



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

E & L CASE NO. 351 OF 2017

DANIEL KIMUTAI RUGUT.....1ST PLAINTIFF

STEPHEN KIPKORIR RUGUT.....2ND PLAINTIFF

VERSUS

JOYCE JEPLETING REINHARD.....DEFENDANT

JUDGMENT

By a plaint dated 18th October, 2017 the Plaintiffs herein sued the defendant seeking for the following orders:

- a) An order of a permanent injunction restraining the defendant by herself her agents and/or servants or whosoever from trespassing onto, cultivating, disposing, charging or in any manner dealing with the plaintiffs' plot **No. NAND/LOLKERINGET/411.**
- b) An eviction order of the defendant her servants and or agents from plot **No. NAND/LOLKERINGET/411.**
- c) A declaration that the suit property herein being **NAND/LOLKERINGET/411.** is jointly owned by the plaintiffs.
- d) Costs of the suit and interest

The plaintiffs filed an application under certificate of urgency contemporaneously with the plaint seeking for a temporary injunction. Counsel later agreed to fast track the hearing of the suit and abandoned the applications.

Plaintiff's Case

This matter proceeded for hearing on 1st March 2018 when the plaintiffs gave evidence in support of their case. It was PW1's case that he entered into a sale agreement on 20/12/16 with Wilson for the purchase of land measuring 3 acres.

PW1 stated that the defendant who is his sister had entered into a verbal agreement that they exchange the said parcel of land and that he relocates to Kapsaret where the defendant owned a separate parcel. He further stated that he relocated with his cows and vehicle but later noticed that the defendant had closed access to the Kapsaret land and that she chased him away forcing him to go back to his mother's land. He further stated that when he acquired title to the suit land, he gave the 2nd plaintiff to keep it but did not sell the land to him. PW 1 produced documents in his list of documents to prove his case. He therefore prayed for judgment to be entered as prayed in the plaint.

On cross examination, PW1 denied his statement and also any knowledge of the sale agreement. He also denied the signature on the agreement. He further confirmed that the suit land was registered in the defendant's name and that it is the defendant who built the house on the land in 2010 and that nobody stays there.

On further examination, he stated that he was not aware of who bought land in his mother's name, whether there was a power of attorney, when the title deed got lost, whether Keringet/192 was transferred to his mother and denied knowing the parcel of land which he moved in Kapsaret. PW 1 also denied issues of having been arrested for defiling the defendant's daughter in Switzerland.

PW2 Stephen Kipkorir Rugut testified that he is the owner of the suit parcel of land which he bought from one Wilson which was registered in the name of PW1 Daniel Rugut. He stated that they were two portions which were subdivided as 411 and 185. Later in the year 2009 the title to the said parcel of land got lost a matter which was reported to the police station. He further stated that the title was never recovered and that it was not reissued.

It was PW2's testimony that he later discovered that the defendant was now the registered owner of the suit land. He produced documents, search certificate, valuation report, bundle of photographs, letter from the Lands office and a police abstract.

On cross examination, he stated that he discovered that the land had been transferred to defendant in 2015. He also stated that he took possession of the land in December, 2006. He denied donating a power of attorney to his mother. He therefore urged the court to grant the orders as prayed in the plaint

Defence Case

The defendant testified and stated that she bought land from the 1st plaintiff. She stated that their family land was Nandi Lolkeringet /192 which was registered in their mother's name but later transferred in the names of the 2nd plaintiff. She further stated that she bought the suit land with the trees but does not know who planted them.

DW1 also testified that she is the registered owner of the suit land as per the copy of title deed, official search certificate, copy of green card, photographs of the house that she had built and a letter from the Land Registrar which she produced in court. It was further her evidence that the title deed was initially in the name of Wilson Kimeli Kirwa who later sold it to PW1

On cross examination, she stated that she bought land from PW1 at an agreed consideration of Kshs. 700,000/ and that she paid Kshs. 600,000/ on execution and a further Kshs. 100,000/. She stated that she got the title after 7 days after a transfer was done at the Kapsabet Lands registry. DW1 denied evicting PW1, any knowledge of loss of title, value of the trees and also knowing whether Stephen bought land on behalf of his brother.

On reexamination DW1 stated that she paid the balance of Kshs. 100,000/ to PW1 in an Advocates office and that they paid for a special Land Board for a consent. DW1 there further stated that her transaction was lawful and done procedurally. She therefore prayed that the plaintiffs' suit be dismissed and her counterclaim be allowed

DW2 was one Moses Kiplagat who adopted his statement dated 4/11/2017. On cross examination he stated that he is the defendant's caretaker and confirmed participation in the process of acquisition of the suit land but never signed the agreement. He confirmed that it's the defendant who stays on that parcel of land. It was also DW2's evidence that they booked a special land Board and a consent was granted. That was the close of the defense case.

