



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 22 OF 2010

**CONSOLATA KIPSOI (Suing as a legal representative
of the Estate of Francis Sawe Kipsoi.....PLAINTIFF**

VERSUS

DANIEL KIRAGU.....1ST DEFENDANT

ERNEST MORARA SAKWA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit against the Defendant in her capacity as the legal representative of the Estate of Francis Sawe Kipsoi(deceased) on the 28th January 2010 vide a grant of Letters of Administration *Ad Litem* in **High Court Succession Cause No. 164 of 2009(Nakuru)** issued on the 8th December 2000.

2. It was her statement of claim that at all material times **Land Parcel No. Nakuru Municipality Block 29/802** was registered in the name of Francis Sawe Kipsoi, her late husband, and that on or about April 2005, the Defendants illegally, fraudulently and without consent or authority of the family of the deceased caused a subdivision to be done on the parcel whereof two sub-divisions were created being **No. 1730 and 1731** and subsequently, fraudulently and illegally registered themselves as the owners on the 16th January 2007 and 9th June 2005 respectively.

Particulars of fraud and illegality were stated in the plaint. It was her further claim that the said registration of the subdivisions in their names, the defendants deprived the deceased's Estate their beneficial use of the property hence have suffered loss and damage.

She therefore sought:

a) A Declaration that Francis Sawe Kipsoi (deceased) is and was the registered proprietor of Nakuru Municipality Block 29/802.

b) That the subdivision of Nakuru Municipality Block 29/802 into Nakuru Municipality Block 29/1730 and 1731 and subsequent registration of the defendants as the registered owners are fraudulent illegal and hence null and void.

c) An order of cancellation of the resultant titles Nakuru Municipality Block 29/1730 and 1731 and an order for the amendment of the map to restore land parcel No. Nakuru Municipality 29/802.

d) *A permanent injunction restraining the defendants either by themselves, agents, and or servants from selling, leasing, subdividing, constructing, developing or in any way dealing with **Nakuru Municipality Block 29/1730 and 1731.***

e) *The value of demolished building valued at Kshs.391,000/=*

f) *An order of eviction*

g) *Costs.*

3. The first Defendant, Daniel Kiragu Kinyua filed his statement of defence dated 11th February 2010 on the 15th February 2010. It was his defence that he bought the land parcel **Nakuru Municipality Block 29/1730** for valuable consideration from one **David Kiprono Mutai** vide an agreement executed on the 27th September 2006 and that an official certificate of search confirms him as the duly registered owner of the said land parcel. He denied all the alleged particulars of illegality in the acquisition of the said land parcel and further denied demolition of a building on the land parcel and its value of Kshs.391,000/=.

4. The first defendant's case was withdrawn by the plaintiff vide a notice of withdrawal of suit filed in court on the 13th February 2012 by reason that the said first defendant had since died.

5. **The plaintiff's case**

The plaintiff called four witnesses. PW1, the plaintiff stated that the deceased was her husband and there are other two wives, and between them were 20 children, that the deceased died on the 10th April 1995, a fact confirmed by production of a death certificate as an exhibit.

She testified that the land in parcel issue was bought from Kalenjin Enterprises where the deceased was a member No.208. She produced a certificate of official search of the **Plot Nakuru Municipality Block 29/802** that showed that deceased, Francis Sawe Kipsoi was the registered owner on the 16th February 2004. It was her further evidence that one of the deceased's daughter, Salome was staying in the land parcel after the demise of the deceased upto when she was evicted from therein by the first defendant who claimed to have bought the land after an alleged subdivision that created two other **Parcels** being **No. 1730 and 1731**. The first defendant was registered owner of **Nakuru Municipality Block 29/1730**-on the 16th January 2007 without the necessary letters of administration.

6. It was her further testimony that the title issued to the first defendant was fake and not genuine as no one had authority to sell the land. She testified that a caution to prohibit any dealings on the land had been placed thereon on 3rd May 2007 and that she did not know how it was removed to facilitate the transfer to the first defendant. She stated that **David Kiprono Mutai** was her step son and he had no authority or Letters of Administration to enable him sell the land to the defendant or anybody else.

7. PW2, one Kipkurui Rono, stated that he was a director of Kalenjin Enterprises. He produced a register to confirm that the deceased was its member and had been allocated **Plot No.802** at Rhoda and a *shamba* at **Koilel Farm No. 21**, that survey fees and clearance fees had been paid and was therefore entitled to the Plot 802. He testified that the defendants were not members of the company and could not have been allocated land from the land's office.

