



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

Civil Appeal 72 of 1995

PAULINE CHEPKOECH CHOGEAPPELLANT

AND

KIPTARUS ARAP BARNGETUNYRESPONDENT

(Appeal from Judgment and decree of the High Court of Kenya at Eldoret (Lady Justice R.N. Nambuye) dated 11th October, 1994.

IN

H.C.C.C. NO. 88 OF 1987)

JUDGMENT OF THE COURT

Kiptarus arap Barngetuny (hereinafter called “the plaintiff”) sued Cheruiyot arap Choge (th deceased) in the superior court seeking the deceased’s eviction from a piece of land known as Nandi/Ndalat Settlement/66 (the suit land) and a declaration that he is the rightful owner thereof.

The deceased died before filing a defence and was substituted by his widow, Pauline Chepkoech Choge (the defendant). She filed a home-made defence on or about 6th September, 1989. She later enlisted the services of an advocate who filed an amended defence and counter-claim dated 15th March, 1993. The defendant denied the plaintiff’s claim in general terms and by her counter-claim claimed title to the suit land by reason of the fact that the deceased had purchased the suit land from one Jason Kimenjo Rugut. She also pleaded adverse possession but in view of the fact that she entered into possession in 1977, according to her own testimony, and that the suit was filed in 1987, her occupation for the purpose of acquisition of title by adverse possession had not reached the threshold of 12 years required by law.

The case was heard by Nambuye, J. who in a long-winded judgment found for the plaintiff and made an order for possession and eviction against the defendant. It is against that decision that the defendant now appeals to this Court and has put forward some 8 grounds of appeal. All these grounds merely dispute findings of fact by the Judge but we think that the only issues for determination in this appeal are whether the plaintiff established his title to the suit land; and, secondly whether, on the evidence, the

defendant had acquired a good title by purchase from one Jason Kimenju Rugut.

The Land Certificate relating to the suit land placed before the Judge was issued on 13th January, 1987 and names the plaintiff as the proprietor of the suit land. There are two sale agreements both executed in 1977 purporting to transfer the suit land from one person to another. The first is dated 9th May, 1977 and is made between Jacob Kiprono Silembu (as vendor) and Jason Kimenju Rugut (as purchaser). The consideration paid under that agreement was Shs.17,000/-. The second agreement is dated 6th December, 1977 and is made between Jason Kimenju Rugut (now as vendor) and Cheruiyot Choge (as purchaser) at a consideration of Shs.30,000/-. Both these agreements were prepared by M.P. Patel, an Advocate then practising in Eldoret.

Accordingly to the unchallenged evidence of the plaintiff he acquired the suit land from the Settlement Fund Trustees in early sixties and went into occupation. In 1964 he left the suit land and moved to Londiani where he had a brother in business, to seek medical treatment for a condition which was giving him a lot of trouble. He left the suit land in the hands of Kipngetich arap Boit to look after. While the plaintiff was gone, Boit gave a neighbour called Jacob Kiprono Silembu grazing rights over the suit land. It is this Silembu who purported to sell the suit land to Jason Rugut on 9th May, 1977. Boit gave evidence and denied selling the land to Silembu. When the plaintiff returned from his sojourn in Londiani he found the deceased and the defendant in occupation. When he asked them to move out of his land they refused. He was compelled to file suit to secure their eviction from the suit land.

There are two compelling reasons why this appeal must fail. First, the plaintiff has an indefeasible title by a first registration under the provisions of the Registered Land Act (Cap 300). Secondly, the suit land is agricultural land within the meaning of the Land Control Act (Cap 302) and no transaction affecting its title could be undertaken without the consent of the local land control board. The defendant herself told the Judge:

“We did not go to land control board. We were preparing to go to the board and then heard Barngetuny had taken title deed and we did not go to the Land Board.”

The result of all this is that the transactions between Silembu and Rugut and Rugut and Choge in 1977 affecting the suit land were void for all purposes. In the final result this appeal fails and is dismissed with costs to the plaintiff. We feel sorry for the defendant but Jason Rugut who purported to sell the suit land to her told the Judge that he still owns some land in the neighbourhood.

Dated and delivered at Nakuru this 1st day of March, 1996.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL