. They averred that the Plaintiff had sought a refund of Kshs. 12,000/= to relinquish his claim on the land and the refund was made to him. The Defendants asserted that the Plaintiff's suit was bad in law as there was no privity of contract between him and the Defendants and further any alleged sale of land to him was null and void for lack of the requisite consent of the Land Control Board.

4. The Plaintiff filed a reply to defence in which he denied ever entering into an agreement for a refund from the 2nd Defendant or receiving

Kshs. 12,200/= from him. He reiterated that he had been in occupation of his plot since 1993 when he purchased it from the original owner. He maintained that he had *locus standi* to institute the suit and insisted that the agreement between him and the original seller was valid and binding.

PLAINTIFF'S CASE

5. Barnabas Maritim (PW1) testified that he purchased a plot measuring 50ft by 100ft out of L.R. No. Kericho/Olokyin/315 from Rusi Titany (PW2) in 1993. He stated that they had reduced their agreement into writing which he produced as P.EX1. Barnabas told the court that after buying the plot, the 1st Defendant who had bought a portion measuring 100ft by 100ft from PW2, registered both plots in his name. The 1st Defendant then subdivided the land into L.R. No. Kericho/Olokyin/1086 and 1087 and further subdivided L.R. No. Kericho/Olokyin/1086 into 5 portions namely 1106, 1107, 1108, 1109 and 1110. When he found out about the subdivisions, the Plaintiff reported the matter to the chief. The chief summoned the 1st Defendant and he agreed to return the 5 portions to PW2 but he only returned 4 portions excluding parcel No. 1108. The Plaintiff testified that parcel No. 1108 was transferred to the 2nd Defendant. He testified that parcel No. 1108 included a portion of his plot measuring 25ft by 100ft which he was claiming from the 2nd Defendant.

6. The Plaintiff admitted that they had not obtained the Land Control Board's consent during the sale when questioned about it during cross examination. He stated that he had constructed some semi-permanent structures on the land which were demolished by the interested party in 2014. He also admitted that he had sold his portion measuring 25ft by 100ft to one Jonathan Ngeno in 2016 while the suit was still pending.

7. Rusi Titany (PW2) adopted her statement as her evidence in chief. During cross examination, she testified that she had reported the 1st Defendant to the village elders because he had registered himself as the owner of her land. She stated that the elders ordered the 1st Defendant to return her land to her and that since he had subdivided it into 5 portions he returned 4 titles to her. She also testified that she had filed a case against the 1st Defendant and the court noted that the matter had been settled. She testified that she later sold 2 plots to the 2nd Defendant whose measurements she could not recall.

8. Sitonik Langat (PW3) also adopted his written statement as his evidence in chief. He added that he had been informed by PW2 that she had sold land to the Plaintiff and the 2nd Defendant but conceded that he had not witnessed the sale to the Plaintiff.

9. After he had adopted his statement as his evidence, Chelule Koske (PW4) who was a village elder in Central within Mulot, Bomet County, testified that he knew that L.R. No. Kericho/Olokyin/1108 belonged to the Plaintiff. He admitted that he was not present when the sale agreement was signed and did not participate in the proceedings where it was decided that PW2 gets back her land.

DEFENDANTS' CASE

10. Manywele Korgoren (DW1) testified that he had wrongly been sued by the Plaintiff as he had never had any business transaction with him. He told the court that his sister-in-law PW2, who was a drunkard at the time, transferred to him her title in respect to parcel No. L.R. No. Kericho/Olokyin/315 in the late 80s to safeguard it for her. He stated that PW2 informed him that she had sold 2 plots measuring 50ft by 100ft and 25ft by 100ft to the 2nd Defendant (DW3). She instructed him to transfer the portion of land she had sold to the 2nd Defendant which he did and returned the rest of the land to PW2. DW1 testified that PW2 had filed a case against him at Mulot Land Disputes Tribunal and they settled it when he transferred the title back to her. He denied ever purchasing any land from PW2. He said he was not aware that the Plaintiff had bought land from PW2.

11. PW2's son, Daniel Kipyegon Kikwai (DW2) testified that his neighbour, the 2nd Defendant, bought two parcels of land from his mother. He stated that before the land was sold to the 2nd Defendant, it was registered in the name of his uncle, DW1. Before that the land was registered in his mother's name. He testified that the Plaintiff bought a portion measuring 25ft by 50ft from his mother. DW2 testified that he sold a small portion to the Plaintiff to construct a pit latrine at Kshs. 12,000/= but later learnt that the portion had been sold to the 2nd Defendant. He recalled that the Plaintiff had had him locked up in a cell when he realized that the land had been sold to the 2nd Defendant. He testified that he was not arraigned in court as the 2nd Defendant refunded the Plaintiff the sum of Kshs. 12,000/= to secure his release.

12. The 2nd Defendant, Kipkoske Arap Tangu (DW3) denied that the 1st Defendant had fraudulently acquired title to L.R. No. Kericho/Olokyin/1086 and subdivided it into several titles including title No. 1108. He told the court that he purchased L.R. No. Kericho/Olokyin/1086 from PW2 and produced a sale agreement to support his claim. He stated that when he bought the land it was registered as L.R. No. Kericho/Olokyin/315. He stated that the parcel of land had been transferred to DW1 to hold it in trust for PW2 since she was a drunkard and so were her children. He stated that PW2 instructed him to pay the outstanding balance to DW1 since the title was registered in his name. He recalled that he and DW1 had gone to the Land Control Board and obtained consent to subdivide and transfer the land.

13. DW3 stated that the original title gave rise to parcel No. 1086 and 1087. Parcel No. 1086 was further subdivided into five small portions, from 1106 to 1110 and plot No. 1108 was later transferred to him. DW3 subsequently transferred the land to his son Robert Kipkoech Koske. He insisted that he had acquired his title lawfully and had no dispute with the original owner. He informed the court that he had even purchased more portions of land from the same vendor. DW3 stated that he did not know why the Plaintiff had sued him as he had never entered into any sale agreement with him. He therefore urged the court to dismiss the Plaintiff's claim.

14. The defence also called Wilson Kipsiele Marindany (DW4) who adopted his witness statement as his evidence in chief before they closed their case.

PLAINTIFF'S SUBMISSIONS

15. The Plaintiff's counsel submitted that when they called the initial owner of the original land parcel **L.R. No. Kericho/Olokyin/315**, she testified that she did sell a portion of land measuring 50ft by 100ft to the plaintiff. Counsel submitted that the 1st Defendant fraudulently transferred the entire property into his name in the guise of obtaining title for the portion he purchased from PW2. That it was not until a suit was filed against him that he reverted back the property to the original owner except the portion belonging to the Plaintiff. Counsel argued that since the 2nd Defendant obtained title from the 1st Defendant, who had obtained title from the original owner fraudulently, the transaction between the Defendants was void.

16. The Plaintiff's counsel argued that the decree produced by the Defendant in Misc App 91 of 2007, confirmed that PW2 had instituted a suit against the 1st Defendant when he transferred the entire land into his name. She also noted that the sale agreement dated 13th February 1998 which had been produced as DEx2 did not state what property was sold to the 2nd Defendant by PW2. She contended that during trial, PW2 testified that she did not sell to the 2nd Defendant a portion of the suit land but sold him a different plot.

DEFENDANTS' SUBMISSIONS

17. For his part, the Defendants' counsel opposed the Plaintiff's claim that he purchased a plot measuring 50ft by 100ft from Rusi. He argued that PW3's testimony that the Plaintiff bought a plot measuring 50ft by 100ft was inadmissible hearsay evidence and similarly dismissed as hearsay, the evidence of PW4 that parcel No. 1108 belonged to the Plaintiff. He argued that the Plaintiff failed to discredit the evidence of DW2 and DW4 that he had purchased a plot measuring 25ft by 100ft from Rusi which could only mean that the Plaintiff purchased a plot measuring 25ft by 100ft from Rusi.

