



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

ENVIRONMENTAL AND LAND CASE NO. 22 OF 2013

TAITA ARAP ROTICH.....PLAINTIFF

VERSUS

ANDREA ROTICH.....DEFENDANT

J U D G M E N T

(Plaintiff having obtained suit land after land disputes tribunal ordered a subdivision; award adopted as decree; transfer of the property having occurred during a stay of the decree; plaintiff now suing defendant to restrain him from suit property; counterclaim by defendant to have plaintiff's title cancelled; tribunal not having jurisdiction to order subdivision and transfer of the original land; transfer having occurred when there was a stay of execution of the decree; subdivision and transfer of the land irregular and reversed; property to revert back to its original status)

PART A : INTRODUCTION AND PLEADINGS

This suit was commenced by way of plaint filed on 19th April 2013. In his pleadings, the plaintiff has averred that the defendant is his brother and that they were both beneficiaries to their ancestral land Kericho/Sorget/Kalyet/Saramek/289. It is pleaded that vide a court order issued on 9 March 2009, in Miscellaneous Civil Application No. 97 of 2008, this land was subdivided into two portions and the plaintiff was issued with the title deed to his portion being Kericho/Londiani/Sorget/Kalyet Block 7/Saramek/432. It is averred that despite this, the defendant has continued to trespass into the plaintiff's land, has on several occasions destroyed the fence thereon, and cultivated the plaintiff's land. In the suit, the plaintiff has sought the following orders against the defendant :-

- (a) An order of eviction.*
- (b) Losses incurred and mesne profits.*
- (c) Costs of this suit and interest on (b) and (c).*

The defendant filed a defence and counterclaim. He pleaded that he is the first registered owner of the land parcel Kericho/Sorget/Kalyet Block 7 (Saramek)/289 and averred that this land has been fraudulently subdivided by the plaintiff into two portions being Kericho/Londiani/Sorget/Kalyet Block 7 (Saramek)/431 and 432. The following particulars of fraud are pleaded against the plaintiff :-

- (a) Illegally causing sub-division of land parcel Kericho/Sorget/Kalyet Block 7(saramek)/ 289 into two portions of 0.85 hectares (2.10 acres) each.*

(b) Fraudulently transferring a portion resultant from subdivision of Kericho/Sorget/ Kalyet Block 7 (saramek)/289 to the defendant.

(c) Disobeying court orders issued on 11. 10. 2010.

The defendant has further pleaded that there was never a decision made by the Londiani Land Disputes Tribunal, Claim No. 37 of 2008, to subdivide the land parcel No. 289 into two portions. He has also pleaded that the proceedings of the Londiani Land Disputes Tribunal were a nullity as the tribunal did not have powers to preside over a dispute which seeks to effect change of proprietorship of land.

In his counterclaim, the defendant has repeated that he is the first registered owner of the land parcel No. 289. He has pleaded that long after the repeal of the Land Disputes Tribunal Act, Act No. 18 of 1990, the plaintiff fraudulently caused subdivision of the land parcel No. 289 into two portions, which he avers was done fraudulently. He has pleaded the following particulars of fraud in addition to those pleaded in the defence :-

(a) The executive officer had no powers to make any application(s) for consent(s) to Londiani Land Control Board.

(b) An order dated 27.09.2010 purporting to give power to the Executive Officer of Kericho Chief Magistrate's Court was set aside on 15. 11.2010 and has never been re-instated to date.

(c) Mutation dated 28.09.2010 or as the case may be registered on 31.12.2012 were fraudulently obtained.

(d) Transfer executed on 28.09.2010 and allegedly registered on 27.02.2013 was fraudulently obtained and are null and void as it has no legal backing.

(e) Closure of register in respect of land parcel No. 289 and its subsequent subdivision and issuance of title deed to the plaintiff were unlawfully done.

(f) To confirm fraud, order dated 9.03.2009, order that was dated 27.09.2010 (set aside), decision/determination of Londiani Land Disputes Tribunal and the contents of the District Land Registrar's letter dated 4.08.2011 do not conform with what is contained in application(s) for Land Control Board consent(s), mutation, transfer, entries made in the register(s) and title issued to the plaintiff.

In the counterclaim, the defendant has asked for the following orders :-

(a) That the subdivision of land parcel No. 289 into parcels No. 431 and 432 and the closure of the register including all other unlawful actions done by the plaintiff be declared as null and void.

(b) Costs and interest.

(c) Any other or further relief that the court may deem fit to grant.

There was filed a Reply to Defence and Defence to Counterclaim, in which the plaintiff denied the averments therein and asked that the counterclaim be dismissed.

