



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CASE NO. 281 of 2014

PHILEMON SINGOEL.....PLAINTIFF

VERSUS

DANIEL BUTUK.....1ST DEFENDANT

MICHAEL KEMBOI.....2ND DEFENDANT

JUDGMENT

By a plaint dated 2nd September, 2014 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A declaration that the plaintiff is the registered owner of land parcel No. Nandi/Kurgung/290 and an order of eviction against the defendant, their family agents and servants.
- b) Costs of the suit

The 1st defendant filed a statement of defence and counterclaim dated 19th September 2014 whereby he denied all the allegations in the plaint and prayed for the cancellation of title issued to the plaintiff Philemon Singoei.

The 2nd defendant also filed a defence and urged the court to dismiss the plaintiff's suit with costs.

PLAINTIFF'S CASE

PW1 Philemon Kibii Singoei testified that in 1980, he did a case with Kibutuk Ngelechei and whereby he was awarded the suit land Nandi/Kurgung/290. It was his evidence that he purchased 25 acres from Kibutuk and has been in occupation since 1970. He stated that he sued the defendant because he had refused to transfer the land to him.

PW 1 further stated that it was later discovered that the suit land was 25 acres and not 22 acres. That the defendant asked him to pay an additional Kshs 3,000 for the extra 3 acres which he did.

It was PW1's testimony that in 1986, he was issued with a title deed which he produced as exhibits, a decree issued in Eldoret court, a copy of transfer form and payment receipt. PW1 also stated that surveyors visited the suit land in his absence and Kibutuk Ngelechei and the surveyor subdivided the land into 3 portions leaving him with 17 acres.

PW1 further testified that Kibutuk Ngelechei gave his sons 8 acres who are staying on 5 and 3 acres respectively. It was his evidence that he never sold land to the defendants and has never done any case at the tribunal in respect of this case.

On cross examination, he confirmed having brought the suit land in 1970 from Kibutuk Ngelechei the father of the 1st defendant and that the 2nd defendant and his family reside on the suit land. He further stated that he was not aware of the order indicating that the suit land be subdivided into portions.

DEFENDANT'S CASE

DW1 the 1st defendant testified that he has been staying on the suit land since 1995 and that he has never moved from the suit land. He further stated that his father sold 22 acres to the plaintiff and remained with 3 acres.

It was DW1's testimony that there was a case between his father and the plaintiff and a consent order was issued to subdivide the suit land in

3 portions. The consent was marked as DMFI 1 and the proceedings as DMFI 2, ruling in civil application no. 74 of 1989 DMFI 3 (a) and (b) and a copy of the green card as DMFI 4.

The 1st defendant stated that is in occupation of 5 acres and that he found Michael Kemboi on the land in 1995 when he took occupation.

On cross examination he stated that his father sold 22 acres and not the whole parcel and moved to Moiben . He denied his father ever being paid Kshs 3,000 for the remaining 3 acres and that he was not aware whether his father signed the transfer forms.

DW2 Michael Kiptoo Kemboi the 2nd defendant testified that he has been staying on the suit land since 1989 and that his late father was buried on the suit land in 2006. It was his evidence that he has not trespassed on the suit land and that the land does not belong to the plaintiff as he has stayed there for over 32 years.

On cross examination, he stated that he has neither filed a counter claim for the land to be given to him nor filed any Succession Cause. He testified that the court divided the land in 3 portions 592, 593 and 594 vide Eldoret Case No. 413 of 1980 and that he stays on 5 acres of the suit land.

DW3 Abel Kiptanui Chirchir testified that Edward Kiptarus Singoei bought land from Philemon Singoei in 1980 approximately 5 acres. He later sold the land in 1989 to Isaac Kipkemboi Songok who stayed on the land and was buried there.

On cross examination he stated that he was not aware whether the plaintiff had title to the suit land. He confirmed that plot No.290 is 25 acres. That the plaintiff's land is 17 acres but defendants bought 5 acres from the 22 acres.

DW4 Malik Kasachion who is the in charge civil registry produced the proceedings in suit No. 413 of 1980. He stated that there is a decree in the file dated 22nd October 1980 and produce the file as Dexb 1.

On cross examination, he stated that the decree is dated 22nd October 1980 was varied by a consent in 1986 and that there is no indication whether the advocates were present as they did not sign the consent. He further stated that there is no indication whether the parties themselves were present.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff submitted that the plaintiff has demonstrated that he validly acquired title to the suit land and that all parties are in agreement that the plaintiff purchased 22 acres of land from the 1st defendant's father. Counsel further submitted that no substantive suits were filed by the 1st and 2nd defendant's father to challenge the plaintiff's title.

