



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 662 OF 2012

SOLOMON ODIRA OKELLO.....1ST PLAINTIFF

FRIDAH BILHA M. SHIROYA.....2ND PLAINTIFF

VERSUS

ESTHER LABOSO.....DEFENDANT

JUDGEMENT

1. By a plaint dated 11th November 2010 and amended on 16th May 2013, the 1st and 2nd Plaintiffs sought the following reliefs against the Defendant;

- a. A permanent injunction be issued against the Defendant, her servants, agents and/or assigns in respect to the suit property. (sic)
- b. An eviction (sic) to be issued against the Defendant, her servants, agents and/or assigns in respect of land parcel No. Uasin Gishu/Illula/297 and an order that the 2nd Applicant/Plaintiff do enjoy quiet possession of the land.
- c. A government assessor be ordered to conduct an assessment on the damages on the ground in respect to paragraph eight (8A).
- d. In respect to the report as per prayer (b) above the Defendant be ordered to compensate the 2nd Plaintiff.
- e. The Defendant be restrained from interfering with the transfer process between the 1st Plaintiff alluded in paragraph ten (10A) above. (sic)
- f. An award of mesne profits.
- g. Costs of this suit.
- h. Interest in (c), (f) and (g) above at court rates till payment in full.
- i. Any other or further relief this honourable court may deem fit and just to grant.

2. It was pleaded in the plaint that on diverse dates between 1985 and 1986 the 1st Plaintiff purchased Title No. Uasin Gishu/Illula/297 (hereinafter called *the suit property*) from one Lomekur Loitakono (hereinafter called *Lomekur*). It was further pleaded that the 1st Plaintiff later on sold the suit property to the 2nd Plaintiff in 2008.

3. The Plaintiffs further pleaded that the Defendant who was at some point the handmaiden of the wife of Lomekur, Tapsolo Loitakono, (hereinafter called *Tapsolo*) had wrongfully trespassed into the suit property, destroyed trees thereon, harvested stones thereon and destroyed some structures thereon. It was contended that the Defendant had, therefore, denied the 2nd Plaintiff quiet enjoyment and user of the suit property.

4. The Defendant filed a defence and counterclaim dated 16th January 2013 which was amended on 22nd May 2013. In the said pleading, the Defendant denied the Plaintiffs' claim and raised a counterclaim against the Plaintiffs. The Defendant denied having been a handmaiden of Tapsolo and asserted that she was an adopted daughter of Lomekur and Tapsolo.

5. The Defendant further denied having trespassed into the suit property and stated that she was lawfully in occupation at all material times. She asserted that she was the sole beneficiary of the estate of the late Lomekur who was the registered owner of the suit property.

6. In her counterclaim, the Defendant pleaded that the suit property was fraudulently, illegally and in breach of statute transferred to the Plaintiffs. She enumerated several particulars of fraud, illegality and breach of statute against the Plaintiffs in paragraph 3 of the counterclaim. The Defendant, therefore, sought the following reliefs in the amended counter-claim;

*a. A declaration that the suit parcel of land, namely, Uasin Gishu/Illulla/297 was not available for alienation to the Plaintiffs under the provisions of the **Lands Act and Cap 160 Laws of Kenya**, the title deed having inter alia been issued over the said parcel of land to the 1st and 2nd Plaintiffs on 18th June 2010 and 27th of September 2012 respectively.*

b. A declaration that all steps taken and all the documents held by the 1st Defendant over land parcel numbers Uasin Gishu/Illulla/297 are null and void ab initio and do not confer any legal interest on the Plaintiffs over the said parcels of land and that the title deed held by the 2nd Plaintiff over the same be and is hereby ordered cancelled and expunged from the register forthwith.

c. An order permanently restraining the Plaintiffs, their servants and or agents from trespassing into, constructing upon, selling, transferring, leasing and or in any other manner whatsoever interfering with land parcel number Uasin Gishu/Illulla/297.

d. Costs of this suit.

e. Any other or further reliefs as the court may be pleased to grant.

7. The Plaintiffs filed a reply to the amended defence and defence to the amended counterclaim on 3rd September 2013. By their reply, they joined issue upon the amended defence. By their defence to the amended counterclaim, the Plaintiffs denied all the allegations contained therein including the pleaded particulars of fraud, illegality and breach of statute. The Plaintiffs asserted that they had acquired the suit property lawfully and procedurally.

