



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**LAND CASE NO. 238 OF 2013**

**ANTHONY LEKISHON KILOLONG.....PLAINTIFF**

**VERSUS**

**CHARLES A. CHEBIL.....1<sup>ST</sup> DEFENDANT**

**WILSON ARAP OMONEY.....2<sup>ND</sup> DEFENDANT**

**AND**

**CHARLES A. CHEBIL.....PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR KEIYO MARAKWET.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**JANE J.KILOLONG.....4<sup>TH</sup> DEFENDANT**

**ANTHONY LEKISHON KILOLONG.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 6<sup>th</sup> April 2013 and amended on 30<sup>th</sup> October, 2015 the Plaintiff herein sued the Defendants seeking for the following orders

- a) An order of eviction and/or vacant possession of land parcel No. IRONG/SERGOIT/122
- b) Mesne profits from 2009 till the defendants give vacant possession of the suit land to the plaintiff.
- c) Permanent injunction to restrain the defendants, their agents, servants from entering and/or using the said parcel of land or in any other way interfering with the said parcel of land.
- d) Cost of the suit.
- e) Interest on (b) above.
- f) Any other or further relief this Honourable court may deem fit to grant

The defendants were served with summons to enter appearance together with a plaint and filed a defence and counterclaim dated 18<sup>th</sup> November 2015 whereby they pleaded that the plaintiff through fraud obtained registration of the subject land. They further pleaded that the suit land belongs to the 1<sup>st</sup> defendant and therefore the 1<sup>st</sup> Defendant is entitled to its occupation.

Vide the counterclaim, the 1<sup>st</sup> Defendant introduced other defendants and sought to have the plaintiff's title cancelled, an order for injunction to restrain the plaintiff and other defendants from entering into, selling and/or transferring the subject land.

The matter therefore proceeded for hearing with the parties giving evidence.

### **Plaintiff's Case**

The plaintiff testified and stated that he is the registered owner of land parcel No IRONG/SERGOIT/122 having been transferred to him by his deceased father the late MATHEW MWANGI GITHINJI in 2009 who had obtained the land in 1979. It was his evidence that he does not stay on the suit land as the defendants illegally occupied the land without his consent. He further stated that he had asked the defendants to vacate but they refused necessitating the filing of this suit.

The plaintiff produced an official search, an extract of the green card and a letter from R.K Limo Advocate to prove his case. He therefore urged the court to grant the orders as prayed in the plaint.

On cross examination by Counsel for the 1<sup>st</sup> defendant PW1 stated that he has never gone to the suit land and that his late father bought the land from AFC. He also stated that he did not know that the land belonged to the 1<sup>st</sup> defendant Charles Chebii. PW1 also stated on cross examination that he was not aware whether his father took a loan from AFC. He however denied that the 1<sup>st</sup> defendant is the owner of the suit land.

On further cross examination by Mr. Odongo for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants PW1 confirmed that his father bought the land from a public auction and that his father transferred to him the land by way of gift. The plaintiff was shown the application for consent, a consent letter that transferred the land to his father and a transfer by charge in exercise of power of sale. He stated that he did not collude with anyone to get the title deed to the suit land as he followed due process.

PW 2 who is the mother of the plaintiff herein gave evidence and confirmed that the suit land belonged to her late husband Mathew Mwangi Githinji who later gave the suit land to the plaintiff. She stated that all her children were given parcels of land by her late husband and that the suit land belongs to the plaintiff. She confirmed that she knew the 2<sup>nd</sup> defendant and not the 1<sup>st</sup> defendant. On cross examination she stated that they went to the suit land with her husband to fence. The plaintiff therefore closed his case.

### **Defence Case**

The 1<sup>st</sup> defendant Charles Chebii gave evidence and stated that he is the owner of land parcel IRONG/SERGOIT/122 and that he secured a loan with AFC at Iten and repaid the loan. It was further his evidence that he was not given notice by AFC and was not told that he had any arrears. DW1 stated that he did not receive a letter from AFC indicating that he was deceased.

