



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 29 OF 2014

MUSA KIPTAI MULWO.....PLAINTIFF

VERSUS

NGOBIWA FARMERS CO-OPERATIVE

SOCIETY LIMITED.....1ST DEFENDANT

ALBINA J. KIMONGE.....2ND DEFENDANT

JOSEPH KIPROTICH RUTO.....3RD DEFENDANT

ANTHONY CHEBOIBOCH.....4TH DEFENDANT

JUDGMENT

By a plaint dated 30th January 2014 the plaintiff herein sued the defendants seeking for the following prayers;

- a. A declaration that there was no parcel available for the 1st defendant to sub-divide and distribute to the 2nd, 3rd and 4th defendant known as LR No. SOY/SOY/NAVILLUS BLOCK 10/2287,2288 AND 2289 since the same had been paid for, shown and allocated to the Plaintiff.
- b. A declaration that LR No. SOY/SOY/NAVILLUS BLOCK 10/2287,2288 and 2289 belong to the Plaintiff and is part of LR No. SOY/SOY/NAVILLUS BLOCK 10/2290 and were illegally registered and transferred by the 1st defendant to the 2nd, 3rd and 4th Defendants without the consent of the plaintiff.
- c. An order of perpetual injunction restricting the defendant from entering or interfering with the plaintiff's parcels of land which are fenced all round and that the plaintiff is in occupation since 2000 as stated in (b) above.
- d. A declaratory order that LR No. SOY/SOY/NAVILLUS BLOCK 10/2287,2288 AND 2289 were illegally obtained and registered in the names of the 1st, 2nd, 3rd and 4th defendants and the same be cancelled and registered in the name of the plaintiff.
- e. Costs of the suit.

The plaintiff filed an application under certificate of urgency dated 4th February 2014 seeking for a temporary injunction restraining the defendants from interfering with the suit land and an inhibition stopping the registration or disposal of the suit land until this matter is heard and determined. The court granted the interim orders as prayed which were later confirmed pending the hearing of the case.

Plaintiff's Case

The brief facts of the case are that the dispute arises over ownership of 5 acres of land that the 2nd, 3rd and 4th defendants have title to. It was the Plaintiff's case that he was a member of the 1st defendant and he made payments towards purchase of various portions of land.

The plaintiff stated that he purchased shares and in the year 2000 he was given 11 acres of land where 1 acre was for public utilities thus leaving him with 10 acres which he began developing. The plaintiff further stated that in the year 2005 he paid Kshs. 1,250,000/- to purchase additional 10 acres from the 1st defendant whereby he was shown the parcel of land in 2006.

It was the plaintiff's evidence that he fenced the parcel of land, developed it and that when he went to collect the title deed in 2011, he found out his parcel of land had been reduced to 15 acres. The plaintiff stated that he discovered that the land had been subdivided into LR No. SOY/SOY/NAVILLUS BLOCK 10/2287,2288,2289 and 2290 without his knowledge or consent and registered in the names of the defendants. He therefore lodged a caution on the land but later discovered that the same had been removed and the land registered in the names of the 2nd, 3rd and 4th defendants.

The plaintiff gave a chronology of how he became a member of the 1st defendant and the purchase of the shares together with the additional parcels from other members which he paid for in full. He produced receipts of payment as proof of the purchase of the suit land.

PW1 testified that there was no balloting done and that the 1st defendant engaged in fraudulent activity by introducing non-members to displace bona fide members of the society and that the 2nd, 3rd and 4th defendant had nothing to confirm membership or payment of any amount. The plaintiff therefore urged the court to enter judgment against the defendants as prayed in the plaint.

On cross examination the plaintiff reiterated his evidence and stated that he did not have some payment receipts in his name because he had bought the shares from willing sellers who had no complaint against him. The plaintiff also confirmed that no one was issued with a share certificate by the 1st defendant and that he was shown the beacons for the 20 acres.

The 1st defendant did not tender any evidence therefore they closed their case.

2nd, 3rd and 4th Defendants' Case

The 2nd, 3rd and 4th defendants gave evidence and admitted that they have never been in occupation of the suit land. DW1 stated that the late husband was the member of Ngobitwa Farmers who had one share of 1 acre but she later sold the land. She neither had a sale agreement nor payment receipts for the membership. DW1 also stated that it is her brother in law one William Kendagor who sold the land. She also confirmed that she has never been in occupation of the suit land and that she never attended any Land Control Board. It was also her evidence that she just signed the documents which were brought to her to her home.