8. There is no indication on record of the parties having filed an agreed statement of issues for determination under **Order 11 of the Civil Procedure Rules**. The court shall, therefore, proceed to frame issues for determination as provided for under **Order 15 Rule 2 of the Civil Procedure Rules**. In the opinion of the court, the following issues arise for determination in this suit;

a. Whether the 1st Plaintiff unlawfully acquired the suit property from the late Lomekur.

b. Whether the subsequent transfer of the suit property by the 1st Plaintiff to the 2nd Plaintiff was lawful.

c. Whether the Defendant is entitled to the suit property or any part thereof by reason of being an adopted daughter of Lomekur or beneficiary of his estate.

d. Whether or not the Plaintiffs are entitled to the reliefs sought in the amended plaint.

e. Whether or not the Defendant is entitled to the reliefs sought in the amended counter-claim.

f. Who shall bear the costs of the suit and the counter-claim.

9. The court has considered the evidence and written submissions on record on the 1st issue. The 1st Plaintiff's case was that he lawfully bought the suit property from Lomekur for valuable consideration between 1985 and 1986. He stated that consent of the Land Control Board (LCB) was duly obtained and that at the time of purchase the suit property was charged to the Settlement Fund Trustees (SFT). It was his case that he took it upon himself to service the outstanding loan after which the suit property was transferred to him.

10. The court has also considered the evidence of the Assistant Director of Land Adjudication and Settlement who testified as PW 3. He stated that the suit property was initially allocated to Lomekur by SFT who later on transferred it to the 1st Plaintiff in 1990. The consent of the LCB was obtained for the transaction and he produced the relevant file which documented the various transactions on the suit property.

11. The Defendant, on the other hand, challenged the transfer of the suit property from the late Lomekur to the 1st Plaintiff on account of alleged fraud, illegality and breach of statutory provisions. Although the Defendant contended that the late Lomekur never sold the suit property to the 1st Plaintiff the court finds that this contention has not been demonstrated. The transaction between Lomekur and the 1st Plaintiff took place long before the Defendant came into the picture. She could not possibly have known all the details and transactions which may have taken place earlier on. She could not possibly tell whether or not any consideration was paid, either in part or in full.

12. The court has taken note of the Defendant's evidence at the trial when she stated that at some point the late Lomekur had informed her that he had sold at least 2 acres of the suit property to the 1st Plaintiff. The 1st Plaintiff's contention of having purchased the suit property cannot be said to be without basis. The file produced by PW 3 who was an Assistant Director of Land Adjudication and Settlement lends credence to the 1st Plaintiff's evidence of having purchased the suit property from the late Lomekur.

13. The court is also unable to accept the Defendant's contention that the transfer of the suit property from Lomekur to the 1st Plaintiff was

null and void for lack of consent of the LCB for two reasons. First, the court accepts the evidence of PW 3 that the consent of the LCB was duly obtained for the transaction. Second, even if such consent had not been obtained or had been obtained out of time, such a shortcoming could not necessarily invalidate the transaction in its entirety. See **Eldoret Civil Appeal No. 51 of 2015 Willy Kimutai Kitilit Vs Michael Kibet [2018] eKLR**.

14. The Defendant's allegation that the documents which the 1st Defendant used in the acquisition of the suit property were forgeries was not proved at all or to the required standard. There was no evidence tendered by any of the public authorities concerned with the generation and custody of such documents to demonstrate the alleged forgery. On the contrary, the Office of Land Adjudication and Settlement confirmed that all transactions and documentation in relation to the suit property were in order.

15. The court agrees with the submission by the Plaintiffs' advocates that a litigant who alleges fraud or conspiracy to defraud bears a heavy burden of proof. As was stated in the case of **R.G. Patel V. Lalji Makanji [1957] EA 314** allegations of fraud must be proved on a standard which is a higher than a balance of probabilities but not as high as beyond reasonable doubt. In the case of **Evans Otieno Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR** Majanja J held, *inter alia*, that;

“In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd Vs Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case”.

16. It is, therefore, evident that the Defendant has failed to substantiate and prove the particulars of fraud, illegality and breach of statute pleaded in the amended counter-claim. There was no evidence tendered to suggest that the late Lomekur had complained of any fraud or illegality against the 1st Plaintiff during his lifetime. It is clear from the material on record that the suit property was transferred to the 1st Plaintiff during the lifetime of Lomekur. The 1st issue is therefore answered in favour of the 1st Plaintiff.

17. The 2nd issue is whether the subsequent transfer of the suit property by the 1st Plaintiff to the 2nd Plaintiff was lawful. The Plaintiffs' case was that the transaction was lawful and regular. The evidence of PW 3 who produced the relevant file found nothing irregular or unlawful about the transactions with regard to the suit property.