18. Counsel further argued that the allegation that the 1st Defendant illegally and fraudulently subdivided L.R. No. Kericho/Olokyin/1086 into five portions and fraudulently transferred L.R. No. Kericho/Olokyin/1108 to the 2nd Defendant was not supported by evidence. He relied on the case of **Joseph Kipkoech Chemor v Kimaiyo Chemor & Another [2019]eKLR** in support of the argument that the Plaintiff was required to prove the allegations of fraud against the 1st Defendant. He argued that ideally, the charge of fraud against the 1st Defendant should have been pleaded and prosecuted by Rusi but she did not allude to commission of fraud by the Defendants in the acquisition of L.R. No. Kericho/Olokyin/1086 and also testified that she had no claim against the Defendants. That in any case the Plaintiff lacked the *locus standi* to institute the suit as there was no privity of contract between the Plaintiff and the Defendants.

ANALYSIS AND DETERMINATION;

19. The main issue arising for determination from the evidence and submissions of the parties is whether the 1st Defendant fraudulently transferred a portion of the Plaintiff's plot measuring 25ft by 100ft to the 2nd Defendant.

20. The original parcel of land known as L.R. No. Kericho/Olokyin/315 was first owned by Rusi (PW2). The Plaintiff claimed that he purchased 50ft by 100ft of the land from Rusi and produced an undated sale agreement to support his claim. The agreement showed that the Plaintiff purchased a plot measuring 50ft by 100ft from Rusi at a purchase price of 22,000/=. Rusi also testified in support of the Plaintiff's claim that he had purchased a plot measuring 50 ft by 100 ft from her in 1993.

21. The Defendants' contention that the Plaintiff only purchased a plot measuring 25ft by 100 ft was not proved. They called the Plaintiff's son DW2 and DW4 to reinforce that claim. Having analyzed the evidence, I find that there is no substantive proof that DW2 or DW4 witnessed or participated in the transaction in any way. It is clear from the agreement between the Plaintiff and the vendor that the Plaintiff purchased a plot measuring 50 ft by 100ft and I therefore reject the Defendant's claim that the Plaintiff only purchased a plot measuring 25ft by 100ft.

22. The focal point of the Plaintiff's suit against the Defendants is his claim that after purchasing his plot from Rusi, a portion measuring 25ft by 100ft was subsumed into L.R. No. Kericho/Olokyin/1108 which is currently registered in the name of the interested party. The Plaintiff blames the 1st Defendant for his woes. He claims that the 1st Defendant purchased a portion measuring 100ft by 100ft from PW2 out of L.R. No. Kericho/Olokyin/315 but registered both portions into his name. The Plaintiff testified that the 1st Defendant subdivided the land into L .R. No. Kericho/Olokyin/1086 and 1087 and further subdivided L .R. No. Kericho/Olokyin/1086 into 5 portions being parcels No. 1106, 1107, 1108, 1109 and 1110. He then transferred parcel No. 1108 to the 2nd Defendant which included a portion of his plot measuring 25ft by 100ft.

23. The 1st Defendant denied the Plaintiff's claim that he had purchased land from Rusi. He testified that in the 80's, Rusi transferred the entire L.R. No. Kericho/Olokyin/315 into his name for safekeeping due to her drinking problem. He testified that the Plaintiff had him arraigned before Mulot Land Disputes Tribunal when she wanted her land back and he transferred the land to her excluding parcel No. 1108 which he had transferred to the 2nd Defendant on Rusi's instructions. The 1st Defendant testified that Rusi had informed him that she had sold two plots to the 2nd Defendant one measuring 50ft by 100ft and another measuring 25ft by 100ft.