8. PW3, Salome Chepkorir Kipsoi is the daughter of the deceased. It was her testimony that only Limited grant of letters of administration had been obtained by the plaintiff on behalf of the deceased's family and that she was living in the plot in question until the 7th September 2009 when she was evicted from the plot by one David Kiragu and her properties damaged whose value was estimated at Kshs.391,000/=. She stated that she did not know how and when the said David Kiragu bought the plot as he had been occupying the same since 2006 after her father died on 10th April 1995.

9. PW4, Charles Birundu is the Land Registrar, Nakuru County having worked for the Ministry of Lands for over 30 years, in various land offices.

He produced a current official search on the property in issue, Nakuru Municipality Block 29/802(Sironda).

He confirmed that Francis Sawe Kipsoi(deceased) was entered in the register on 16th March 2004 as the owner. He also confirmed that on the 3rd May 2007 a restriction was placed on the said property indicating that the registered owner was dead and that dealings with the property were prohibited awaiting completion of succession.

He also produced the “Green Card” - the register and the official search as **PExh No 16 and 17**. He stated that the said parcel, **Nakuru Municipality Block 29/802** was intact. When shown a copy of **Nakuru Municipality Block 29/1730** – he confirmed that it was issued to one David Kiprono Mutai on the 29th September 2005, and that it was a subdivision of **Block 29/802**.

He testified that if the subdivision came from **Block 29/802**, the new entries ought to have opened with Francis Kipsoi, transfer to David Kipsoi and other subsequent persons. He reiterated that the title to the Subdivision should have had a first entry as Francis Sawe Kipsoi, but then it shows first entry as David Kipsoi. It was his testimony that the current procedure was not followed in the entries in the register.

Upon intense cross examination by Mr. Ndolo, Advocate for the first defendant, the Land Registrar reiterated that the Title Deed to the deceased was never issued, and that there was n subdivision on the property as far as the official search certificate dated 12th October 2006 was concerned, and no other entries were shown after the restriction was placed on the property.

10. He further testified that as at 29th September 2005, the subdivision Block 29/1730 belonged to David Kiprono Mutai as the first registered owner, and therefore the search as at 16th January 2007 was not reflective of the true status and as the titles were different. He could not explain the differences in the titles.

11. The **first defendant**, Daniel Kiragu did not call any witnesses:

He testified that he purchased the **Plot Nakuru Municipality Block 29/1730** from one David Kiprono Mutai after a search he conducted confirmed that he was the registered owner as at 12th October 2006 and after executing a sale agreement on the 27th September 2006 and got registered as the owner and issued with a Title Deed on the 16th January 2007. He testified that he thereafter took possession and removed doors of a small house he found in the land after giving several demands for rent payment and eviction to the then occupant, one Salome. It was his testimony that he obtained the title to the land legally and that his title is genuine and legal. He also confirmed that he did not apply or obtain consent from Land control board for the sale and transfer of the property to himself.

12. Both counsel agreed to file written submissions, and framed separate issues.

The issues in my view, that arise from the pleadings and evidence, and as framed by both counsel may be summarised as herebelow:

- 1. Whether the subdivision of **Parcel No. 29/802** and subsequent sell of the resultant sub plots, in particular **Nakuru Municipality Block 29/1730** to the first Defendant were fraudulently and illegally done.*
- 2. Whether the suit property is subject to Land Control Board Act, Chapter 302 Laws of Kenya.*
- 3. Whether the plaintiffs suit ought to be dismissed for non- joinder of parties.*

4. *Whether the plaintiff is entitled to the prayers sought in the plaint.*

1. Whether there was illegality and fraud in the subdivision and transfer of the suit property, Nakuru Municipality Block 29/802.

Counsel for the plaintiff submitted that the original owner of the suit property, Francis Sawe Kipsoi died on the 10th April 1995, that a caution was registered against the property prohibiting all dealings pending grant of letters of Administration for his estate on the 3rd May 2007, that an official search conducted on the 29th September 2008 confirmed ownership to the deceased Francis Sawe Kipsoi, and that grant of letters of Administration for the Estate were granted *ad litem* for purposes of filing this suit only and as such, there was no legal authority whatsoever by anyone including the son of the deceased, David Kiprono Mutai to purport to subdivide and sell part of the suit property.

