



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 110 B OF 2012

JOEL ARUSEI KIPSAINA

SAMSON BARABARA BARTUIYOT.....PLAINTIFFS

VERSUS

ZIPPORAH JEPKETER KIPSAINA

THE HON. ATTORNEY GENERAL OF KENYA.....DEFENDANTS

JUDGMENT

(Suit for declaration of ownership to land; land acquired through succession proceedings; counterclaim to nullify the succession proceedings; whether court can nullify succession proceedings through a separate suit by way of plaint; land disputes tribunal having made an award in favour of defendant; whether tribunal had jurisdiction to override decision of succession court and to award land; no jurisdiction to do so; judgment for the plaintiffs; counterclaim dismissed)

A. BACKGROUND AND PLEADINGS

This is an old matter commenced by way of plaint on 27 February 2003. In the plaint, the plaintiffs have pleaded that they are the registered owners of the land parcels Nandi/Cheptil/310 and 311 and that they have been so registered since the year 1994. They pleaded that they acquired the said properties by way of transmission after conducting succession proceedings for the estate of their father. It is pleaded that on 12 February 2003, the Kabiyeet Land Disputes Tribunal, sat without jurisdiction and awarded the defendant 5 acres from each of the two parcels of land. It was pleaded inter alia that the Tribunal lacked jurisdiction as the proceedings were time barred; and that the matter had already been dealt with and determined in succession proceedings. It was pleaded that prior to the hearing before the Tribunal, the plaintiffs were never served with a copy of the claim and summons nor did they have a chance to file their defence. It was pleaded that the award has been filed before the Magistrate's Court at Kapsabet for adoption. In the suit, the plaintiffs asked for orders that the Kabiyeet Land Disputes Tribunal lacked jurisdiction to entertain the dispute and make the award and that the award is null and void; a declaration that the tribunal's decision is ultra vires and arrived at without jurisdiction and in breach of the established rules of procedure; a permanent injunction to restrain the defendants from interfering with the two suit lands; costs and any further relief deemed fit.

Together with the plaint, the plaintiffs filed an application for injunction inter alia seeking orders to stay the proceedings in Kapsabet Land Disputes Tribunal Case No. 11 pending hearing and determination of this suit. The said orders were granted on 26 March 2003.

The 1st defendant filed defence which she later amended to include a counterclaim. In the Amended

Defence and Counterclaim, the defendant has pleaded that the plaintiffs acquired proprietorship of the two suit lands by way of fraud. The following particulars of fraud were pleaded

(a) Knowingly omitting the 1st defendant in succession proceedings.

(b) Failing to consider the 1st defendant in distribution of assets in succession proceedings.

(c) Fraudulently registering themselves and dividing land parcel Nandi/Cheptil/310 and 311 respectively and leaving out the 1st defendant

(d) Failing and/or neglecting to distribute any property in the succession proceedings to the 1st defendant.

(e) Not disclosing a material fact that the 1st defendant was out of the country when succession was done.

She has further pleaded that the tribunal had jurisdiction to entertain the case and make the award as the succession proceedings were not conducted fairly. She has pleaded that the plaintiffs were properly notified of the tribunal proceedings and participated fully. In the counterclaim, she has pleaded that the plaintiffs are her step-brothers and that they did not include her in the succession proceedings to enable her inherit property from her father. She pleaded that at the time succession proceedings were conducted, she was in Uganda. She has averred that the succession proceedings should be declared null and void for not having full particulars and disclosure and further that the same were conducted in a court without jurisdiction. In the counterclaim, she has asked for the following orders :-

(a) A declaration that the succession proceedings were null and void and the 1st defendant is entitled to 32 acres of land from Nandi/Cheptil/310 and 311 formerly Nandi/Cheptil/45 and cancellation of title deeds in respect of Land parcels Nandi/Cheptil/310 and 311.

(b) Costs of the suit.

The plaintiffs filed a Reply to Defence and Defence to Counterclaim in which they refuted the claims of the 1st defendant. They inter alia pleaded that succession proceedings cannot be challenged vide this suit.

The 2nd defendant on the other hand pleaded that the claim before the tribunal was one that the tribunal had jurisdiction as it was a claim to determine the right of occupation of the suit land. They asked that the suit be dismissed.

Pleadings having closed, the matter proceeded for hearing.