DW2 stated that he was a member of the 1st defendant and that he had one share but did not have receipts in respect of the payment made to the 1st defendant. He confirmed that he has never taken possession of the suit land even though he had been shown the land. He further stated that he has never gone to the Land Control Board and that he got the title deed from the 1st defendant. He however did not state why he had not taken possession of the land and yet he had a title deed. DW2 also stated that he did not have any problem with the 1st defendant.

DW3 also gave evidence and stated that he paid for 3 acres but did not have receipts to prove the same. He stated that he was shown the parcel of land in 2014 and that the title deeds were processed by the lawyers of the 1st defendant. He did not attend a Land Control Board. He also stated that he is not in occupation of the suit land and that the plaintiff is the one in occupation. He stated that he has no dispute with the 1st defendant. The defendants therefore closed their case.

Counsel filed written submissions and reiterated their respective client's evidence and submitted on the issues to be determined by the court.

Plaintiff's Submission

Counsel submitted that the 2nd, 3rd and 4th defendants had nothing to confirm membership or payment of any amount and that the plaintiff proved payment to the 1st defendant and supported his case with banking slips.

It was further Counsel's submission that the 1st defendant has not refunded the plaintiff the amount equivalent to five (5) acres which the plaintiff is claiming. Counsel stated that the 1st defendant had the obligation to distribute the property of the company to its members in a manner which is transparent, equitable and just according to contribution of each member and that it is clear from the evidence on record that the plaintiff was shown his twenty (20) acres after paying survey fees of which he took possession of.

Mr. Kipkenei Counsel for the plaintiff also took issue with the fact that the process was not subjected to the relevant Land Control Board thereby denying the plaintiff the opportunity to raise the necessary objection. The 1st defendant did not give evidence in court to shed light on the allegations attributed to it by the plaintiff.

Counsel further submitted that the total acreage of the 2nd, 3rd and 4th defendants measures five (5) acres which is a confirmation that this was what was taken away by the 1st defendant and is exactly the entitlement of the plaintiff. He therefore urged the court to enter judgment as prayed in favour of the plaintiff.

1st Defendant's Submission

It should be noted that the 1st defendant did not tender any evidence in this matter but filed written submissions. Counsel submitted that the issues for determination by the court are the relationship between the Plaintiff and the 1st Defendant, whether the Plaintiff is entitled to the suit property claimed and whether the 1st Defendant deprived the Plaintiff of the proprietorship of the suit property.

On the 1st issue Counsel submitted that the plaintiff neither produced a member's list nor share certificate to show that he was a paid up member of the 1st Defendant. He cited Section 17 of the Co-operative Society Act (Chapter 490, Laws of Kenya) which provides;

"No member of a Co-operative Society shall exercise any of the rights of a member unless he has made such payment to the Society in respect of membership, or has acquired such interest in the society as may be prescribed under this Act or under the by-laws of the society. "

Counsel further alluded to section 3 of the Contract Act and the Land Control Board in a transaction of agricultural land. He therefore urged the court to dismiss the plaintiff's case with costs for lack of proof.

Counsel for the 2nd 3rd and 4th defendants also filed written submissions and stated that the 2nd 3rd and 4th defendants are the registered proprietors and have title deeds of the parcels of land namely title No. SOY/SOY/BLOCK 10 (NAVILLUS) 2287, 2288 and 2289 respectively by actions of both the 1st defendant and the Land Registrar who is not a party in this suit after the subdivision of parcel number SOY/SOY/BLOCK 10 (NAVILLUS)/12.

Counsel further submitted that certificates of title or the title deeds issued by the Land Registrar upon registration of the parcels of land namely title No. SOY/SOY/BLOCK 10 (NAVILLUS)/2287, 2288 and 2289 (alias SOY/SOY/ BLOCK 10 (NAVILLUS)/2287, 2288 and 2289) are prima facie or conclusive evidence of proprietorship of the 2nd 3rd and 4th defendants respectively under the provisions of section 26,30, 34, 35 of and the Land Registration Act. He urged the court to dismiss the plaintiff's suit against the defendants.

Analysis and determination

The issues for determination in this case are as to whether the plaintiff was a member of the 1st defendant society, whether the plaintiff is the rightful owner of the suit land, whether the defendants purchased the suit land and who is entitled to the suit land.