Plaintiff's Submissions

The plaintiffs' Counsel filed submissions and reiterated their evidence. Mrs. Khayo submitted that the plaintiffs are the bona fide owner of the suit land having purchased it. Counsel further submitted that the transaction was subject to the consent of the Land Control Board which the defendant did not obtain therefore the transaction was null and void. Further Counsel cited the provisions of section 26 of the Land Registration Act 2012 whereby a certificate of title is considered as conclusive proof of ownership unless it is proven that it was acquired through fraud or misrepresentation or unprocedurally.

It was Counsel's submission that PW1 testified that he did not sign any agreement for sale of land as the signature on the agreement was not his. Counsel submitted that since the evidence is uncontroverted and the plaintiffs have proved their case as required by law, they should be granted the orders as prayed for in the plaint.

Defendant's Submission

Counsel for the defendant also reiterated the defendant's evidence and submitted that the defendant established that she purchased the suit land and was registered as owner legally. Counsel listed the following issues for determination by the court:

- a) To whom did the title No. NANDI/LOLKERINGET/411 belong before the same was sold and transferred to the defendant.
- b) Did the 1st plaintiff and the defendant enter into a sale agreement in respect of the suit land together with the developments?
- c) Whether the registration of the defendant as owner of the suit land is absolute and indefeasible
- d) Whether the parties are entitled to the reliefs and who should pay costs.

Counsel submitted on the 1st issue that from the evidence on record and from the green card it shows that the title was originally registered in the name of Wilson Kirwa, then in the name of Daniel Kimutai Rugut PW1 and lastly in the name of the defendant who is the current registered owner. The interest of PW2 is not noted on the suit land.

On the 2nd issue on whether the plaintiff and the defendant entered into a sale agreement, Counsel submitted that the defendant proved that there was a sale agreement prepared in an Advocates office, Kimaru Kiplagat & Co Advocates where the consideration was agreed at Kshs. 700,000/ which was paid in full. He stated that this evidence was corroborated by DW2's evidence Counsel relied on section 26 of the Land Registration Act which provides that a certificate of title by a Registrar upon registration or to a purchaser shall be taken by all courts as prima facie evidence that the named proprietor is the absolute and indefeasible owner unless it is proved that the same was acquired fraudulently or unprocedurally.

It was Counsel's submission that fraud was neither specifically pleaded against the defendant nor proved as required by law and procedure.

Lastly Counsel submitted that without evidence to the contrary the defendant's title to the suit land is absolute and indefeasible and she therefore deserves the reliefs sought in the counterclaim.

Analysis and determination

This is a case involving siblings, two brothers against a sister over the suit land. These are siblings who fell out due to issues which I will not discuss in this analysis as there were accusations and counteraccusations on defilement of the defendant's daughter by PW1 and a criminal charge against PW2 who was charged with threatening to kill the defendant. Since the criminal proceedings of the defilement case were not produced, I will not go into it.

I wish to state that there was acrimony and tension between the siblings during the hearing and even an attempt to suggest that the parties being siblings to try mediation could not work.

The issues for determination in this case are as to whether the plaintiff and the defendant entered into a sale agreement for the sale of the suit land, whether the defendant acquired the title to the suit land fraudulently or legally, whether the parties are entitled to the orders sought in the plaint and in the counterclaim. Finally who should bear the costs of the suit.

As stated above, this was a hearing where there was a lot of tension from the parties stemming from the bad blood amongst the siblings. On the 1st issue as to whether the plaintiff entered into a sale agreement with the defendant, it is clear from the agreement produced in court that there was a sale agreement dated 10th December 2012.

The plaintiff denied having signed the agreement but he did not provide any evidence that he had reported that the same was a forgery which was subjected to investigations to confirm the signature from an expert. PW1 even denied his statement that he had recorded at his advocate's office. He did not strike me from his demeanor as a truthful witness. He bungled his case by not giving credible evidence. What would make anyone believe that he actually did not enter into the agreement that was produced in court.

It was PW1's evidence that they had agreed to exchange land with the defendant whereby he moved to the defendant's Kapsaret land. What were the terms of this exchange and how does PW 2 come in this arrangement. The evidence of PW1 and PW2 were contradictory as one stated that he bought the land alone, PW 1 also stated that they were to share the land equally with PW2. The contradiction on who bought the land on whose behalf by the plaintiffs was glaring.

