



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 78 OF 2008

LILIAN JELIMO.....PLAINTIFF

VERSUS

ENOCK KIPKOECH KEMBOI.....1ST DEFENDANT

JOYCE CHEPCHIRCHIR TANGUT.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated **15/10/2008** and later amended on **3/2/2014**, the plaintiff sought the following orders:-

(a) A declaration that she is the owner of title number Kitale Municipality Block 1/Lessos /1224 and title number Kitale Municipality Block 1/Lessos 412 measuring 10.290 ha and 7.20 ha respectively.

(b) A permanent injunction to restrain the defendants their servants, agents or employees or anyone claiming on their behalf from interfering with or laying claim over the above stated properties.

(c) Costs.

(d) Interest.

(e) Any other relief this court may deem fit to grant.

The Plaintiff's Case

2. The plaintiff's claim in her amended plaint is that she is the registered proprietor of the suit properties and that upon the demise of her husband in **November 2007** the defendants began laying claim to the properties. The issue was taken before the Chief who ordered the plaintiff to surrender two acres to the defendants but she declined to comply. The issue was also taken before the District Officer though it is not clear what transpired then. The plaintiff avers that the defendant's actions amount to interference with her right to ownership of property.

The Defendants' Defence

3. The defendants filed joint amended defence and counterclaim on 3/4/2014 and a further amended defence and counterclaim on 3/10/2017, denying the plaintiff's claim. The gist of the defendant's defence and counterclaim is that the plaintiff obtained registration to the suit properties fraudulently as the same had been acquired by the defendants' father one **Tangut Bariwot** in **1969** but he passed on in **1982** before the property was transferred into his name. Thereafter the properties are said to have been registered in the name of the plaintiff's husband **Wilson Kipkorir Tangut** as he was the deceased's only son. The defendants aver that they have been residing on the suit premises since they were born and that it is the only home they know. According to them they only discovered that the land had been transferred into the plaintiff's name when the suit was filed. It is alleged that the plaintiff secretly transferred the suit land and in respect of Parcel No. 1224 and that she did so without having obtained prior letters of administration to her husband's estate. The defendants deny that they began laying claim to the property and aver that they were in occupation and that it was the plaintiff who began the dispute by threatening to evict them out of the premises hence their decision to seek help from the Provincial Administration. They seek orders to the effect that the new titles to the suit Parcels Nos. **1224** and **412** be cancelled and that they do revert to their Original Numbers **994** and **39** respectively and the register be rectified and costs of the suit and interest.

Reply to Defence and Defence to Counterclaim

4. The plaintiff filed a reply to defence and defence to counterclaim on 23/3/2014 and denied the allegations therein.

The Plaintiff's Evidence

5. The plaintiff testified on **18/2/2015** and on **16/9/2015**. Her evidence matched the contents of the plaint. She explained that her husband had owned the **LR No. 412** and that the Land Control Board gave its consent on **22/5/2002** and she transferred the same to her name on **16/5/2003**; that her husband also owned **LR No. 826** and the Land Control Board gave its consent on **22/5/2003** and the same was transferred to her and she has since subdivided the same into several sub-plots including plot no. **867**; that plot **867** was subsequently subdivided into plots nos. **994** and **995**; that plot no. **994** has been subdivided into plots nos. **1062,1063,1102, 1111** and **1112**. Plot no. **1062** was further subdivided into plots nos. **1130-1134** inclusive. Plot no. **1130** was subdivided into plots **1172** and **1173**. Plot no. **1172** was further subdivided into plots nos. **1215** and **1216**. Plot no. **1215** has been subdivided into plots nos. **1224** and **1225**. The plaintiff testified that she resides on plot no. **1224** and that she is utilizing plot no. **412**. She averred that the land was subdivided and sold in order to enable payment of medical bills for her late husband and to raise fees for her children. According to her the defendants do not reside on the suit land and they never claimed the properties while her husband was alive but did so only after his demise. She denied that the plots were transferred into her name after his death. She denied the allegation that her husband never signed the transfers to her name; however she did not keep any copies of the transfers.

6. On cross examination she admitted having gotten married while her husband was still on the suit premises but denied that her husband was staying with the defendants. She averred that Nancy and Joyce are married, and she has never been informed that the suit lands belonged to her father in law. Though she admitted that her husband's vehicle was involved in an accident, she denied that her husband transferred the plots to her because he wished to save them from execution proceedings in respect of proceedings arising from an accident in which his insured vehicle had caused some fatalities. She also admitted under cross examination that Rebecca and Ruth, her husband's sisters owned plots number **413** and **414** and that another, Mary Chebet, is occupying her own land.