The defendant produced a notice to the estate of Charles Chebii, a notice of default and payment receipts as exhibits before the court. It was his evidence that no auctioneer told him that his land was being sold. He stated that he still cultivates the suit land.

On cross examination by Counsel for the plaintiff the defendant stated that he did not take a loan and that he did not owe AFC any money. He also stated that the documents that were produced indicating that he had taken a loan from AFC were not authentic. DW1 testified that he does not know how the plaintiff bought his parcel of land.

DW2 who stated that he is the son of the 1<sup>st</sup> defendant and admitted that the 1<sup>st</sup> defendant took a loan from AFC amounting to Kshs. 13,000/ . That they later paid the loan and got a discharge of charge. He stated that his late brother lodged a caution on the suit land. The 1<sup>st</sup> and 2<sup>nd</sup> defendants therefore closed their case.

### **1<sup>st</sup> defendant in the Counterclaim.**

DW3 a Branch Manager at AFC gave evidence and stated that the 1<sup>st</sup> defendant was a client who borrowed Kshs. 13,600/ in 1976 and that he did not honor the terms of the loan agreement thereby necessitating the sale of the land as security vide an auction after notices were issued to him. It was his evidence that the auction was conducted in 1979 and later the land was discharged and transferred to the purchaser one Mathew Mwangi Githinji the same year.

DW3 stated that after the auction the proceeds were not enough to clear the loan and therefore they continued demanding the amount from the 1<sup>st</sup> defendant Charles Chebii. It was further DW3's evidence that the 2<sup>nd</sup> defendant went to AFC office and paid Kshs 3000/ to the cashier who was not aware that the amount was not to be received. It was his evidence that they later called the son of the 1<sup>st</sup> defendant and refunded the money in 2010.

He further stated that they had been given information that the 1<sup>st</sup> defendant was deceased and upon investigation they realized that it was erroneous and they apologized to the 1<sup>st</sup> defendant. DW3 produced documents in respect of the transaction on the suit land. The documents were consent to transfer dated 5/9/79, transfer by charge dated 7/9/79, application for registration dated 7/9/79, forwarding letter dated 6/9/79, copies of title deeds in the names of the plaintiff and Mathew Mwangi Githinji, copy of green card, certificate of official search dated 4/2/09, letter from 1<sup>st</sup> defendant and power of attorney dated 31/8/09.

On cross examination by Mr. Chemwok Counsel for the 1<sup>st</sup> defendant he confirmed that the 1<sup>st</sup> defendant borrowed Kshs. 13,600/ from AFC

and that there was a letter of offer and a notification of charge. He also confirmed that the 1<sup>st</sup> defendant defaulted in the payment of the monies and demand notice was sent to him. He stated that when a party defaults, a notice is sent to them and if they do not respond then the land is auctioned. That the land was sold to the highest bidder who was the plaintiff's father.

On cross examination by Mrs. Khayo for the plaintiff, he confirmed that the land was transferred to the purchaser in 1979 and later to the plaintiff in 2009 and they received no complaint from the 1<sup>st</sup> defendant.

### **2<sup>nd</sup> and 3<sup>rd</sup> Defendant in the Counter claim**

DW4 the County Land Registrar Elgeyo Marakwet gave evidence in respect of the suit land known as IRONG/SERGOIT/122. She stated that from the records it was first registered in 1962 in the name of Charles Chebii and later transferred to Mathew Mwangi Githinji in 1979 who transferred it to Anthony Kilolong Lekishon in 2009. She stated that the land was subject to a number of charges and the 1<sup>st</sup> one was by AFC for Kshs. 13,000/-. Later the 2<sup>nd</sup> owner took a loan in 1984 of kshs. 40,000/- from Nationwide Finance Co. Ltd which was discharged in 1988. It was further DW4's evidence that the suit land was transferred to the plaintiff in 2009 who is the current registered owner. She also confirmed that all the transactions were procedurally done as all the relevant documents were presented and filed.