B. EVIDENCE OF THE PARTIES

(i) Evidence of the Plaintiffs

The first plaintiff, Joel Arusei Kipsaina, testified as PW-1. He stated that the 1st defendant, Zipporah, is her step-sister, from a different mother. His father had 3 wives. The 1st died without child. The second had one child, Zipporah ; whereas, his mother had 4 children, two sons and two daughters. These two sons are the plaintiffs. He testified that his father, Bartuiyot arap Mining, had two parcels of land being numbers 45 and 58 in Cheptil. He died in the year 1977. Upon his death, they filed succession proceedings in 1978/1979 and listed the land parcel No. 45 as the only property of their father since this was the only one registered in his name. He stated that parcel No. 58 was in the name of Kipsugut Kirwa, the husband of Zipporah, and he produced the copy of register to that parcel of land. That property had been sold by the time succession proceedings were conducted. At the succession proceedings, the plaintiffs were declared administrators of the estate of Bartuiyot arap Mining. They land was distributed equally between the two brothers and they proceeded to sub-divide it into two. Those two sub-divisions are the current land parcels Nandi/Cheptil/310 and 311 which are more or less equal in size, each at about 31 or so acres. The dispute with Zipporah started about the year 2003, when she started claiming part of

the two suit lands. The plaintiffs however informed her that she had no right over the same. According to PW-1, their father had given the family of Zipporah the land parcel No. 58, which they later sold and save for purchasing a small parcel of land in Soy area, they otherwise squandered the proceeds. The position of the plaintiffs is that the share of Zipporah's inheritance was in the parcel No. 58. PW-1 stated that their other sisters have laid no claim over the land.

In cross-examination, PW-1 stated that their father gave out the land parcel No. 58 to Zipporah's husband, and that he was informed of this by their father. This land was given before adjudication. He testified that when they filed succession proceedings, Zipporah was in Kitale, and not Uganda. She came back in the year 1998 and lived with PW-1 for 4 years. He testified that Zipporah was married. If she was a man, they would have given her an equal share. He stated that according to Keiyo custom, Zipporah could not inherit land since once ladies get married, they get land where they are married.

PW-2 was the second plaintiff, Samson Barabara Bartuiyot. He testified that when their father died, Zipporah was not around, and did not even attend the burial, nor the subsequent memorials. He was not aware where she was at this time. Therefore, PW-2 stated that Zipporah used to live with her husband, at Cheptil, but they differed and she left. They were living in land initially owned by their father and which their father gave to them. The land was 26 acres. After they split, Zipporah's husband sold the Cheptil land and moved to Turbo area where he later died. He testified that Zipporah started claiming the suit lands in the year 2003. He stated that she currently lives with the wife of her deceased son. It was his view that it was not necessary to involve Zipporah in the succession proceedings.

PW-3 was Evaline Too. She is sister to the two plaintiffs. She testified that Zipporah got married in the 1930s. She herself was born in the year 1935. She testified that in the year 1947, Zipporah and her husband moved from Turbo and settled in Cheptil. At that time, land had not yet been adjudicated. Their father gave out some of his land to the two to settle and they did settle on it. PW-3 left them on this land when she got married and moved out in the year 1964. When she (PW3) got married, Zipporah had 2 children. She stated that Zipporah later differed with her husband and left in the year 1968. She testified that their father died in the year 1973. They tried to trace Zipporah in vain. At that time, Zipporah was still resident on their land with their children. She stated that Zipporah came back in the year 1994. By that time, her husband had sold their land and had gone to live with his brothers in Soy area. It was her evidence that Zipporah is not entitled to a share of the suit properties because they were given land by their father. She testified that this is the share that Zipporah's mother would have been entitled to. In cross-examination, she stated that according to their custom, when a person dies, his land is divided amongst the houses in equal shares if the wives are alive, irrespective of the number of children in each house. She testified that a married woman was not entitled to inherit, but if unmarried, she can get a small share to take care of her children. She stated that the 1st plaintiff offered Zipporah one acre which she refused, and now lives with her grandchildren.

PW-4 was one Kipkurgat Koskei. He is a neighbor to the litigants. He testified that he is aware that Zipporah was given land by her father, which is about two farms away from the suit properties. He stated that he witnessed Zipporah live on this land. He stated that Zipporah left in the early 1970s. She sold the land and moved to Soy area. He stated that they have tried to mediate the dispute in vain.

With the above evidence, the plaintiffs closed their case.

(ii) Evidence of the Defence

The 2nd defendant closed their case without calling any witness.

DW-1 was the 1st defendant. She testified that he father had 3 wives. The first died when delivering twins, who also died. She was born of the second house. Their house had two children, but her sibling died and she was left as an only child. The 3rd house had the two sons (the plaintiffs) and two daughters. She denied that their father gave her any land but that her husband had land of his own which at the time had not yet been adjudicated. She testified that she separated with her husband and did not even have children with him. After the separation, she stated that she went to work as a cook and househelp in

Eldoret town. She did not get married again but had children. She got a girl child who died. She then got two other children, a boy and a girl, who are also now deceased. She later came back home by which time her father had died. When she came back she went to live on the suit land since her father had given it to her before he died. Her brothers offered her 1 acre which she refused. She refused because in her view, her mother would not have been given 1 acre. She asked to be given the share that would have been awarded to her mother.

