



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 388 OF 2017

(Formerly Machakos ELC No. 194 of 2014)

MABOKO DISTRIBUTORS LTD..... PLAINTIFF

VERSUS

JAMES KIOI MUHURI.....DEFENDANT

JUDGEMENT

By an amended Complaint dated 27th July, 2017, the Plaintiff prays for judgement against the Defendant for: -

- a) An order for permanent injunction restraining the Defendant from interfering, trespassing, alienating, ploughing or offering for sale, transferring in any other way LR No. Kajiado/ Mailua/ 1906;
- b) A Declaratory Order do issue that the consolidation of the various pieces of land measuring 65 acres into LR. No. Kajiado/ Mailua/ 1906 and the subsequent transfer to the Defendant's name was fraudulent, illegal, null and void;
- c) An order do issue that the Title Deed for parcel of land no. LR. No. Kajiado/ Mailua/ 1906 in the name of the Defendant be cancelled and a new title be issued in the names of the Plaintiff for 65 acres;
- d) In the alternative, an order do issue directing the Defendant to excise and transfer to the Plaintiff 65 acres from LR. No. Kajiado/ Mailua/ 1906 and in default, the Deputy Registrar do sign all relevant documents required for subdivision and effective transfers on behalf of the Defendant;
- e) Costs of this suit.

The Defendant filed his Defence dated the 29th September, 2017 where he denied the averments in the Complaint except for the descriptive and jurisdiction of the Court. He admitted having bought land from Lankatet Ole Setek and Ole Kirima Ole Setek. Further, that he entered into agreements on his own behalf and benefit. He denied that the Plaintiff contributed towards the purchase price of the suit property as claimed. He averred that the Plaintiff cannot purport to have any rights on the parcels of land that he rightfully acquired and paid for, from his own pocket. On the particulars of fraud, he denied combining the said parcels illegally as he is the registered proprietor of the suit land. Further, that there was nothing to disclose to the Registrar that he was buying his own property and the Transfer was effected without any misrepresentation. He disputed that the Plaintiff has suffered any loss. He further denied being served with a notice to sue.

Evidence of the Plaintiff

PW1 Peter Ndungu Muhuri and PW2 George Muchiri Muhuri testified on behalf of the Plaintiff. They claimed the Plaintiff purchased 65 acres of land from two brothers namely Lankatet Ole Setek and Ole Kirima Ole Setek. It was their testimony that the Defendant who is their brother took over the land and amalgamated it with his own personal land after which he obtained one title namely Kajiado/ Mailua/ 1906 totalling 125 acres. They insisted that the Defendant illegally and fraudulently transferred the Plaintiff's 65 acres of land and the same should revert to the company. Further, that their father did not have authority to give the Defendant land that belonged to the Plaintiff without the Company's resolution. PW1 confirmed that during the time the Plaintiff was purchasing the land in dispute, the directors were their father and mother while the three brothers had not been incorporated therein. Further, that their father signed the Sale Agreement for the 30 acres of land bought from Ole Kirima as a proprietor while he signed as a witness. PW1 clarified in re examination that the Plaintiff bought 30 acres from Ole Kirima and 35 from Lankatet Ole Setek. They stated that they were not interested in the land the Defendant bought in person. They produced various documents including: Share Certificate for Mailua Group Ranch in favour of the Plaintiff; Receipt for Kshs. 10,000 being payment for Share Certificate; Sale Agreements dated 16th December, 1995, 3rd October, 1996, 10th February, 1997, 19th February, 1997, 8th January, 2004 and Bundle of payment Vouchers as exhibits.