7. **PW2, Nelson Otieno Odhiambo, Trans Nzoia Land Registrar**, testified on **18/9/2018**. His evidence is that minutes of the Land Control Board showing transfer plot no. **826** from the plaintiff's husband to the plaintiff are genuine. He dismissed the unsigned entries on **PEXh2** and **DMF18** as "*not serious*" and as "*anomalies capable of being corrected*".

8. **DW1 Joyce Chepchirchir Tangut**, the 2nd defendant, testified on **1/10/2018**. Her evidence is that her mother passed on in **1979** before her father's demise in **1982** when **DW1** was about **4** years old, being one of the **6** of his children; the plaintiff's husband passed on in **2007**; that her father's farm of **154** acres which was his share from land that was purchase by him and **17** others who were members of Lessos Farm called Chuma & Partners had bought through joint efforts from the Agricultural Development Corporation, was not registered in his name by the time of his demise; that **75** acres of the land were registered in her brother's name (the plaintiff's deceased husband); that **75** acres went to her stepmother; that **4** acres were given to her sister Mary Chebet Bariwot. She produced receipts vide which the land was bought by **Chuma & Partners** as **DExh 2(a) – (e)**. According to her the plaintiff was married by her brother while the family was still resident on the land in **1989** and her brother was registered to hold the land in trust for the family as he was the only son; his motor vehicle was involved in an accident; he died in **2007**. However he had transferred the suit land to the plaintiff in **2003**. Upon his death the plaintiff claimed the land and wanted her sisters in law to leave; Wilson gave her sister Ruth **4** acres out of the land. Mary, her sister was also given land from the suit land; she believed that the plaintiff obtained registration of plots number **1062** and **1224** without having first obtained letters of administration to Wilson's estate; **DW1** was still a student during that time and that is why she never got land but her sister Nancy (the original 1st defendant) was promised land by Wilson but she was never given land.

9. On cross examination **DW1** stated that the plaintiff moved her from plot **1062** where her mother's house was, to plot number **412**.

10. She denied ever having been married. She also testified that her sister Nancy (the original 1st defendant) was buried at a plot in Eldoret which she had purchased.

11. **DW2 Enock Kipkoech Kemboi** testified and adopted the statement of the original 1st defendant filed in this suit. He stated that the suit land belonged to his grandfather and that his mother and the 2nd defendant were administrators to his estate. He also stated that during holidays they would stay at the plaintiff's (and Wilson's) home.

12. **DW3 Rael Chepkas Mwaswai** testified that she and Tangut Bariwot were part of a group that purchased shares in Lessos Farm; that Bariwot's share in the land was **154** acres; that title to the land had not been issued by the time of Bariwot's death; that the plaintiff found Bariwot's children on the land when she got married to Wilson; that Wilson used to stay in the same house with the defendants and other sisters; that Mary Chebet one of the daughters was given a parcel by Bariwot; that Ruth and Rebecca were also given **4** acres each by Wilson; that Lessos Farm decided that the title would be registered in the name of Wilson who would distribute the land to the others. Upon cross examination she stated that she was one of the leaders of Lessos Farm who kept the records; that no-one had sold their land before the titles were issued; that by the time Bariwot died the oldest of his children could have been only **15** years old.

13. **DW4 Mary Chebet Bariwot** testified in the matter. Her evidence was that the plaintiff, her sister in law, was married to Wilson in **1987** while Wilson was still residing at his mother's home. She corroborated **DW3's** evidence on the purchase of the land by Bariwot, and added that by the time of Bariwot's death, he had not completed payments for the land and therefore **DW4** paid the remaining amount. She was given **4** acres during Bariwot's lifetime for the reason that her father considered that she had "guarded his property." She stated that elders resolved that the land be not registered in the name of the sisters but in the name of Wilson the only son. According to her, she, Ruth and Rebecca all got **4** acres. Joyce was still in school then while Nancy was still in Mombasa. Wilson had stated that he would give them land later on. Wilson lived in his mother's house on the suit land and when the plaintiff got married into the family she stayed in the same house. According to her Wilson never purchased the land. He was born in **1966** and was **16** by **1982** so he could not have afforded to buy the land. On cross examination she admitted that the Lessos Group shared out part of the land to her, Wilson and their stepmother.

14. **DW5 Helen Mutai**, Land Registrar West Pokot, testified in the matter. Her evidence was that she previously worked as Land Registrar Trans Nzoia between **2007-2018** and that the absence of a signature on the green card in respect of plot number **412** may have been

inadvertent and that it can be rectified if the Registrar becomes satisfied that it is necessary.

15. **DW6 Shem Kiptoo Sawe** testified in this suit and adopted his statement filed in the record. His evidence was that he used to be a senior chief, Kibomet Location Trans Nzoia County in **1993**; that his father and Bariwot lived in the same village; that the Bariwot land was about **150** acres and was subdivided between Bariwot's two wives; that the committee handling the land issue found it fit to have the land registered in the name of Wilson to hold in trust for the family; that Bariwot died while Wilson was about 10 years old; that Wilson's vehicle was involved in a fatal accident along Kiungani road; that Wilson feared that he would lose the family land and sought advice, and the witness and others advised him to seek an advocate as his car was not insured. He then transferred that land to his wife and his sister, and later on he was declared bankrupt by the court; that the plaintiff found the defendants and their other sisters living on the suit land; according to him, the eviction of the defendants would be an abuse of trust as it is family land; that according to him Bariwot passed on intestate while Wilson was still young. When cross examined he averred that as chief, he was an *ex officio* member of the committee between **1991-1993**. He stated that the basis of the information he gave in his testimony was the recollection from the meetings which the committee held in which it discussed the land, gave land to the owners and wound up the company. He also admitted that Wilson was seeking a way of securing family property and that he advised Wilson to transfer the land to his sisters and his wife. In his re-examination he stated that in Kalenjin customs land was held by sons and not daughters.

Determination

Issues for determination

16. The following facts are not in dispute:

That the suit land was purchased by Tangut Bariwot and not by Wilson, his son; that the land was part of land that Bariwot and a group calling itself Lessos Farm had purchased and Bariwot's share was 154 acres; that the plaintiff, upon marrying Wilson, went to reside on the land and found the defendants there; that by the time Bariwot died the land had not been formally registered in his name; that each of Bariwot's two houses was given 75 acres while four acres were given to one of the daughters; that however 75 acres were registered in Wilson's name; that Wilson gave two of his sisters 4 acres each excluding the two defendants herein; that the land has now been registered in the name of the plaintiff and serially subdivided into numerous portions.

17. The issues that arise for determination are:

(a) Whether the plaintiff holds the land in trust for the defendants.

(b) Whether the plaintiff obtained registration in her name over the suit land fraudulently;

(c) What orders should issue.

(a) Whether the plaintiff holds the land in trust for the defendants

18. The plaintiff averred in her evidence that she did not know the history regarding the acquisition of the land from Agricultural Development Corporation by members of the Chuma & Partners. The defendants filled her in on this missing history.

19. Evidence from the defence side makes it clear that the land was bought by the plaintiff's father in law and not by the plaintiff's husband. It is also clear from the evidence of the defendants that Wilson did not even strive to be registered as the proprietor, but was arbitrarily considered as the suitable candidate to hold the land on behalf of the family for the reason that his parents were deceased and he was the only son.

20. **DW4** averred that under Kalenjin customs it was the son and not the daughters who were vested with the responsibility of holding the land. This evidence was not controverted by the plaintiff in any manner.

21. I therefore find that there is sufficient evidence to enable this court hold that the plaintiff's husband held the land in trust for the defendants' family and that the land having been transferred to the plaintiff, she now by extension holds the land in trust for the defendants' family.

(b) Whether the plaintiff obtained registration in her name over the suit land fraudulently.

22. To resolve this issue an examination of the various transfers is required. It appears from the record that Wilson became the registered owner of plots number plot 412 on 3/2/1997 and plot no 826 on 12/2/2003. He apparently transferred the land to the plaintiff before his demise.

23. In respect of plot no 412, **16/5/2003** is the date appearing on its green card as the date of transfer to the plaintiff. That parcel is indicated as **7.20** ha which translates to **17.79** acres.

24. In respect of plot no 826, **12/2/2003** is indicated as the date of transfer to the plaintiff. That parcel is indicated as **13.00** ha which translates to **32.12** acres

25. The total acreage of the two parcels is **49.91** acres. If the amount of land originally registered in the name of the plaintiff's husband was **75** acres then a portion of land measuring **25.09** acres is unaccounted for in this suit. It can only be presumed that the same was disposed of

by Wilson before the parcels nos. 412 and 827 were transferred to the plaintiff.

26. If the transfers were executed by Wilson on those dates stated above, then it would have to be taken as true that he voluntarily transferred the land to the plaintiff. Wilson is said to have met his demise on **29/11/2007** long after the dates of the transfers.