On the 1st issue, the 1st defendant submitted that the plaintiff did not produce any share certificate to prove that he is a member of the society. Counsel cited section 17 of the Cooperatives Societies Act which provides thus

'No member of a co-operative society shall exercise any of the rights a member unless he has made such payment to the society in respect of membership, or has acquired such interest in the society as may be prescribed under this Act or under the by-laws of the society'

This line of argument was counterproductive as the 1st defendant did not call any evidence or produce any exhibit of the list of its members. The plaintiff however produced payment receipts into an account at Cooperative Bank held by the 1st defendant. What was the plaintiff paying for in an account belonging to the 1st defendant? The 1st defendant did not show that the plaintiff had erroneously paid money into their account. If there was such error, there was no proof of refund of the money to the plaintiff. The 1st defendant cannot be allowed to retain the plaintiff's money and the land. If the plaintiff was not a member then how did he get the 20 acres or the parcel of land that he is in occupation of? The 2nd 3rd and 4th defendants also confirmed that they have titles to the 5 acres the plaintiff is claiming but they have no occupation as the plaintiff is in possession.

Further there are minutes of the meeting of Ngobitwa Baringo dated 1st October 2004 where the Plaintiff's name is appears.. It should also be noted that the 1st defendant wrote a letter to the plaintiff purporting to expel him from the society. The letter acknowledges that the plaintiff's portion of the land was reduced from 11.4 acres to 9.9 acres and that he bought out other members without notifying the society. The 1st defendant could not have purported to expel a person who is not their member. I therefore find that the plaintiff was a paid up member of the 1st defendant.

On the 2nd issue as to whether the plaintiff is the owner of the suit land, it is not disputed that the plaintiff is the one in occupation of the 20 acres of which 5 acres are in contention. It is also admitted by the defendants that it is the plaintiff who is in occupation. It is evident that the plaintiff made payments to the society for shares and paid survey fees for the land.

Why are the defendants holding titles of which they have never taken occupation of? Why have they never taken occupation of their land which they were shown by the 1st defendant? There is a likelihood that they do not own the land that is why they are not interested in taking occupation. Why have the defendants not sued the plaintiff for not allowing them to take what is rightfully theirs? The defendants do not have a good title. They are on the same side with the 1st defendant who facilitated the irregular issuance of title to them.

The defendants did not produce any document to prove the process how they acquired the suit land and the titles. Unlike the plaintiff who had receipts and is in occupation the defendants were beneficiaries of a flawed process.

Section 26 of the Land Registration Act

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, 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 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

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

As Justice Munyao put it in the case of **Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR**

... it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions’.

The defendants have produced as Defence exhibits 1,2 and 3 original title deeds to the suit property, however they have failed to provide evidence of how they were allocated the land.

I find that the plaintiff is the rightful owner of the suit land as the defendants irregularly acquired the title deeds. They did not satisfy the court as to how they acquired the titles. They have not provided the consent from the Land Control Board which allowed them to subdivide the land amongst themselves. Further, they have not provided any proof of payment for the parcels of land or payment of survey fees whereas the plaintiff has provided proof that he made such payments to the 1st defendant.

On the last issue as to who is entitled to the suit land, the plaintiff has proven that he made payments for the 20 acres vide receipts. The defendants have failed to prove how they acquired the titles. There is no proof of payment of any kind to the society that suggests that they paid for the value of the parcels of land.

I have considered the evidence of the parties, the submission of Counsel, judicial authorities cited and come to the conclusion that the plaintiff has proved his case against the defendants to the required standard. I therefore make the following orders.

- a. A declaration that there was no parcel available for the 1st defendant to sub-divide and distribute to the 2nd, 3rd and 4th defendant known as LR No. SOY/SOY/NAVILLUS BLOCK 10/2287,2288 and 2289 since the same had been paid for, shown and allocated to the Plaintiff.
- b. A declaration is hereby issued that LR No. SOY/SOY/NAVILLUS BLOCK 10/2287,2288 and 2289 belongs to the Plaintiff and is part of LR No. SOY/SOY/NAVILLUS BLOCK 10/2290 and were illegally registered and transferred by the 1st defendant to the 2nd, 3rd and 4th Defendants without the consent of the plaintiff.
- c. An order of perpetual injunction is hereby issued restricting the defendant from entering or interfering with the plaintiff’s parcels of land which are fenced all round which the plaintiff has been in occupation since 2000 as stated in (b) above.
- d. A declaratory order is hereby issued that LR No. SOY/SOY/NAVILLUS BLOCK 10/2287,2288 AND 2289 were illegally obtained and registered in the names of the 1st, 2nd, 3rd and 4th defendants and the same are hereby cancelled and be registered in the name of the plaintiff.
- e. The defendants to pay costs of the suit to the plaintiff.

Dated and delivered at Eldoret this 22nd day of January, 2019

M.A ODENY

JUDGE

Judgment read in open court in the presence of Mr. Kipnyekwei holding brief for Kipkenei for Plaintiff and Miss Khadambi holding brief for Cheptarus for 2nd, 3rd and 4th defendant and in the absence of Mr.Aseso for 1st defendant.

M/s. Topista – Court Assistant.