Evidence of the Defendant

The Defendant as DW1 testified that he was the owner of land parcel number Kajiado/ Mailua/ 1906. He contended that his father in a meeting held on 24th August, 2004, gifted him 20 acres of land which he had bought from Daniel Setek. Two of the Defendant's witnesses who were present during the meeting held on 24th August, 2004 testified that the deceased Hon. Godfrey Muhuri Muchiri gifted the parcel of land known as Kajiado/Mailua/1451 to the Defendant. The Defendant insisted that the whole of the suit land belonged to him and denied having fraudulently registered the 20 acres of land in his name. The Defendant explained that his father only paid for the 20 acres of land he had purchased from Daniel Setek and he bought another 15 acres from the said vendor to make it 35 acres. The Defendant as DW1 confirmed that once he finalized the payment of the purchase price to the vendors, he amalgamated the parcels of land he had purchased including the one his father gave him and obtained the title namely Kajiado/ Mailua/ 1906 (suit land). The Defendant produced various documents including Payment receipt for the Beacon Certificate dated 4/04/2001; Beacon Certificate dated 4/04/2001; Payment Receipts for Transfer and Title; Agreement of Shamba dated 15/2/2003; Agreement of Sale of Land and Acknowledgement of receipt of payment for 50 acres of land bought from Olkirima Setek Oloije; Agreement of Sale of land and acknowledgement of receipt of payment for 10 acres of land bought from Olkirima Setek Oloije; Sale Agreement dated 27th April 2005 and acknowledgement of receipt for 5 acres for KAJIADO MAILUA/1478; Mutation Form for KAJIADO/MAILUA/1115; Transfer of Land Form and Application for consent for KAJIADO/MAILUA/1477; Transfer of Land Form and Application for Consent for KAJIADO/MAILUA 1478; Sale agreement dated 4th March, 2006 and acknowledgement of receipt of 5 acres of land to be excised from KAJIADO/MAILUA/1476; Sale Agreement dated 30th May, 2006 and acknowledgement of receipt for 10 acres to be excised from KAJIADO/MAILUA/1476; Sale Agreement for 15 acres dated 24th August 2006 and acknowledgement of receipt, to be excised from KAJIADO/MAILUA/1476; Sale Agreement dated 2nd February 2007 and acknowledgement of receipts for 5 acres to be exercised from KAJIADO/MAILUA/1476; Sale agreement dated 13th May, 2007 and acknowledgement of receipts for 10 acres to be exercised from KAJIADO/MAILUA to be excised from 1476; Title deed for KAJIADO/MAILUA/2324 measuring approximately 17 acres, title that was used to exchange with the 10 acres belonging to Stanley Sabaya Parmet; Title Deed for KAJIADO/MAILUA/2322 part of which was used in exchange of Evanson Muugi Nganga's 2 acres; Mutation for two titles that is KAJIADO/MAILUA/2322 and 2324; Olkirima Setek Oloije Title Deed for KAJIADO/MAILUA/2322 and 2324 approximately 88 acres; Application for Consent and Consent for subdivision of KAJIADO/MAILUA/1476; Mutation Form for KAJIADO/MAILUA/1476; Title Number KAJIADO/MAILUA/1819 in Olkirima's name; Consent of Transfer for KAJIADO/MAILUA/1819; Transfer Documents of KAJIADO/MAILUA/1819; Amalgamation Mutation for the three parcels that is KAJIADO/MAILUA/1477, 1478 and 1819; Title Deed number KAJIADO/MAILUA/1906; Certificate of Official Search on KAJIADO/MAILUA/1906 dated 16th September,2015; A Letter from Seneti and Company Advocates to the Registrar of Lands at Kajiado Land Office dated 15th October 2015 and the Application for removal of the Restriction on Title Number KAJIADO/MAILUA/1906; Summons to Enter Appearance and Plaintiff in Civil Suit Number 198 of 2014; Mutation Form dated 20/7/2004; Petty Cash Vouchers paid by James Kioi to Daniel Lankanet Setek; Acknowledgement of receipt dated 25th August, 2004; Petty cash vouchers; A letter dated 24th August, 2004; Application for Transfer and Consent of Transfer of KAJIADO/MAILUA/1451 in favour of James Kioi Muhuri; Title Deed for KAJIADO/MAILUA/1451; Affidavit of Daniel Lankanet Setek dated 28th January, 2013 and A schedule of the distribution of the late Godfrey Muhuri Muchiri's estate dated 26th February 2014 as his exhibits.

Submissions

Plaintiff's Submissions

The Plaintiff submitted that it purchased 65 acres of land from Lankanet Ole Setek and Ole Kirima Ole Setek. It was its contention that the Defendant admitted to irregularly acquiring the land and amalgamating it with his own land. The Plaintiff pointed out the evidence tendered on the undisputed Sale Agreements produced during trial. The Plaintiff made reference to the issuance of a Share Certificate to the Company by Mailua Group Ranch, after paying for their share at Kshs. 10,000. The Plaintiff further referred to the respective payment vouchers to confirm payment of the purchase price.

It submitted that, Godfrey Muhuri Muchiri (deceased), had no capacity to give out company property to the Defendant without approval of other shareholders or consent of other directors. It insisted there was no evidence that it ever gave the Defendant 65 acres of the suit land. Further, that the Defendant's action to take over company property without approval of the company shareholders or resolution is thus null and void.

In conclusion, it submitted that it had proven its case on a balance of probability. Further, that the suit should be allowed, and the 65 acres be shared equally between the Plaintiff and the Defendant.