It was counsel's submission that the 1st and 2nd defendants have not laid a basis upon which they are occupying the plaintiff's land and that they sought to implement a decree which has not only lapsed but they were not privy to. Counsel urged the court to find that the plaintiff has proved his case and is the legal and absolute owner of the suit land.

DEFENDANTS' SUBMISSIONS

Counsel for the 1st defendant submitted that the plaintiff acquired title fraudulently and is holding the same illegally hence it should be cancelled. That the said title ought to be cancelled and the same be reverted back to the original owner Ngelechei Butuk.

It was counsel's further submission that since the decree issued in Eldoret CMCC No. 413 of 1980 has never been vacated and /or set aside, that same should be implemented. The 1st defendant filed a counter claim against the plaintiff seeking to be registered as the owner of the registered land of a portion measuring 3 acres out of Nandi /Kurgung/290.

Counsel for the 2nd defendant submitted that from the evidence presented it is clear that there was a suit over ownership of Nandi/Kurgung/290 which was concluded and the land subdivided into three portions of 17 acres, 5 acres and 3 acres. That the plaintiff had initially purchased 22 acres of land out of which he sold 5 acres to Edward Kiptarus Rongoei who in turn sold the same to Isaac Kipkemboi Songok the 2nd defendant's father.

Mr. Keter counsel for the 2nd defendant submitted that the plaintiff admitted in his evidence that the defendants have been in occupation of the respective portions since 1980s. That the fact that the plaintiff transferred the whole parcel of land to himself and without disclosing the final orders of the court in Eldoret RMCC NO. 413 of 1980 is an illegality.

Counsel further submitted that the plaintiff's claim against the defendants is time barred by the Limitation of Actions Act as the 2nd defendant had been in actual use, possession and occupation of the parcel of land for a period in excess of 25 years. Counsel therefore urged the court to dismiss the plaintiff's claim with costs and an order for cancellation of title and fresh issue of titles according to the subdivision.

ANALYSIS AND DETERMINATION

The issues for determination are as to whether the plaintiff acquired title to the suit land legally and whether he is entitled to the reliefs sought. The other issue is how many acres did the plaintiff purchase.

The plaintiff gave evidence and gave a brief background on how he purchased the suit land in 1970. He further stated that he later had a case with the defendant's father and was awarded the suit land of which Kibutuk gave him transfer forms. The plaintiff produced a copy of the title deed, transfer forms, decree from Eldoret court and payment receipts. He was registered as an absolute owner in 1986 and has been in occupation since then. The plaintiff also confirmed to the court that he paid an additional Kshs. 3000/ for the extra 3 acres which were discovered making it a total of 25 acres.

Section 24 of the Land Registration Act No 3 of 2012 provides as follows:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 25 (1) of the said Act further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

Section 26 of the same Act provides that:

“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 indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

- a) on grounds of fraud, or misrepresentation to which 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.”*

From the evidence on record, the Plaintiff's is the registered owner of land parcel Nandi/Kurgung/290 as demonstrated by the production of a title deed in his name. The defendant claimed that the fact that the plaintiff registered the whole parcel of land in his name amounts to fraud which was not proved by the defendants. They did not lead any evidence to disprove the fact that the plaintiff is the absolute owner of the suit land.

When a person alleges fraud, the same must be specifically pleaded and specifically proved. Just a mere mention of fraud cannot be taken as prove of fraud. **In the case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** Justice Munyao observed that a title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. There was no evidence that the plaintiff procured the title fraudulently or through corrupt schemes.

Further in the case of in the case of **Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012** Justice Munyao stated as follows :-

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

The plaintiff is therefore entitled to protection of his title as provided for under the Land Registration Act No. 3 of 2012. Additionally, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that:

“No person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property”.

Regarding the issue as to whether the Plaintiff is entitled to the reliefs sought, the Plaintiff seeks two remedies; a permanent injunction against the defendants and an order of eviction against them. Since the defendants never challenged the validity of the plaintiff's title, the same remains valid and the defendants have no rights over the suit land.

I find that the plaintiff having established that he is the legal owner of the suit land, is therefore entitled to the orders sought. The defendant's counterclaim for cancellation has not been proved and therefore is dismissed with costs to the plaintiff.

The defendants to give vacant possession of the suit land to the plaintiff within 45 days failure to which eviction orders to issue.

DATED and DELIVERED at ELDORET this 17TH DAY OF SEPTEMBER, 2020

M. A. ODENY

JUDGE