18. The court has examined the certified copy of the land register for the suit property. It shows that the register was opened on 12th June 1986 when SFT was entered as the proprietor. The suit property was transferred to Lomekur in 1988 who in turn transferred it to the 1st Plaintiff in 2010. The 1st Plaintiff thereafter transferred it to the 2nd Plaintiff in 2012. There is no evidence of fraud, illegality or irregularity on the face of the register. There is no indication of any restriction or caution having been lodged by any person. The file produced by PW 3 does not indicate any dispute having been brought to the attention of the authorities.

19. The court, therefore, finds and holds that the transfer of the suit property to the 2nd Plaintiff was lawful. The Defendant has failed to demonstrate that the said transfer was tainted with fraud, illegality or breach of statutory provisions. The 2nd issue is, therefore, answered in favour of the Plaintiffs.

20. The 3rd issue is whether or not the Defendant is entitled to the suit property or a share thereof. The Defendant contended that she was entitled to the suit property by reason of being an adopted daughter of Lomekur and a beneficiary of his estate. There was a contest on whether or not the Defendant was an adopted daughter of Lomekur. The Plaintiffs disputed that she was ever adopted as such.

21. The court has considered the evidence and submissions on record on this issue. It is not entirely clear whether the Defendant was adopted as a daughter by Lomekur or married by Lomekur's wife, Tapsolo under customary law. Equally unclear was the particular customary law under which the Defendant was either adopted or married into the family of Lomekur and Tapsolo. The evidence on record shows that Lomekur hailed from the Pokot community. His wife Tapsolo was from the Nandi community whereas the Defendant was from the Kipsigis community.

22. Assuming that the Defendant was either validly adopted or married into the family of Lomekur, then any claim for a share of the estate of either Lomekur or Tapsolo would fall within the province of the Law of Succession. There is no evidence on record to show that the Defendant had taken out letters of administration or taken any steps to vindicate her perceived rights under the Law of Succession Act. In those circumstances, the court is not satisfied that the Defendant has any legitimate claim against the Plaintiffs.

23. The court is further of the view that even if the Defendant had taken steps under the Law of Succession Act with respect to the estate of either the late Lomekur or late Tapsolo, the only legitimate claim would lie in respect of their free assets. There would be no legitimate claim against property which Lomekur had disposed of during his lifetime. Such property would not constitute part of his estate under the law. The court, therefore, answers the 3rd issue in the negative.

24. The 4th issue is whether the Plaintiffs are entitled to the reliefs sought in the amended plaint. The court has already found that the 1st Plaintiff's acquisition of the suit property from Lomekur was lawful. The court has also found that the transfer to the 2nd Plaintiff was lawful. It would, therefore, follow that the Plaintiffs are entitled to the reliefs sought in the amended plaint.

25. The 5th issue is on the remedies sought by the Defendant. The court has found that the Defendant has failed to prove that the Plaintiffs' acquisition of the suit property was tainted with fraud, illegality and breach of statutory provisions. The court has also found that the Defendant is not entitled to the suit property even in her capacity as an adopted daughter of the late Lomekur. It would, therefore, follow that the Defendant is not entitled to the reliefs sought in the amended counterclaim, or any one of them.

26. The 6th and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. There is no good reason why the successful litigants should not be awarded the costs in this suit. Accordingly, the Plaintiffs shall be awarded the costs of the suit and the counterclaim.

27. The upshot of the foregoing is that the court finds that the Plaintiffs have proved their case to the required standard and judgement shall be entered in their favour. The court, however, finds no merit in the Defendant's counter-claim and the same shall accordingly be dismissed. Consequently, the court makes the following orders;

- a. Judgement be and is hereby entered for the Plaintiffs against the Defendant in terms of prayers (a) (b) of the amended plaint.
- b. The Defendant's counterclaim be and is hereby dismissed in its entirety.
- c. The Plaintiffs are hereby awarded costs of the suit and the counterclaim to be borne by the Defendant.
- d. The Defendant shall have grace period of sixty (60) days within which to vacate the suit property in default of which any eviction shall be carried out in strict compliance with the applicable law.

28. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **ELDORET** this **24TH day** of **JANUARY, 2019**.

In the presence of the 2nd Plaintiff in person

1st Plaintiff Absent

Mr. Barasa holding brief for Mr. Kibii for the Defendant

Court clerk Emmanuel

Y.M. ANGIMA

JUDGE

24.01.19