Defendant's Submissions

The Defendant submitted that his title is absolute and indefeasible as provided under section 26(1) of the Land Registration Act. He argued that the said title could only be impeached if it was procured through fraud or misrepresentation to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme. He submitted that there was no evidence adduced at trial to prove allegations of fraud on his part hence the Plaintiff failed to discharge its burden of proof as stipulated in section 107 and 109 of the Evidence Act. He further submitted that the title was issued by land officials, and none of them testified on whether the transaction was irregular or fraudulent. Further, that the existence of the title was never disputed and no evidence was availed to prove that his title was acquired through fraud, misrepresentation or mistake.

In regards to the parcel of land known as Kajiado/Mailua/ 1451, he submitted that the said land was gifted to him. The letter evidencing the persons present during the gifting ceremony was never contested or challenged by the Plaintiff.

The Defendant further submitted that land parcel number Kajiado/Mailua/ 1451 did not form part of the deceased estate, nor listed as one of the properties belonging to the Plaintiff. Further, that Peter Ndung'u Muhuri, who is one of the grant holders to the deceased estate never contested the confirmation of grant, amended the grant or appealed the same. He reiterated that the instant suit amounts to appealing against the Certificate of Confirmation of Grant through the back door. Further, that all the Plaintiff's properties were distributed as agreed upon by

the beneficiaries, with the Certificate of confirmation of grant issued by the court on 23rd July, 2014 confirming this position. Further, that no objection was filed to oppose the grant being issued by the court and the Plaintiff never protested the mode of distribution. He further submitted that Peter Ndungu and George Muchiri Muhuri failed to tender evidence showing that they are the Plaintiff's directors and there was no company resolution giving them mandate to institute the present suit. To buttress these arguments, he relied on the cases of **Leo Investments Ltd vs. Trident Insurance Company Limited 2014 (eKLR)** and **Re estate of Harun Kivindyo Kimari (deceased) (2018) eKLR**.

Analysis and Determination

Upon consideration of the Plaintiff, Defence, Witnesses Testimonies, Exhibits and submissions, the following are the issues for determination:

- Whether there was a resolution from the Plaintiff to institute this suit against the Defendant.
- Whether the Defendant fraudulently acquired the Plaintiff's 65 acres of land and amalgamated it into land parcel number Kajiado/ Mailua/ 1906.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

As to whether there was a resolution from the Plaintiff to institute this suit against the Defendant.

It is not in dispute that PW1, PW2 and the Defendant (DW1) are directors of the Plaintiff. It is further not in dispute that the transaction which is subject of the dispute herein was undertaken when PW1, PW2 and DW1 were not directors of the Company. Further, that the said transaction was undertaken by the father of PW1, PW2 and DW1 who was the major shareholder of the Plaintiff together with his wife who held minority shares. From the evidence tendered in Court, no party furnished the Memorandum of Association as well as Articles of Association in respect to the Plaintiff. Further, the Plaintiff never furnished any resolution in court allowing PW1 and PW2 to institute this suit against the Defendant who is their co Director. In the case of **Leo Investments LTD vs. Trident Insurance Company Limited 2014 (eKLR)** which cited in approval the case of **Assia Pharmaceuticals vs. Nairobi Veterinary Center Ltd HCCC No. 391 of 2000** wherein it was held that, **"It is settled law that where a suit is instituted for and on behalf of a company there should be a company resolution to that effect....as regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may be subsequently ratified."**

This position is reaffirmed in the case of **East Africa Portland Cement Ltd Vs Capital Markets Authority & 4 Others (2014) eKLR**.

Based on the evidence before me and in associating myself with the decision cited above, I find that PW1 and PW2 did not have authority to institute this suit as there was no company resolution to that effect. The upshot of the matter is that since this suit is devoid of a Directors' resolution sanctioning its commencement, I find that the Company is therefore not before the Court.