13. It was his submission that the Land Registrar, Nakuru County pursuant to an official Search dated 29th September 2008 confirmed that the suit land was intact hence how the same was subdivided and transferred to the defendant must have been fraudulent and illegal. It was submitted that to date there is no administrator to the deceased's estate as the plaintiff took out interim Letters of administration to facilitate filing of this suit to safeguard the estate.

The plaintiff's counsel further submitted that the defendant's defence of being an innocent purchaser for value was baseless and based his submission on the **Provisions of Article 40(6) of the Kenya Constitution** that states:

“The rights under this article do not extend to any property that has been found to have been unlawfully acquired.”

He wondered how a title deed in the name of David Kiprono Mutai to **Plot No. 1730 a subdivision of Block 29/802** could have been obtained without Letters of Administration for the deceased's estate and concluded that it could only have been through an elaborate scheme of illegality and fraud.

14. Citing Case **Paul Muira and Another -vs- Jane Kendi Ikinuya and 2 Others (2014) e KLR**, it was submitted that the law does not recognise or protect persons who claim properties that were obtained through unlawful means.

It was a further submission that as the title was fraudulently obtained, it ought to be cancelled pursuant to provisions of **Section 80(1) of the Land Registration Act, 2012** by a court order and urge that the court do order rectification of the register and direct cancellation or amendment of the register in favour of the plaintiff. He also cited **Section 26 Land Registration Act 2012** to affirm the legal position that a person named as a proprietor of land is the absolute and indefeasible owner, subject to encumbrances, restrictions and other conditions endorsed in the certificate and that the title shall not be subject to challenge save on account of fraud or misrepresentation to which the person is proved to be a party or where the title has been acquired illegally, unprocedurally or through a corrupt scheme.

15. In summary, counsel urged that the Defendant's title was a fake as the Land Registrar confirmed that the original title to the deceased is yet to be issued to the deceased therefore the title held by the Defendant could only have been obtained illegally and through fraud. He seeks that the prayers sought by the plaintiff be granted.

16. On the said issue, the first Defendant's submissions by Advocate Mr. Ndolo are that the plaintiff has not proved any fraud or illegality in the manner he obtained the title – to **Plot No 1730**. Citing the case **Twaha Kabuye -vs- Livingstone JJ uko- Kampala HCCC No 596 of 1985**, it was his submission that the plaintiff failed to prove that the first defendant is guilty of some fraudulent act or must have known of such act by somebody else and took advantage of it. It is his submission that no evidence was adduced as to who sub-divided the suit land or how the first defendant registered himself and how he was issued with the title Deed, nor how the restriction the property was removed. He therefore submitted that without

proof of any fraud on the part of the first defendants, the suit should be dismissed.

17. **Whether the suit is subject to Land Control Act.**

The plaintiff's submission is that the suit property **Nakuru Municipality Block 29/802** is agricultural land and in line with **Section 6 of the Land Control Board Act, Cap 301 Laws of Kenya** consent to either subdivide or sell is mandatory, and in default, any transaction without the said consent is null and void.

The first defendant tendered no submission on this issue.

18. On non joinder of crucial parties, the first defendant submits that failure to enjoin the seller of the suit property the subdivision **Block 29/1730** one David Kiprono Mutai, and the Commissioner of Lands as necessary parties is fatal to the plaintiff's case as necessary information was withheld from the court as how the survey and subdivision of the land was done, and eventual issuance of a title deed in the first Defendant's name. The first Defendant further submits that in its totality, there were no acts of illegality or fraud in the subdivision or transfer of the suit property in the first defendants name and therefore payers sought by the plaintiff should not issue.

Analysis of evidence and submissions, and findings

19. From the evidence tendered before me, there is no dispute that **Land Parcel No.Nakuru Municipality Block 29/802** was registered in the deceased's name, Francis Sawe Kipsoi on the 16th March 2004 but the title deed had not been issued or collected from the Commissioner of Lands offices by the time of his death on the 10th April 1995. It is also not in dispute that upon his demise, a caution was registered against the title to prohibit all dealings pending grant of letters of administration which as at the date of filing this suit had not been obtained save for a limited grant obtained by the plaintiff, one of the widows of the deceased to facilitate filing of the suit.