PART B : EVIDENCE OF THE PARTIES

(i) The plaintiff's evidence

In his evidence, the plaintiff testified that the land originally comprised of a huge tract of land that was owned by a white settler. The land was then bought by a group. The plaintiff joined the group in 1966 but the defendant was not a member because he was young, having been born in 1955 and was only about 10

years old then. He testified that he contributed to buy land together with his mother and they purchased 4 acres. In the year 1976, they allowed the defendant to live on the land so that he can keep watch over it. But later, they discovered that the defendant had registered the land in his name. The plaintiff mentioned this to his mother who promised to resolve the issue but she died before doing so. . He then filed a case at the Land Disputes Tribunal, and it was decided that the land be subdivided into two. The land was then subdivided into the parcel numbers 431 and 432. He put up a fence which was destroyed by the defendant and he is now unable to use the land. In cross-examination, he stated, that the land was purchased at Kshs. 1,000/= and he and his mother contributed Kshs. 500 each. He denied any knowledge of any order which stayed the decision of the tribunal.

In his evidence, the defendant testified that he first went to the land in the year 1973 when it was still under the Group. He stated that it was him who paid for the land and that when he went to the land, he was 25 years old. He testified that the plaintiff has other land in Kitale and lives in a place called Saunet, in land purchased by their mother. He testified that the plaintiff also has possession of their ancestral land in Saunet which he has taken away from their sisters, and now wants to grab this land, which is situated in Londiani. He testified that the plaintiff came to the land after the death of their mother. He had issue with the subdivision and stated that the plaintiff has 2.1 acres whereas he has 2 acres. He denied being aware of the proceedings before the Land Disputes Tribunal and stated that he never attended any of their sessions. He stated that he wants the whole land reinstated to him. He produced several documents to support his case including the entire subordinate court file of the Land Disputes Tribunal proceedings.

In cross-examination, he testified that it was their mother who sent him to the land as the plaintiff had abandoned it because he claimed that it was too cold. He testified that it was their mother who was registered as owner by the Group. He testified that their mother paid for membership but that it was him (defendant) who paid to purchase the land.

With the above evidence the defendant closed his case.

C. SUBMISSIONS OF COUNSEL

In his submissions, Mr. Joshua Mutai for the plaintiff, submitted inter alia that the plaintiff is the owner of the land parcel No. 432 as proved by the title deed. He submitted that the defendant is a trespasser. He further submitted that both plaintiff and defendant testified at the tribunal and a decision was made to subdivide the land parcel No. 289 into two. He pointed out that no appeal was filed against this decision and the same must stand. He asked for an award of Kshs. 100,000/= in general damages.

On his part, Mr. Siele Sigira for the defendant, submitted that the plaintiff is first registered owner of the land parcel No. 289 and that therefore his title cannot be challenged according to Section 143 (1) of the Registered Land Act Cap 300 (now repealed). He further submitted that the subject land cannot be said to be ancestral land. He was of the view that the defendant has proved that the plaintiff acquired his title through fraud. He submitted that the Executive Officer of the Court had no power to execute the Land Board Consent forms and the transfer instruments. He also submitted that the subdivision caused the defendant to have 2 acres against 2.1 acres for the plaintiff. He submitted that the defendant's constitutional rights to own property have been infringed. He relied on Eldoret ELC No. 135 of 2013. He submitted that the plaintiff claimed the defendant's land after 19 years; that he was never informed of the proceedings before the Land Control Board; that no witnesses were called to support the allegation of the land buying company.

D. ANALYSIS AND DECISION

I do take note that the plaintiff is the current registered proprietor of the land parcel No. 432. I would have had no problem granting a declaration that the plaintiff is the proper owner of the suit property if it were not that the defendant also claims the same land and asserts that the plaintiff's title ought to be nullified for it was obtained by way of fraud. The defendant wants the two subdivisions of the land parcel No. 289 nullified so that the said parcel reverts back as it was originally, meaning that the defendant would now be the sole registered proprietor of the whole parcel No. 289. The plaintiff's title is therefore under challenge

and I need to interrogate whether the plaintiff got properly registered as proprietor of the suit property. If I am convinced that the plaintiff did not obtain registration in the correct manner, then I will have little option but to nullify his title.

From the evidence on record, it is clear that the plaintiff obtained registration of the parcel No. 432 pursuant to an award of the Land Disputes Tribunal (LDT or simply tribunal) which ordered the subdivision of the land parcel No. 289 into two equal portions, one to the plaintiff and one to the defendant. I have the benefit of having before me the Magistrates' court file which adopted the decree and I have perused the same. The plaintiff was the applicant at the tribunal and his case was that the defendant was wrongly registered as sole proprietor of the land parcel No. 289. The tribunal was of the view that the defendant got registered as proprietor "by false pretence" and ordered the land subdivided into two equal portions between the plaintiff and defendant. The award is dated 22 December 2008. The award was read in court on 9 March 2009 in the presence of the plaintiff but in the absence of the defendant and was adopted as a decree of the court.