On cross-examination by Mr. Chemwok Counsel for the 1<sup>st</sup> defendant, DW4 confirmed that the discharge of charge was registered in the Lands Office and that there was no caution that was registered in respect of the suit land. She also stated that they have never received any complaint apart from this court case. That was the close of the defence case.

### **Plaintiff's Submission**

The plaintiff's Counsel reiterated the evidence of the parties and submitted that it is not in dispute that the Plaintiff Anthony Lekishon Kilolong is the registered owner of the land parcel IRONG/SERGOIT/122 who obtained the land following a transfer in the year 2009 from deceased Mathew Mwangi Githinji

Counsel for the plaintiff further submitted that if the defendants had any issue with the ownership of the property they would have brought it up before the 12 years' limitation had lapsed as per section 22 of the Limitation of Actions Act. On that basis the plaintiff's Counsel submitted that he is entitled to the order of vacant possession of the suit property.

Further that there was no evidence that the Plaintiff had deprived the 1<sup>st</sup> defendant of the subject land and that the 1<sup>st</sup> defendant had failed to prove that the Plaintiff is holding an illegal title as claimed. The Plaintiff's rights to the subject land are protected under section 24 and 26 of the land Registration Act 2012. Counsel therefore urged the court to grant an order of vacant possession of land parcel L.R No. IRONG/SERG01T/122 and mesne profits plus cost of the suit. Counsel also prayed that the plaintiff be awarded Kshs. 500,000/= as general damages.

### **1<sup>st</sup> defendant's Submissions**

Counsel for the 1<sup>st</sup> defendant also gave a brief background of the suit and submitted that the defendant denied taking a loan from AFC and raised the issue that the plaintiff's claim is time barred and should not stand.

Counsel also took issue with the recovery process of the land after default by the 1<sup>st</sup> defendant. He submitted that the process did not comply with the law as no notice was given to the 1<sup>st</sup> defendant. He therefore urged the court to dismiss the plaintiff's claim against the defendant and enter judgment for the defendant as per the counterclaim.

### **2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Submission to Counterclaim**

Counsel submitted that from the pleadings there is no cause of action disclosed against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the counterclaim. Counsel further submitted that from the facts before court it is not disputed that indeed the plaintiff in the counter claim herein was advanced loan facility from the 1<sup>st</sup> defendant sometimes in the year 1976. It is also not disputed that the said loan facility was secured by the Plaintiff's title known as L.R NO. IRONG/SERGOIT/122. Further that the said transaction was reduced into legal instrument and an entry accordingly entered in the Plaintiffs title and registered as per the charge instrument in 1976.

That it is also common knowledge that the plaintiff in counterclaim being aware of all these facts did not repay the loan as no evidence of repayment has been submitted and or presented by him. It has also been clearly demonstrated by the 1<sup>st</sup> defendant that after the advancement of the loan facility the plaintiff defaulted in repayment which fact the plaintiff has not denied. Thereafter the 1<sup>st</sup> defendant exercised its statutory power of sale and the property was then legally registered to a third party who subsequently transferred the same to the 5<sup>th</sup> defendant.

The plaintiff in the counterclaim has pleaded fraud against the defendants, but none has been pleaded and specifically proved as against the 2<sup>nd</sup> defendant. The plaintiff only introduced fraud as a decoy to avoid limitation of time.

On the issue as to whether the claim is time barred section 26 of the Limitation of Actions Act gives an extension of time on merited cases and states as follows: 'Where in the case of an action for which a period of limitation is prescribed, either—

- a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- b) the right of action is concealed by the fraud of any such person as aforesaid; or
- c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.'