It is further not in dispute that after the death of the deceased, the suit property was subdivided and two subdivisions created being **Nakuru Municipality Block 29/1730** and **1731**, and thereafter **Nakuru Municipality lock 29/1730** sold and transferred to the first Defendant by one David Kiprono Mutai, said to be a son of the deceased, without the necessary authority by way of a confirmed Grant of Letters of Administration to the estate.

What is not clear is how the deceased's son, David Kiprono Mutai without having applied for and obtained a grant of Letters of Administration for his father's estate got himself registered as the proprietor, on first registration, of the suit property. It is also not clear how the caution that had been registered against the property was removed at the Nakuru Lands registry to facilitate registration of the **Subdivision Block 29/1730** and transfer of the same to the first Defendant. I agree with the first Defendant's submissions that David Kiprono Mutai and the Commissioner of Lands were necessary parties to the suit who would have shed some light to the court as to how and by whom the acts of removal of the caution, subdivision and registration of the sub title in the first Defendant's name were effected without the crucial documents being the confirmed Grant of Letters of Administration and the Land Control Board consent, among others.

20. The duty to include, add and or remove parties to a suit is a choice by both parties. The plaintiff had a duty to do so if she deemed it necessary so did the first defendant have equal duty to add the two parties as third parties to the suit had he deemed it necessary.

It is trite law that once a proprietor of land has died, his estate can only be administered by his administrators who of necessity must obtain Letters of Administration from the court, and only after confirmation of the grant would the administrators be seized with legal authority to deal with capital assets of the deceased constituting his estate.

Section 55(1) Laws of Succession Act, Chapter 160 reads:

“No grant of representation whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by Section 71.

Evidence was tendered that no grant of representation was applied for by any of the deceased's beneficiaries or anyone else, and as such all dealings touching on the deceased's land parcel **No. Nakuru Municipality Block 29/802**, by way of sub-division, sale, lease, mortgage exchange were illegally done. The first defendant too confirmed that there was no Land Control Board consent obtained prior to the sale to him of the property.

21. Section 6(1) of the Land Control Board prohibits any transactions without its consent touching on agricultural land situated within a Land control area.

In **David Sigonga Ole Tukai -vs Francis Arap Muge & 2 Others (2014) e KLR**, it was held that:

(1) all transactions involving agricultural land situate in a land control area are void for all purposes unless the land control board within that land control area has sanctioned them.

(2) It is a criminal offence punishable by imprisonment or fine or both to pay or receive payment in respect of a void transaction or to take possession or remain in possession of land which is the subject of such void transaction.

22. The question that sought to be answered here is whether or not the suit property was an agricultural land, and whether or not it is situated within a land controlled area. The first defendant stated that the plot was not an agricultural plot so not subject to Land Control Board was not necessary and neither was it pleaded in the plaint.

I have looked at the Register of members of Kalenjin Enterprises produced as exhibit by PW2, Kipkururi Rono (PEXh No. 11 and 12). It has over **1241** members. The deceased was member No. 152, and had been allocated plot **Block 29/21 – Plot No. 802**. It was his testimony that only members were allocated plots and that the defendants could not be allocated plots as they were not members. It is therefore evident that the land that could accommodate allocations to the 1241 members of the company was not a plot but an agricultural land parcel. The court finds that the suit property was and is an agricultural property and therefore subject to the **Land Control Board and Section 6(1)** of the said Act is applicable.

23. As stated above, the first registered owner of the suit property was the deceased having been so registered on the 16th March 2004. The Nakuru County Land Registrar produced the register (Greencard) that showed that the only other entry therein was the restriction dated 3rd May 2007 prohibiting dealings on the land after the registered owner died, and no other entries to date. The register and official search were produced as PEXh No. 16 and 17. From that, it was his testimony that the land parcel was intact, and if there were any dealings, they must have been illegally and fraudulently made.

The Land Registrar looking at the Title Deed for **Nakuru Municipality Block 29/1730** – a subdivision of **Block 29/802**, confirmed its issuance on the 29th September 2005 to David Kiptuto Mutai. It was his evidence that if that subdivision came from Block 29/802, it ought to have had the first entry as Francis Sawe Kipsoi, transfer to David Kipruto and others, that the first entry in the register should have been the original owner. He confirmed that official records show no subdivisions and therefore there is a disconnect as the entries in the registers do not agree.