Vide an application dated 24th June 2010, the plaintiff sought orders to have the Executive Officer of the court, execute the documents required to effect the decree, so that the land is subdivided into two, and title issued for one portion in the name of the plaintiff. On 27th September 2010, the application was allowed. A few days after the order was issued, the defendant filed an application dated 7th October 2010, seeking the setting aside of the order issued on 27th September 2010, on the grounds that it was heard ex-parte. The application also sought interim orders pending its determination. The matter was placed before the Magistrate on 11th October 2010 and interim orders were issued staying execution of the order of 27th September 2010. The application was eventually heard and was allowed through a ruling dated 15th November 2011. It was directed that the application dated 24th June 2010 be heard afresh inter partes. I have no record of the application dated 24th June 2010 being heard again, but another application, dated 12th January 2011 was filed by the defendant, seeking to have the tribunal award set aside on the grounds inter alia that the award is ambiguous. That application was heard, with Mr. Siele, counsel for the applicant, being absent and the same was dismissed vide a ruling delivered on 7th March 2011. Undeterred, the defendant filed another application dated 19th December 2011, seeking to set aside the orders of 7th March 2011. The court dismissed that application through a ruling delivered on 2nd July 2012. That is the last record I have of the matter.

It will be observed that in his defence, the defendant has complained that the Executive Officer could not have executed the transfer documents given that there was a stay order, and that the orders of 27th September 2010 were vacated, and never reinstated. He has also complained that the consents of the Land Control Board (LCB) were irregularly issued. I think there is substance in these allegations. It is not clear who executed the forms seeking consent of the land control board to subdivide the land. I note that the consent to subdivide from the LCB, was issued on 11th June 2009. At this time, the Executive Officer had not been authorized to execute any forms, for the authority came in 2010, through the order of 27th September 2010, and it is not clear to me who executed the application forms for consent to subdivide. It is also not clear who signed the LCB application forms for consent to transfer, but I can see that consent was given on 9th December 2010. The defendant clearly could not have signed the forms for he was busy contesting the award in court, and neither could the Executive Officer of the court, for by that time the order of 27th September 2010 had already been set aside through the ruling of 7th October 2010.

I note also that the mutation forms were executed on 31st December 2012 by the Executive Officer, but this is irregular, as the order of 27th September 2010 giving him authority to do so, had already been set aside, and the application seeking the Executive Officer to be authorized to execute documents, had not been heard again inter partes as directed. The transfer was registered on 27th February 2013, with the signature of the Executive Officer as transferee, but it will be recalled that his signature had already been nullified by the order of 7th October 2010.

The long and short of the above, is that the instruments that set in motion the subdivision and subsequent

transfer of one half of the subdivided portions to the plaintiff, were irregular, null and void. The same cannot be given effect given that irregularity. In essence I do nullify the subdivisions of the land parcel No. 289 and given that position, the plaintiff's title to the land parcel No. 432 has to be cancelled as well as the title of the land parcel No. 431. The property has to revert back to the land parcel No. 289.

That said, the award of the Land Disputes Tribunal cannot be enforced. It is clear beyond peradventure, that the tribunal went beyond its jurisdiction. The jurisdiction of the Land Disputes Tribunals was set out in Section 3 (1) of the Land Disputes Tribunal Act, Act No. 18 of 1991 (now repealed by the Environment and Land Court Act, 2012) which provided as follows :-

3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land,

shall be heard and determined by a Tribunal established under section

The dispute between the plaintiff and defendant at the tribunal was not one relating to division of land held in common, or the determination of boundaries to such land; neither was it a claim to occupy or work land and it was certainly not a claim of trespass to land. It was a claim over ownership of land for which the tribunal could not have had jurisdiction. The award of the tribunal was an award that went beyond its jurisdiction and it is therefore null and void and of no effect. It is hereby set aside.

The effect of the above is that the parties have to revert back to the positions that they were in before the filing of the tribunal proceedings. The title also has to revert back to the the parcel No. 289. In essence I do allow the counterclaim filed by the defendant and dismiss the plaintiff's suit. Costs ordinarily follow the event and I do not see the need of departing from that. The defendant will have costs of both suit and counterclaim.

I have dealt with all matters herein and now issue the following final orders :-

(i) That the subdivision of the land parcel Kericho/Londiani/Sorget/ Kalyet Block 7 (Saramek)/ 289 was irregular, null and void, and is of no effect.

(ii) The two titles, which resulted from the irregular subdivision of the land parcel Kericho/Londiani/Sorget/Kalyet Block 7 (Saramek)/ 289, being Kericho/Londiani/Sorget/ Kalyet Block 7 (Saramek) / 431 and 432, are hereby nullified and cancelled and it is ordered that the original parcel number Kericho/Londiani/Sorget/Kalyet Block 7 (Saramek) / 289 be reinstated as it originally was before the subdivision.

(iii) The defendant shall have costs of both suit and counterclaim.

Judgment accordingly.

DELIVERED, DATED AND SIGNED THIS 2ND DAY OF OCTOBER, 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

In the presence of:

Mr. J.K. Mutai h/b for Mr. Joshua Mutai of M/s Chelule & Co. Advocates

Mr. Siele Sigira for defendant.