27. Were the transfers genuine? The copies of executed transfers that were registered were not produced in evidence by either party. The court has to look elsewhere for evidence. The Land Registrar, Nelson Otieno confirmed that the minutes of the Land Control Board meeting of **22/5/2002** were genuine.

28. Minute number **DLB/91/02** reads “**Kitale Municipality Block 15/Lessos/826 – LCR 384/02. Transfer of 13.048 ha by W.K. Tangut to Lilian Jelimo as a gift.**” The consent letter dated **22/5/2002** corroborates the fact that a transfer in favour of the plaintiff was being prepared for registration.

29. Minute number **DLB/78/02** reads “**Kitale Municipality Block 1/Lessos/412 – LCR 38/02. Transfer of 7.20 ha by W.K. Tangut to Lilian Jelimo as a gift.**” The consent letter dated **22/5/2002** corroborates the fact that a transfer in favour of the plaintiff was being prepared for registration.

30. There is credible evidence that the land was transferred to the plaintiff by Wilson. That notwithstanding, can the transfer be faulted as being fraudulent? There is evidence that the registration of the Wilson was not prompted by himself and he had not purchased the land.

31. Evidence points to the fact that both Tangut Bariwot and his wife having died, the land committee that dealt the winding up issue in respect of Lessos Farm was at a loss as to whose name the land purchased by Bariwot should be registered in. They took initiative and chose to have the land registered in Wilson’s name. Such an arbitrary transfer by a non-owner can only be presumed to mandate the transferee to hold the property on behalf of the family of a deceased, for any other interpretation may lead to unjust enrichment of a transferee at the expense of all the other beneficiaries of the deceased’s estate. I use the term “non-owner” to refer to Lessos Farm for the reason that though they could transfer the land, it was legally Bariwot’s.

32. Wilson, apparently recognizing his trusteeship, even transferred two parcels each of 4 acres to each of his two sisters, Ruth and Rebecca. From his conduct, it can be safely concluded that Wilson knew that he was only holding the land as a trustee for the family.

33. However later on, he appeared to set out on an expedition to fritter the very resources that his father had gathered for his family. The minutes of the Land Control Board meeting of **22/5/2002** are dominated by transactions in which he was transferring numerous parcels carved out of the suit land to numerous third parties. It is this conduct that renders his transfer of plots to his wife, the plaintiff, suspect.

34. No evidence has been tabled by the plaintiff to support the allegation that her own sale of portions of the land transferred to her were prompted by any acute need. No evidence was presented that the portions disposed of to third parties during Wilson’s lifetime were sold to raise money for any medical expenses. No history of illness formed part of the plaintiff’s evidence.

35. Further, the speed with which the plaintiff has ensured multiple subdivisions of the land transferred to her is quite suspect. Her story that she required money for school fees for her children was not supported by any concrete evidence. She is deemed to have known the status of the land in question.

36. In view of the foregoing, it is the conclusion of this court that even though it would appear that all the legal requirements were observed in the transactions between the plaintiff and her husband there is evidence of intent on the part of the couple to defraud the rest of the family of its share in the land.

37. The transfers to the plaintiff were therefore part of the fraudulent scheme on the part of the plaintiff and her husband.

38. The conclusion here being that the plaintiff and her husband were out to defraud the rest of the family and hence disinherit them, this court can not condone their conduct by granting the plaintiff judgment herein.

(c) What Orders should issue?

39. I therefore find that the plaintiff has failed to establish her claim against the defendants on a balance of probabilities and that the defendants have established their counterclaim against the plaintiff on a balance of probabilities.

40. I issue the following orders:

(a) The plaintiff’s suit is dismissed with costs.

(b) The defendant’s counterclaim is allowed.

(c) A declaration that the transfer of the suit land to the defendant was fraudulent.

(d) An order that all resultant subdivisions emanating from parcels number Kitale Municipality Block 1/Lessos/994 and Kitale Municipality Block 1/Lessos/39 are hereby nullified and all the titles issued in respect thereof are hereby cancelled and that the Land Register be rectified to reflect the reinstatement of parcel numbers Kitale Municipality Block 1/Lessos/994 and Kitale Municipality Block 1/Lessos/39 respectively.

(e) The plaintiff in the main suit shall bear the costs of the main suit and the costs of the counterclaim.

It is so ordered.

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

MWANGI NJOROGI

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bororio holding brief for Muniolo for the defendant

Mr. Bungei holding brief for Mr. Kamau for the plaintiff

COURT

Judgment read in open court.

MWANGI NJOROGI

JUDGE

29/01/2019