



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

CIVIL CASE NO. 3A OF 2012

JOSEPHINE JEROTICH CHEROP.....PLAINTIFF

VERSUS

JOHN CHERUIYOT SIRON.....1ST DEFENDANT

PHILIP KIPTALA.....2ND DEFENDANT

WILLIAM ARAP CHEBURKOMOL.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Plaint dated and filed herein on the **19th of January 2012**, the Plaintiff prays for a declaration that Land Parcel No. **Cherangany/ Koitgum/252** belongs to her to the exclusion of all third parties and a permanent injunction restraining the Defendants, their agents and/ or servants from trespassing upon and/ or committing any acts or putting up any structures upon the Plaintiff's said land parcel No. **Cherangany/ Koitgum/252**.

2. The Defendants filed a Joint Statement of Defence and raised a counterclaim in which they sought the following reliefs;

a) **An order that the Plaintiff do transfer 2.6 acres to the acres to the 1st Defendant, 6.9 acres to Tapkigen Kimaiyo and 2.5 acres to the 3rd Defendant, all out of Land parcel No. Cherangany/ Koitgum/252, and in default the court do make an order authorizing the Deputy Registrar , High Court of Kenya , to sign the necessary documents to effect the transfer of the portions aforesaid**

b) **Costs of this suit**

c) **Interest on (b) above**

d) **Any other relief that this Honourable Court may deem fit**

3. The Plaintiff is the registered owner of Land Parcel No. **Cherangany/ Koitgum/252**.

4. The 1st and 3rd Defendants contend that one of the beneficiaries, the Plaintiff's son by the name Christopher Kiptarus Kiprop upon being given his portion by the Plaintiff sold **2.6 acres** to the 1st Defendant and **2.5 acres** to the 3rd Defendant.

5. The 2nd Defendant avers that he has been wrongly enjoined in this suit as he is only an agent for one Tapkigen Kimaiyo who owns **6.9 acres** having bought the same from the Plaintiff's son named David Kiptanui Kiprop.

THE EVIDENCE

6. The Plaintiff testified as the sole witness in her case. She stated that she is the registered owner of **Land Parcel No. Cherangany/Koitgum/252**. She produced a copy of the title deed and a search certificate to demonstrate that the suit land is registered in her name.

7. She further stated that she learnt that her children had sold the land herein when she visited the landS office. According to her, she never sold the defendants the land nor give consent to his sons to sell the same.

8. In cross examination, it emerged that the Defendants had bought the respective parcels of lands out of **Land Parcel No. Cherangany/Koitgum/252**.

9. The Plaintiff insisted that the said land was sold to the Defendants without her knowledge. However, she confirmed that she had indeed applied for consent from the Land Consent Board to sub divide the same for the sole purpose of giving his children their shares.

10. When the sketch map was put to her, she conceded that Christopher his son, was to get **5.1** acres and that it is true that indeed the said Christopher sold to the 1st and 3rd Defendants **2.6** and **2.5** acres respectively.

11. She confirmed that she had been told that his son had written an agreement with respect to the suit land herein with the 1st Defendant. In her testimony, the Plaintiff further stated that the Defendants had erected buildings in the suit land as confirmed by the photographic evidence.

12. The 1st Defendant testified and adopted his witness statement dated **23rd November 2012**. He stated that as per the sketch map, he lives in portion marked **“E”** in the sketch map measuring **2.6 acres**.

13. On being cross examined the 1st defendant reiterated that he bought the said parcel of land from one Christopher Kiptarus Kiprop who had been given that land by the Plaintiff as his share.

14. The 1st defendant contended that he has never gone to the lands office to verify ownership. He stated that he lives in the said suit land and they are good neighbours with the Plaintiff.

15. The 2nd Defendant also testified and adopted his witness statement dated **23rd November 2012**. In summary, his contention was that per sketch map he lives in portion marked **“J”** measuring **6.9 acres**.