24. From that evidence, it is quite clear that the Defendant's title was not a first registration and that the said registration was not procedurally and legally entered thus confirming that the entry and issue of the Title Deed to the said David Kipruto Mutai and subsequent transfer to the first defendant were so obtained through an elaborate scheme of illegality and fraud.

Having made findings that due process was not followed in dealings with the deceased's land parcel subject of this case as far as there was no confirmed grant of Letters of Administration or any authority,

and particularly for the subdivision and sell and transfer of the said subdivision to third parties, and in particular to the first defendant, and having found that there was no Land Control Board consent to subdivide and sell the said land parcel to the first defendant and taking into account the clear legal provisions stated above and particularly **Section 6 of the Land Control Board Act** and **Section 26 of the Land Registration Act 2012**, I come to the inevitable conclusion that the Title Deed issued on the 16th January 2007 to the first defendant was so issued fraudulently through an illegal scheme made to deprive the deceased's estate of its enjoyment and benefits from the said land parcel. See **Paul Muira and Another -vs- Jane Kendi Ikinyua & 2 Others** (Supra).

25. As stated in the case **Mutsonga -vs- Nyati (1984) e KLR** and in **Koinange and 13 Others -vs- Koinange (1986) e KLR**, the allegations of fraud must be proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities. The onus of discharging that burden is on the party alleging the fraud. I am satisfied that the plaintiff and her witnesses discharged the burden and proved that the first defendants title to the suit property was acquired though fraud and illegality.

26. It matters not that the first Defendant was a *bonafide* purchaser for value. His recourse is to the seller who deceived him into purchasing the land using fraudulently obtained documents. The plaintiff has therefore succeeded in showing that the registration of the suit property (subdivision) in the first defendants name was fraudulent. and therefore null and void.

27. Whether the plaintiff is entitled to the reliefs sought.

The Court of Appeal in the case **Dr. Joseph N.K. Arap Ng'ok**(Supra) stated that Section:

“Section 239(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act.

It is our law and the law takes precedence over all other alleged equitable rights of Title. In fact the Act is meant to give such sanctity of the title otherwise the whole process or registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

The above reiterates the status of claims by registered owners of properties as opposed to claims by physical occupants, and illegally and fraudulently obtained registrations of land.

Section 80(1) (2) of the Land Registration Act, 2012 empowers the court to order 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. Likewise, under the Land Control Act, all transactions involving agricultural land are void for all purposes unless consent is granted by the Board.

28. I need not go back to my findings. Suffice to state that the court is satisfied that the plaintiff has proved that the first defendant's title to the subdivision **Nakuru Municipality Block 29/1730** out of the deceased **Title No. Nakuru Municipality Block 29/802** was illegally and fraudulently obtained and therefore null and void *ab initio* must be rectified in the manner as contained in the reliefs sought.

It is also the court's finding that the plaintiff has failed to prove the special damage pleaded as Kshs.391,000/= being value of demolished building in the said land parcel as no proof was tendered.

29. Consequently, and for the above reasons and findings, there shall be judgment entered for the plaintiff against the first Defendant Daniel Kiragu Kinyua as follows:

(a) A declaration is issued that Francis Sawe Kapsoi (deceased) is the registered proprietor of land parcel known as **Nakuru Municipality Block 29/802**.

(b) That the Subdivision of **Nakuru Municipality Block 29/802** into two portions **No. 1730 and 1731** and subsequent registration of **Nakuru Municipality Block 29/1730** in the first Defendant's name as the proprietor are fraudulent, illegal and therefore null and void.

(c) An Order of cancellation of title **No. Nakuru Municipality Block 29/1730** is issued together with a an order for the amendment of the map to restore Land Parcel **No. Nakuru Municipality Block 29/802**, to its status as at 16th March 2004.

(d) Permanent injunction restraining the first defendant by his himself, his agents and servants from selling, leasing, constructing, developing or in any other way dealing with the land parcels **Nakuru Municipality Block 29/1730**.

(e) A claim for Kshs.391,000/= is dismissed.

(f) An order of eviction of the first defendant from parcel No. Nakuru Municipality **Block 29/1730**.

(g) Circumstances pertaining to the suit hereof persuade me to make an order that each party bears its own costs of the suit.

Dated, signed and delivered in the open court this 14th day of July 2016.

JANET MULWA

JUDGE