In cross-examination, by counsel for the 2nd defendant, it was put to her that in her pleadings, she has pleaded that she was in Uganda between 1970 and 1994 and not in Eldoret as she had testified in chief. She stated that she was in Uganda. When she left for Uganda, her father was alive. She stated that when she came back, her father was still alive and that he showed her where to settle, which land he said was for her mother. She testified that her father died after she had come back home. She ploughed the land and cultivated crops but she was evicted before she could harvest.

In cross-examination by counsel for the plaintiff, the 1st defendant testified that her husband came from Kapkong in Turbo area. She went to live in Kapkong with her husband. She stated that her husband had 4 wives. She separated with her husband while they were still living in Kapkong. She stated that at no point did they live together with her husband in Cheptil. She testified that it is after separating with her husband that she came back home to Cheptil. It is there that she got her children. Put to her that she had left the country in 1970, she stated that she cannot tell the years because she did not go to school. She insisted that her father was still alive when she came back home and that she went to Uganda a second time. She could not however tell the years. She testified that the land that she settled in after coming back home was sold and belongs to the Government. She stated that the plaintiffs sold the share that belonged to her mother after she had come back from Uganda. She said that the same was sold to a person called Paul. He testified that her son, Kipchumba, got 7 children. Kipchumba died but was not buried on the suit properties. According to her, the Tribunal did not hear the case nor make any determination.

DW-2 was David Kipkoech Maritim, a resident of Cheptil area. He was born in 1931. He stated that he knows well the family of the litigants. He stated that he attended various meetings held in attempts to mediate over the dispute and that the elders decided to award 5 acres to the 1st defendant. He was not very conversant with Nandi custom but according to him, when a person dies having two houses, the land is shared equally between the two houses. He stated that he could not testify on distribution of the land in the subject case.

DW-3 was Simeon Kibyego Sitienei. He is a village elder in Cheptil. He was born in 1939. He testified that he is among one of the village elders who attempted to mediate the dispute. He stated that the elders decided that Zipporah be given the land of her mother since according to Nandi custom, land is divided according to houses. He testified that where a house has a girl as an only child, if that girl gets married but comes back, she will fully inherit the share of that house. He testified that Zipporah differed with her husband and went to Uganda. He stated that when she came back, her mother had died, but her father was still alive. He stated that Zipporah's son, Kipchumba was born in Cheptil, the same month that the 1st plaintiff was born. In cross-examination, he conceded that arap Mining was a Keiyo, not Nandi and that he was not familiar with Keiyo customs. In cross-examination, he stated that by the year 1959, Zipporah had already left for Uganda and that the next time he saw Zipporah was around 1996. He stated that initially, Zipporah used to live with her husband in Soy. They then came to live in Cheptil and built a house. The husband later sold the land that they settled in and went back to Soy where he later died and was buried. He testified that Zipporah got her three children while living in Cheptil with her husband.

With the above evidence, the 1st defendant closed her case.

Neither counsel made any submissions.

C. DECISION

I have considered the pleadings and the evidence. The parties did not agree on the issues. On my part, I think the following two issues hold the key to resolving this matter. These are :-

1. *Whether the succession proceedings can be challenged in this case ?*

2. *Whether the Land Disputes Tribunal had jurisdiction to award the 1st defendant a portion of the suit properties.*

First, it is not in dispute that the title of the plaintiffs was acquired after succession proceedings. Initially the two parcels of land in issue in this case, being Nandi/Cheptil/310 and 311, were comprised in the title Nandi/Cheptil/45. From the record, it seems as if arap Mining, their father, died in the year 1977. The two brothers undertook succession proceedings, and since they were the only two sons of arap Mining, they proceeded to sub-divide the land parcel No. 45 equally between them. This was done in the year 1979, although titles to the two suit properties were issued on 9 March 1994. According to the two brothers, they saw no point of involving their sisters since they had been married. This included Zipporah who at that time could also not be traced. As far as the plaintiffs are concerned, this distribution was fair.

Zipporah's case in a nutshell, is that the land was supposed to be sub-divided equally into two houses. This is because, arap Mining left two houses with children; that of Zipporah as an only child, and the second house of the plaintiffs and their two sisters. Since the land parcel No. 45 was about 62 acres, she wants about 31 acres of it to be obtained from the two suit properties.

The parties provided a lot of evidence on how land is inherited in both Nandi and Keiyo custom. As far as the plaintiffs are concerned, Zipporah is not entitled to inherit anything from their father. Zipporah of course is of a contrary view.