16. In cross examination, the 2nd Defendant stated that he bought the said parcel of land from one Mr. David, who is the Plaintiff's son. He stated further that the said land belongs to one Tapkigen Kimaiyo and that he bought the same for him but he takes care of that land on his behalf.

17. The 3rd Defendant on his part his witness statement dated **23rd November 2012**. He stated that his parcel of land was marked **‘E’** as per the sketch map measuring **2.5 acres**. According to him, he bought the said parcel of land from one Christopher Kiptarus Kiprop sometimes in the year **2006** and has been in occupation since then.

With that evidence, the Defendants closed their respective cases.

SUBMISSIONS

18. In his submissions, Mr. J. Bororio, learned counsel for the Plaintiff, *inter alia* submitted that the Plaintiff's land belongs to her and that she has never sold any portion to anyone. He relied on **Section 26(1)** of the **Land Registration Act 2012**.

19. Mr. Bororio submitted that the Plaintiff was not a party to the agreement or contract between the Defendant and her sons or any person who sold the portions they are claiming. Regarding the Defendants' Claim in the Counter Claim, he stated that the same could not be sustained. He further submitted that in any event, the Defendants did not bring in the 3rd party proceedings against the Plaintiff's sons whom they claim sold them land.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

20. From the pleadings herein, the evidence and submissions by both parties, the issue arising for determination is whether any interest in the suit land passed to the defendants upon sale of the land to them by the plaintiff's sons.

21. In this case, it is evident that the Plaintiff did not have the intention of selling or transferring the suit land to the Defendants. However upon cross examination the plaintiff admitted that the land belongs to her and her sons and that it was sold about 10-13 years ago. She acknowledged that the defendants live on portions of the land. She admitted that the Land Control Board granted her application for consent to subdivide the land on 25/9/2002 into 8 portions of various sizes.

22. The defendant's evidence consisted a copy of the minutes of the Kapcherop Land Control Board of the meeting held on **25/9/2002**. **Minute No. 95/2002 LCR 90/2002** relates to the suit land. It states as follows:

“MINUTE NO 95/2002 LCR 90/2002 CHERANGANY KOITGUM /252 SUBDIVISION.

Consent was given to an application by Josephine Cherotich Cherop to subdivide the above parcel of 13 ha into 8 portions ranging from 0.0202 ha to 2.792 ha.”

23. The surveyor mapped out the various parcels and their occupation on the ground and found that there were some buyers in occupation. A copy of an agreement dated **20/8/2006** is included in the defendant's evidence (**DExh 6**). It names Christopher Kiptarus Kiprop as the seller of **2.6 acres** to the 1st defendant for the consideration of **Kshs. 195,000/=** of which **Kshs. 165,000/=** was paid on execution with the balance

to be cleared in **March 2007**. It bears what appears to be the stamp of the local assistant chief. The second agreement in the defendants bundle is dated **16/5/2006**. It names Christopher Kiptarus Kiprop as the seller of **2.5 acres** to the 3rd defendant for the consideration of **Ksh 300,000/=** which was fully paid on execution.

24. It is not in doubt that Christopher Kiptarus Kiprop is the plaintiff's son and that he sold land to the 1st and 3rd defendants who state that they are still good neighbours with the plaintiff.

25. Evidence of the 2nd defendant that he bought **6.9 acres** from another of the plaintiff's sons, David Kiptanui Kiprop on behalf of one Tapkigen Kimaiyo in **1999** and that his estimated stay on the land was **18** years was not shaken in cross examination. He has also contested his joinder in the suit as he is not the buyer. However this court observes that the plaintiff's main claim against the defendants is for trespass and the 2nd defendant is said to be on the land. I find that he is appropriately named as a defendant even if he is not the principal buyer. In the members list produced by the defendants the plaintiff is included. It shows that she is to get a portion of **2.0** acres out of the land while some of her children have portions even thrice as big allocated to them.