Counsel submitted that the action complained of by the plaintiff in the counterclaim is the transfer of his land to one Mathew Mwangi Githinji which was done in 1979 that is more than thirty nine years ago. That though the Plaintiff's case in the counterclaim is for recovery of land is based on fraud. The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. That throughout the hearing of the case the plaintiff herein did not at all state and or attempt to state when he discovered the alleged fraud against the defendants for which the court cannot ascertain if the plaintiff could be allowed to enjoy exception as provided under section 26 of the Limitation of Action Act.

It was therefore Counsel's submission that it was upon the plaintiff in the counterclaim to prove how and exactly when he discovered the alleged fraud. Counsel cited the case from the Supreme Court of India which had an occasion to express its views on the law of limitation in the case of Rajender Singh & Others Vs Santa Singh & Others(1973) INSC 141, AIR 1973 SC 2537, 1974(1) SCR 381 as follows:

"The Policy underlying statutes of limitation, spoken of "response" or of

"peace", has been thus stated in Halsbury's Laws of England Vol.24, P.181 (Paragraph 130). The courts have expressed at least three differing reasons supporting the existence of statutes namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to dispose a stale claim and (3) that persons with good causes of actions should pursue them with reasonable diligence. The object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches"

Counsel therefore submitted that the plaintiff claim in the counterclaim having been filed 39 years later is an abuse of court process, an afterthought, prejudicial to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, stale and it does not meet the overriding objectives of the law of limitation. Closer home, the East Africa Court of Justice (E.A.C.J) in the case of Attorney General of Uganda vs Omar Awadh & 6 Others (2013) eKLR held as follows:-

"Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overriding rationale for statutes of limitations, such as the time limit of Article 30(2) of the EAC Treaty is to protect the system from the prejudice of stale claims and their statutory effect on the twin principles of legal certainty and of response. "

Further that the counterclaim herein is bad in law and an abuse of the court process as there is no verifying affidavit to the counterclaim thus making the counterclaim defective and offends the provisions of Order 4 Rule 2(5) and Order 7 Rule 5 (a) of the Civil Procedure Rules, a counter-claim now must be accompanied by a verifying affidavit. He urged the court to dismiss the counterclaim.

### **Analysis and determination**

The issues for determination in this suit are as to who the rightful owner of the suit land , whether the suit is time barred, whether the plaintiff acquired the suit land fraudulently and whether the plaintiff is entitled to the orders sought in the plaint. The other issue is as to whether the plaintiff in the counterclaim who is the 1<sup>st</sup> defendant is entitled to the orders in the counterclaim.

The facts of the case are as stated elaborately above.

### **Who is the rightful owner of the suit land?**

From the evidence on record it is not in dispute that the plaintiff Anthony is the registered owner of the suit land having been registered as such in 2009. The green card and the documents from the Lands office in respect of the process that was undertaken in the registration speaks to this. It is also on record that the suit land was transferred to him by his late father one Mathew Mwangi Githinji who bought the land in 1979 from AFC.

The evidence of the Elgeyo Marakwet County Land Registrar confirmed that due process was followed and a history of the land stated in court together with the documentation.

The 1<sup>st</sup> defendant did not produce any documentary proof that the land belongs to him.

The issue that we must answer is as to whether the process was legitimate as this was questioned by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant gave contradictory evidence on the issue of the loan from AFC. He denied taking a loan from AFC but his son who is the 2<sup>nd</sup> defendant admitted that the 1<sup>st</sup> defendant took a loan from AFC amounting to Kshs 13, 000/ of which they paid with his late brother. Why was the 2<sup>nd</sup> defendant paying money to AFC if they did not owe money? What is the nexus between the defendants with AFC, why did AFC refund money to the 2<sup>nd</sup> defendant in 2010. The 2<sup>nd</sup> defendant had admitted that he paid Kshs 3000/ and did not dispute that the money was refunded.

Further no explanation has been given why they did not follow up for issuance of a title for more than 40 years. The contradictory evidence between father and son shows that there was something that they were hiding from the court.