In my opinion however, it will only be necessary for me to review this evidence and come to a finding on it, if I have the jurisdiction to re-distribute the estate of arap Mining. This begs the question whether this court has jurisdiction to declare as null and void the succession proceedings that led to the distribution of the suit land to the plaintiffs.

I am afraid that I do not have that jurisdiction. If a party is aggrieved by an order made in a succession cause, his/her remedy is to file an application in the succession proceedings, or follow other appropriate procedure under the Succession Act, Chapter 160, Laws of Kenya, to have such proceedings nullified. One cannot file a plaint to nullify succession proceedings. It is the court handling the application brought under the Succession Act, that has jurisdiction to revoke a grant, redistribute an estate, or make any other appropriate orders.

There seems to have been no move by the 1st defendant to nullify the grant or have the distribution of the estate of arap Mining declared to have been made outside the requisite provisions of the law. It therefore appears as if the distribution of the estate of arap Mining has not been challenged. It would be improper for this court to start delving into the issue of whether the distribution was done according to law or not. For that, I have already held that this is the inappropriate forum. The result of this is that I am unable to cancel the plaintiffs' title on the ground that the succession proceedings were done unfairly. Neither can I re-distribute the estate of arap Mining through these proceedings. I do not have the requisite jurisdiction to sit on appeal against the decision of the court that handled the succession matter. The distribution will have to remain as it is unless the court with jurisdiction orders that the estate be re-distributed afresh.

The next issue is whether the Land Disputes Tribunal had jurisdiction to handle the dispute and make an award in favour of the 1st defendant. It is not denied that the 1st defendant filed a cause before the Land Disputes Tribunal. Vide a decision made on 12 March 2003, the Tribunal held that the 1st defendant deserves 10 acres of land. Each of the plaintiffs was to donate 5 acres of land to the 1st defendant out of their respective parcels.

The jurisdiction of the Land Disputes Tribunal was set out in Section 3 (1) of the Land Disputes Tribunal Act (repealed by the Environment and Land Court Act in 2011). The said provision stated 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 4.

It will be seen from the above, that the jurisdiction of the tribunal, was only on matters related to the division or determination of boundaries; claims to occupy or work land; and trespass to land. The Land Disputes Tribunal did not have jurisdiction to issue declaratory orders on the ownership of land and neither did it have jurisdiction to determine disputes revolving around ownership of land. I do not see how it can be said that the Tribunal had jurisdiction in the subject matter that was before it, which was whether or not, Zipporah was entitled to land that was owned by the plaintiffs.

Apart from the foregoing, the Tribunal of course had no jurisdiction to redistribute the estate of arap Mining. The Tribunal could not sit on appeal and reverse the decision of the succession court in the manner of how the estate of arap Mining was to be distributed.

I do not hesitate to hold that the Tribunal had no jurisdiction in the matter. The award having been made out of jurisdiction, is hereby declared to be null and void, and the same cannot be adopted as a judgment or decree by any of the Magistrate's Courts.

The 1st defendant's claim was solely based on the grounds that the succession proceedings were conducted fraudulently. There is no other cause of action. I have already held that I am unable to interfere with those proceedings as I do not have the requisite jurisdiction. I can therefore not redistribute the estate of arap Mining to order that some land be given to the 1st defendant. Her counterclaim must fail.

As to the claim by the plaintiff, since the counterclaim of the 1st defendant has failed, I have no reason to disallow the prayer seeking a permanent injunction to restrain the 1st defendant from the suit properties.

The only other issue is costs. In my discretion, considering the relationship between the parties, and all other surrounding circumstances, I think it is best that I make no orders as to costs.

I therefore make the following final orders :-

1. I declare that the Land Disputes Tribunal had no jurisdiction to entertain the dispute over the land parcel Nandi/Cheptil/310 and 311 between the 1st defendant and the plaintiffs and the award of the tribunal dated 12 February 2003 and filed in Kapsabet Magistrate's Court as Land Disputes Tribunal Case No. 11 of 2003 is hereby declared null and void and the same ought not to be adopted as a judgment or decree of the court.

2. I issue a permanent injunction restraining the defendants from interfering with the plaintiffs' ownership and possession of the land parcels Nandi/Cheptil/310 and 311.

3. The counterclaim of the 1st defendant is hereby dismissed.

4. There shall be no orders as to costs.

Judgment accordingly.

DATED AND DELIVERED AT ELDORET THIS 11TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. P.K. Komen holding brief for M/s E.C Rotich for the plaintiff

Mr. A.K. Chepkwony present for 1st defendant.

Ms. B.J Maina of the State Law office present for 2nd defendant.