The issue of the title being kept by PW2 and the same having been registered in the name of the PW1s name and later getting lost was also questionable. The police abstract and the affidavit that PW2 produced did not indicate the title of parcel of land that got lost. The description of the title was missing in both documents. If they bought the land jointly, why they were not registered as joint owners or each persons' parcel in their individual names. The nexus between the suit parcel of land, PW1 and PW2 was not there. There was no agreement indicating that the plaintiffs were joint owners or that PW1 was holding the land in trust for PW2. These were brothers out to teach their sister a lesson.

From the evidence on record I find that there was a valid agreement for sale between PW1 and the defendant and that the purchase price was paid in full. Counsel for the plaintiff submitted that there was no LCB consent for the transaction of the sale of agricultural land. Why would the plaintiff advance this kind of argument if they believe there was no sale of the parcel of land? If there was no sale then there would be no need of a consent of the LCB.

On the 2nd issue as to whether the defendant acquired the title to the suit land fraudulently or legally, from the evidence on record it is clear that the defendant entered into a valid sale agreement with the plaintiff and paid the full purchase price. The defendant also produced the sale agreement, green card, certificate of official search.

The plaintiff did not call any evidence to prove that the title was obtained fraudulently by the defendant. The plaintiff could have called the Land Registrar to come and shed light on the status of the suit land and produce the file to explain if there was any anomaly in the registration. The plaintiff relied on a letter dated 8th January 2016 which had been written by the Land Registrar upon a complaint to her by PW1 Daniel Rugut that the defendant had cheated him to transfer the whole parcel of land owned jointly with PW2. This was purely a complaint and not a finding that the title had been fraudulently acquired. The defendant had not given her side of the story to qualify as a verdict.

The plaintiff claimed that there was no Land Control Board consent but the defendant stated that they had obtained a special land board and that they went to the lands office with the plaintiff to transfer the land. Further the plaintiff did not call their mother one Salome who featured in their evidence. She could have shed light and in a case where her children are fighting over land.

Section 22 , 24, 25 and 26 of the Land Registration Act, the Plaintiff has to demonstrate that he is the absolute and indefeasible owner of the suit property. The said section provides as follows:

“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 and indefeasible owner thereof”

Furthermore, 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.

Section 26 has brought a sigh of relief to persons who would previously lose their land due to the indefeasibility of title whether acquired procedurally or fraudulently.

In the case of ***Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR*** where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

If the court is satisfied that a title was acquired through corrupt schemes or fraudulently then the court is empowered under Section 80 (1) of the Land Registration Act, 2012 to 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.

In the current case the plaintiff have failed to prove that the defendant obtained the title to the suit land fraudulently. The plaintiffs having failed to prove their case against the defendant, the same is dismissed with costs to the defendant.

The defendant in her counterclaim prayed for an order of injunction against the plaintiffs, removal of a caution on the suit land by the Land Registrar and general damages for trespass. On the issue as to whether the defendant is entitled to general damages against the plaintiffs, it is trite law that trespass to land is actionable per se (without proof of any damage). In the case of ***Park Towers Ltd v. John Mithamo Njika & 7 others (2014) eKLR where J.M Mutungi J., stated:-***

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ..”

The defendant testified that the plaintiff had put a caution on the suit land therefore curtailing any development on the suit land. The parties have had a long standing dispute in respect of the suit land. I find that the defendant will be adequately compensated with a token sum of Kshs. 200,000/ as general damages as compensation of the infringement of the defendant's right to use and enjoy the suit property occasioned by the plaintiff's trespass.

I find that the defendant has proved her counterclaim and make the following orders.

- a) An order of a permanent injunction is hereby issued restraining the plaintiffs jointly and severally, their agents and/or servants from entering or re-entering and or trespassing onto, occupying cutting/felling trees, cultivating, or in any manner dealing with LR. No. **NAND/LOLKERINGET/411**.
- b) An order directing the Nandi County Land Registrar to remove the caution placed on LR. No. **NAND/LOLKERINGET/411**.
- c) Plaintiffs to pay minimal damages of Kshs. 200,000/ to the defendant for trespass
- d) Plaintiffs to pay Costs of the suit and counterclaim to the defendant.

Dated and delivered at Eldoret this 31st day of January 2019

M. A. ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Mrs.Lagat for the Plaintiff and Miss. Ghati holding brief for Mr.R.M. Wafula for defendant.