As to whether the Defendant fraudulently acquired the Plaintiff's 65 acres of land and amalgamated it into land parcel number Kajiado/ Mailua/ 1906. The Plaintiff claimed that the Defendant fraudulently acquired its parcel of land measuring 65 acres and amalgamated it, into the suit land, which fact the Defendant disputed. PW1 in his testimony stated that he witnessed various agreements for the purchase of the 65 acres of land with Lankanet Ole Setek and Ole Kirima Ole Setek wherein his father signed as a proprietor. Further, that he ensured the whole purchase price had been paid by the Company. It was his testimony that the Defendant who is his brother proceeded to register the said parcels of land as his own. He produced various Sale Agreements dated 16th December, 1995, 3rd October, 1996, 10th February, 1997, 19th February, 1997 and 8th January, 2004 between the Plaintiff and the two vendors to buttress his averments. DW1 confirmed in court that their father who was the main shareholder of the Plaintiff company gifted him land parcel number Kajiado/ Mailua/ 1451 vide a meeting held on 24th August, 2004 wherein eight (8) persons attended. He produced a letter dated the 24th August, 2004 to prove this averment. DW3 Daniel Setek testified in court and confirmed that the deceased Godfrey Muhuri gifted the Defendant, 20 acres of the land he bought from him and once the title deed was issued, he transferred the said land to the Defendant. Further, DW5 Jidraph Karanja also confirmed that the late Godfrey Muhuri gifted 20 acres of land to the Defendant, in a meeting held on 24th August, 2004. I note that Godfrey Muhuri who was the father to PW1, PW2 and DW1 died on 31st May, 2006 and was the major shareholder in the Plaintiff Company. From a perusal of the Sale Agreement dated the 8th January, 2004, it is between the late Godfrey Muhuri and Daniel Setek and it concerns the sale of 15 acres. Further, in the Sale Agreement dated the 19th February, 1997 for 15 acres, it does not indicate the parcel number. While in the Sale Agreement dated 10th February, 1997, for purchase of 10 acres, the parcel number is not indicated therein while it is confirmed that the full purchase price was not paid. Even in the Sale Agreement dated the 16th December, 1995, no parcel number was indicated therein nor full purchase price paid. PW1 produced Share Certificates that were issued to them by the Mailua Group Ranch to confirm the land was being purchased by the Company from the said Group Ranch. He insisted that the deceased did not have capacity to gift the land to the Defendant without a company resolution. The Plaintiff's witnesses claimed that the Defendant had been given monies from it to purchase the suit land but never provided evidence to that effect.

In the case **Vivo Energy (K) Ltd -vs- Maloba Petrol station Ltd and Others (2013) KLR**. The Judges of Appeal while citing in approval the case of **R.G. Patel -vs- Lalji Makanji (1957) EA 314** held that **"allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."**

The Plaintiff alleged fraud against the Defendant but from the evidence analysed above, I note that PW1, PW2 and DW1 are all current directors but were not directors of the company at the time the transaction took place. Further, the past two directors never disputed the said

transaction when the Defendant acquired the title to his land. I note no party presented any Memorandum or Articles of Association of the Plaintiff Company to demonstrate that the deceased did not have capacity to gift this land to the Defendant. The Plaintiff further failed to sue the vendors who transferred the land to the Defendant nor summon the Land Registrar to confirm that the Defendant fraudulently acquired land parcel number Kajiado/ Mailua/ 1451 and amalgamated it with the suit land. Even though the Plaintiff produced receipts showing monies were paid from it, the said parcels of land had not been registered in the its name nor full purchase price paid for some of the parcels. I note the Plaintiff's witnesses were also not clear on the exact acreage they were indeed claiming from the Defendant which he had acquired from their father. In associating myself with the decision cited above, I find that the Plaintiff failed to discharge its burden of proof as against the Defendant to confirm that he indeed fraudulently acquired the Plaintiff's 65 acres of land and amalgamated it into land parcel number Kajiado/ Mailua/ 1906.

As to whether the Defendant's title to the suit land should be cancelled as claimed by the Plaintiff. I wish to make reference to the case of *Re estate of Harun Kivindyo Kimari (deceased) (2018) eKLR* where the Court held that: ***"The court held that the applicant has no right over the same as distribution was never challenged and the applicant is sneaking in prayers for revocation of confirmed grant through the back door. Her claim is not based on any known legal principles for annulment or revocation of a grant. This court cannot be a party to applications of this nature whereby a litigant deliberately ignores the right procedure to challenge a grant to gain access to properties she is not entitled to."***

Further section 26 (1) (b) of the Land Registration Act states that: **"The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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."

While section 143 of the Registered Land Act (repealed) which was in place when the Defendant acquired his title, provides that :' **(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such 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 his act, neglect or default.'** These provisions are replicated in section 80 of the Land Registration Act which provides that: **'(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.'

Based on the facts as presented including the quoted legal provisions and in associating myself with the case law cited above, I opine that since the Plaintiff failed to discharge its burden of proof to confirm that the Defendant indeed acquired the 65 acres of land fraudulently, while observing that the vendors were also not parties to this suit, and noting that the directors to the company when the transaction occurred never lodged a complaint; with the estate of the deceased having been distributed, I find that the present two directors cannot act retrospectively and seek for cancellation of the Defendant's title. In the circumstance, I am unable to direct for the rectification of the Defendant's title to land parcel number Kajiado/ Mailua/ 1906 and proceed to uphold it.

In the circumstances, I find that the Plaintiff is not entitled to the orders sought in the Plaintiff.

It is against the foregoing that I find the Plaintiff has failed to prove its case on a balance of probability and will proceed to dismiss it with costs to the Defendant.

Dated Signed and Delivered via email this 2nd Day of July, 2020.

CHRISTINE OCHIENG

JUDGE