26. In my view the plaintiff gave her children the land. The subdivision exercise that was to carve out the portions that were to be given to the children was approved by the Land Control Board. The consent to subdivide the land was obtained in 2002 and this suit was lodged about 10 years later; I find it reasonable to believe that she indeed distributed her land to her children and that her children had taken physical possession of the land they subsequently sold to the defendants.

27. The plaintiff acknowledged that her children had sold the land as long ago as **2006**. The plaintiff acknowledged that the defendants have constructed their houses on the land portions that they purchased. Photographs of those dwellings are in the court record. They seem old. The defendants took possession upon the execution of the sale agreements and became her neighbours. She filed this suit on **19/1/2012**. However, the plaintiff remains the registered the owner of the suit property.

28. The law is very clear on the position of a title holder of land such as the Plaintiff. The position of the holder of a title over a parcel of land is well stated in **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... and the title of that proprietor shall not be subject to challenge, except-

(a) On the ground of fraud or misrepresentation 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.”

29. In this suit, the Plaintiff's title deed has not been challenged by any of the Defendants. The court therefore finds that the Plaintiff has proved that she is the duly registered owner of the suit property.

30. With this finding, it follows that the Plaintiff has the rights over the suit property as set out in **Section 24(a)** of the **Land Registration Act** provides as follows:

“Subject to this Act, 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.”

31. However the plaintiff's action of obtaining a Land Control Board consent to subdivide the land amongst her sons and her inclusion in the list of beneficiaries as being entitled to two acres only and her lack of demur for 6 years before she filed this suit shows that she had released the interest in the land to her sons. For this reason, though the plaintiff and the defendants had no privity of contract between them they can claim purchasers' interest as against the plaintiff's sons though they are not registered owners.

32. The plaintiff's sons were not enjoined in the suit. This court can not shut its eyes to the fact that some of the witness statements for the defendants, though not utilized in this case, are made by the plaintiff's sons and are in the record. The plaintiff's sons never became registered as proprietors but they had possession and a registrable interest born out of the grant by their mother. On the basis of this they sold some of the land to the defendants.

In the case of **Joseph Mathenge Kamutu -vs- Joseph Maina (2015) eKLR, Macharia Mwangi & 87 Others -vs- Davidson Kagiri (2014) eKLR** the court held that the appellant's action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent. It therefore dismissed the appellant's claim and granted an order of specific performance in favour of the respondent.

It is difficult to see how the plaintiff, having shared out her land to her sons, can claim it back from them after they have relied on that act of giving and sold some of it to third parties. The plaintiff appears to be exercising parental love to the extent of fighting her battles against the buyers who have already invested in the land. This is a battle which, ironically, her sons have shown themselves as unwilling to join her in.

Where one has made assurance or a promise to another person which was intended to affect the other party has acted upon it and thus affected their legal relations, the promisor cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made. The plaintiff granted land to her sons and they sold it.

In my view, the plaintiff remained the registered owner but in this court's view she holds the title to the portions occupied by the defendants

in trust for her sons and by extension for the defendants. The only part of the transaction between her and her sons that has not been executed is the formal transfer. There is quite a great amount of doubt that she would have put up any fight against the defendants had she already formally transferred the land into her sons' names.

CONCLUSION

33. In summary, the Plaintiff has not proved her case against the Defendants on a balance of probabilities while the defendants have proved their counterclaim on a balance of probabilities.

34. I therefore dismiss the plaintiff's suit and enter judgment for the defendants as prayed in **prayer No (a)** of the counterclaim.

For clarity the final orders shall be as follows:

a) The Plaintiff shall transfer 2.6 acres to the 1st Defendant, 6.9 acres to Tapkigen Kimaiyo and 2.5 acres to the 3rd Defendant, all out of Land parcel No. Cherangany/ Koitgum/252, and in default the Deputy Registrar of this Court will execute the necessary documents to effect the transfer of the portions aforesaid.

b) As the plaintiff was not the seller of the land I order that each party shall bear their own costs of the suit and counterclaim.

Dated, signed and delivered at Kitale on this 29th day of **January** of **2019**.

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bororio for the plaintiff

N/A for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019