24. The 1st Defendant's evidence was supported by the 2nd Defendant, who refuted any wrongdoing on the part of the 1st Defendant. The 2nd Defendant testified that when he purchased L.R. No. Kericho/Olokyin/1108 from Rusi, the entire parcel of land was registered in the name of the 1st Defendant in trust for Rusi who was a drunkard. He stated that parcel 1086 which was a subdivision of the original land was subdivided into several titles and parcel No. 1108 was transferred to him. He added that he and the 1st Defendant had obtained the consent of the Land Control Board for subdivision and transfer of the land.

25. A cursory look at the copy of green card in respect to L.R. No. Kericho/Olokyin/315 shows that the land was transferred from Rusi to the 1st Defendant on 24th April 1998. In January 2001, the land was subdivided into parcel No. 1086 and parcel No. 1087. The parties have contradicting accounts of how title passed from Rusi to the 1st Defendant. The Plaintiff claims that the 1st Defendant purchased a portion measuring 100ft by 100ft of L.R. No. Kericho/Olokyin/315 from Rusi but failed to produce any document to support his claim. Rusi also

testified that she had sold a portion 100ft by 100ft to the 1st Defendant but failed to adduce evidence to back her claim. The documents relating to the transfer of the land from Rusi to the 1st Defendant were also conspicuously missing from record. Even more baffling was the failure by the Plaintiff to challenge the Defendant's claim that L.R. No. Kericho/Olokyin/315 was transferred to the 1st Defendant to hold it in trust for Rusi due to her drinking problem at the time.

26. Rusi testified that when she learnt about the 1st Defendant's fraudulent transfer of the land to his name, she lodged a complaint before Mulot Land Disputes Tribunal. The proceedings before the Tribunal may have helped to clarify the circumstances leading to the transfer of L.R. No. Kericho/Olokyin/315 to the Plaintiff, but they were similarly not produced before the court. The Defendants produced a decree of the court in PMCC Misc. App. No. 91 of 2007 which indicated that the dispute between Rusi and the 1st Defendant had been settled.

27. In her written statement, Rusi also stated that she had sold a portion measuring 50ft by 100ft to the 2nd Defendant and not the whole plot measuring 75ft by 100ft as he claimed. However, the sale agreement between Rusi and the 2nd Defendant dated 13th February 1998, indicates that Rusi was selling a parcel of land measuring 75ft by 100ft to the 2nd Defendant. She did not produce an agreement to show that she had sold a portion measuring 50ft by 100ft of the original parcel No. 315 to the 2nd Defendant. During cross examination she also testified that she had no claim against the 2nd Defendant. It is probable that Rusi sold overlapping portions of land to the Plaintiff and 2nd Defendant. However, no document was availed before the court to substantiate what portion of the original land was sold to the Plaintiff.

28. In **Joseph Kipkoech Chemor v Kimaiyo Chemor & another (supra)** the court cited with approval the finding of the court in **Vivo Energy Kenya Limited vs Maloba Petrol Station Limited & 3 Others [2015]eKLR**;

“Where fraud is alleged, it must be specially pleaded and particulars thereof given... Even where a Plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities.”

29. The Plaintiff elaborately pleaded particulars of fraud against the Defendants but in my view, he failed to satisfy the burden of proof required for fraud. It was particularly necessary for the Plaintiff to prove his case since there were two conflicting versions of how the 1st Defendant acquired title to L.R. No. Kericho/Olokyin/315. Moreover, the Plaintiff failed to obtain consent from the Land Control Board for the purchase of his plot in contravention of **section 6** of the **Land Control Act**.

30. In the end, I find that the Plaintiff has failed to prove his case on a balance of probabilities. Accordingly, I dismiss the Plaintiff's suit with costs to the Defendants.

Dated, signed and delivered via email this 12th day of June, 2020.

.....

J.M. ONYANGO

JUDGE