It is also important to mention that the manager of AFC gave evidence and explained that they had been given information that the 1<sup>st</sup> defendant was deceased but they later apologized to him. The process of repossession had been done earlier and due process was followed.

The evidence of the Land Registrar and the Manager AFC shed light to the plaintiff's case and shattered the defendants' contention that the title was transferred fraudulently to the plaintiff. I find that the plaintiff has proved that he is the rightful owner of the suit land the same having been transferred legally to him.

The 2<sup>nd</sup> issue is as to whether the suit is time barred. It is on record that the plaintiff was registered as an owner in 2009 and filed the suit in 2013 for an eviction order of the defendants. The plaintiff was swift enough to claim his rights as a registered owner. It is on record that the plaintiff went to AFC offices who called for a meeting to urge the defendant to move out of the suit land but the defendant demanded half of the suit land. The plaintiff therefore decided to go to court after the meetings did not bear fruit. I find that the plaintiff's suit is not time barred.

On the issue as to whether the plaintiff in the counterclaim that is the 1<sup>st</sup> defendant's claim is time barred, the plaintiff has not explained why he did not do anything to claim his rights when they accrued. The plaintiff brought in a counterclaim claiming fraud to defeat the limitation of actions provisions but the same did not work for him as the fraud was not specifically proved. Even if the court finds that the counterclaim is not time barred due to the claim of fraud, the plaintiff did not explain to the court when he discovered that there was fraud. The 1<sup>st</sup> defendant amended the defence to include a counterclaim on 18<sup>th</sup> November 2015 and the same was not accompanied by a verifying affidavit which is a requirement by procedure. It was incumbent upon the plaintiff in the counterclaim to prove the allegations of fraud against the defendants.

The plaintiff in the counterclaim failed to prove his case against the defendants to the required standard as there was overwhelming evidence against his allegations. I therefore find that the plaintiffs' counterclaim has not been proved and is therefore dismissed with costs to the defendants.

Going back to the main claim by the plaintiff, the evidence of record and the documents produced by the plaintiff and the defendants I find that proper procedures were followed and that the plaintiff was legally registered as the owner of the suit land. There was no anomaly in the process. The land was legally repossessed as per the laid down procedures and the defendant did not take any steps for over 40 years .

The defendant also was not truthful on the issue of the loan taken from AFC. The son confirmed that he took the loan and the records spoke volumes on this as per the green card.

Section 26 of the Land Registration 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 and indefeasible owner, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

There was no evidence that the plaintiff procured the title illegally or unprocedurally, therefore the court must take this evidence that the plaintiff is the absolute proprietor of the suit land. If there was proof of any illegality then the court could not have shied away from cancelling the said title.

I have considered the evidence, the submissions and authorities cited and I come to the conclusion that the plaintiff has proved his case against the defendants. The claims for mesne profits is a special damage which must be specifically pleaded and proved. In this case the same was not proved and is therefore disallowed.

I also find that the plaintiff in the counterclaim who is the 1<sup>st</sup> defendant herein has failed to prove his counterclaim and is therefore dismissed with costs. I therefore make the following orders:

- a) The 1<sup>st</sup> and 2<sup>nd</sup> defendant to give vacant possession of land parcel No. IRONG/SERGOIT/122 within 30 days failure of which an eviction order to issue.
- b) A permanent injunction is hereby issued restraining the defendants, their agents, servants from entering and/or using the said parcel of land or in any other way interfering with the said parcel of land.
- c) The 1<sup>st</sup> and 2<sup>nd</sup> defendants to pay costs of the suit

d) The counterclaim is dismissed with costs.

**Dated and delivered at Eldoret this 29<sup>th</sup> day of January 2019**

**M. ODENY**

**JUDGE**

Judgment read in open court in the presence of M/s Khayo for the Plaintiff and in the presence of the 2<sup>nd</sup> Defendant.