



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 107 OF 2017

(Formerly Machakos HCCC No. 71 of 2011)

NICHOLAS MAYIANI PARDIYIO

JACKSON PARDIYIO KARONCHO

KARONCHO PARDIYIO

SOPILAL ENE PARDIYIO (Suing in their

capacity as the Administrators of the Estate of

Pardiyio Ole Leisanka Shungea – Deceased).....PLAINTIFFS

VERSUS

PETER KANYORO WAINAINA.....DEFENDANT

JUDGEMENT

By a Plaint dated the 24th March, 2011, the Plaintiffs pray for judgement against the Defendant for:

- a) A permanent injunction do issue restraining the Defendant whether by himself or by his servants, agents or employees from transferring, selling, charging, alienating or in any way whatsoever dealing with the parcel of land known as LR. No. Kajiado/ Mailua/ 57;
- b) A declaration that the Defendant purchased only 2.2 Hectares of land in LR. No. Kajiado/ Mailua/ 57;
- c) An order for revocation of the Defendant's title and for the transfer of 6.6 Hectares out of LR No. Kajiado/ Mailua/ 57 to the Plaintiffs in their capacity as the administrators of the estate of Pardiyio Ole Leisanka Shungea.
- d) Costs of this Suit.

The Defendant filed his Statement of Defence dated the 8th April, 2011 where he admitted that prior to 1978 the deceased was the registered proprietor of land parcel number Kajiado/ Mailua/ 57 measuring 2.2 hectares and not 8.8 hectares as per the available official records from the Land Registry at the time. He contends that the deceased agreed to sell to him the whole parcel of land Kajiado/ Mailua/ 57 at a consideration of Kshs. 16, 000/ = and not a portion of the land as alleged. He avers that vide an application dated the 10th July, 1978, the deceased applied for consent of the Land Control Board to transfer the whole of land parcel number Kajiado/ Mailua/ 57 to him, which consent was granted. He states that by a transfer dated the 29th September, 1978 executed by the Deceased and himself, the Deceased transferred Kajiado/ Mailua/ 57 to him. He denied the allegations of fraud contained in the Plaint, contended that the suit is statute barred and claimed the Plaintiffs have no legal capacity to institute the suit herein as there was no privity of contract between them. He admitted the jurisdiction of the Court but sought for the suit to be dismissed with costs.

In providing oral testimony, the Plaintiffs' called four witnesses while the Defendant had two witnesses.

Evidence of the Plaintiffs'

It was the Plaintiffs' evidence that the deceased only sold the Defendant 2.2 hectares and not 8.8 hectares as he claimed. They insist the deceased only sold to the Defendant a portion of the land and not the whole of it and he got fraudulently registered on the remaining portion. The Plaintiffs' insist there is no proof of sale but all their witnesses confirmed the deceased never challenged the sale from 1978 until his demise in 1992. All the witnesses did not dispute the application for consent of the Land Control Board and Transfer Form, which indicated it was Sale of the whole parcel of Land. The Plaintiffs' raised the issue of the Defendant fraudulently acquiring the extra portion of the land in 2011.

Evidence of the Defendant

The Defendant claimed he purchased the suit land in 1978 at an agreed purchase price of Kshs. 16,000/=. He referred to the application to the Poorka Land Control Board for consent to transfer suit land, which consent was granted. He produced a transfer dated the 29th September, 1978 that they jointly signed with the deceased and confirmed in court that he received his title deed on the same date. The Defendant confirmed being in actual possession of the suit land which he had even used as collateral for a loan. He stated that the Plaintiffs had never raised any concern over the suit land from 1978 up to 2011 after the deceased demise.

Both the Plaintiffs and the Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the pleadings filed herein including the exhibits produced and upon hearing testimonies from all the witnesses as well as considering submissions filed by the parties, the following are the issues for determination:

- Whether the Defendant bought the whole of land parcel number Kajiado/ Mailua / 57 from the deceased.
- Whether the Defendant fraudulently got registered as the owner of the whole land parcel number Kajiado/ Mailua/ 57
- Whether the Plaintiffs are entitled to the orders sought.
- Who should bear the costs of the suit.

As to whether the Defendant bought the whole of land parcel number Kajiado/ Mailua/ 57 from the deceased. It was the Plaintiffs' contention that the deceased never sold the whole of Kajiado/ Mailua/ 57 to the Defendant but only 2.2 hectares instead of the 8.8 hectares. From the application for consent of the Land Control Board that was produced in Court, it indicated that the land to be sold was the whole of it and not a portion of the same as alleged by the Plaintiffs. After the issuance of the consent by the Poorka Land Control Board, the whole parcel of land passed to the Defendant. The consent letter even refers to the entire suit land and the transaction is indicated as a sale and not subdivision of a portion of Kajiado/ Mailua/ 57. Further, the deceased and the Defendant jointly executed the transfer documents, which were witnessed by Councillor Moses Ntari Ole Ketukei. It was DW1 and DW2's testimony that the Defendant took possession of the suit land from 1978. DW1 even confirmed in court that he took a loan and used the suit property as collateral for the loan. PW1 and PW2 were hard pressed to explain why they never raised any complaint in respect of the sale of the suit land from 1978 up to 2011. It is worth noting that the deceased sold the land in 1978, and died in 1992 without raising any complaints in respect of the acreage of the suit land the Defendant had purchased from him. From the averments of the witnesses, it is my view that the Plaintiffs' allegations are not credible as in one breathe they admit the Defendant purchased a portion of the land but within the Application for Caution which they presented in Court, they deny that the deceased sold land to the Defendant. For a Sale of Land to be successful, it entails a process, which in this instance had been adhered to by the deceased as well as the Defendant that culminated in the transfer including issuance of the title deed to the Defendant. The Plaintiffs claimed the person who witnessed the transaction was an in law to the Defendant and hence could have assisted the Defendant participate in the fraud. They however did not adduce any evidence to prove the deceased lodged a complaint against the Defendant in respect of the suit land. From the Plaintiffs' witnesses oral evidence which at times was contradictory, I believe the deceased never challenged the sale in his lifetime because it was a genuine one. At this juncture I hold that the Plaintiffs' do not have clean hands in respect of their claim against the Defendant. It is against the foregoing, I find that the defendant indeed bought the whole of land parcel number Kajiado/ Mailua/ 57.

As to whether the Defendant fraudulently got registered as the owner of the whole land parcel number Kajiado/ Mailua/ 57.

It was the testimony of all the Plaintiffs' witnesses that the deceased never sold the whole parcel of land to the Defendant but only sold 2.2 hectares. They pleaded in their Plaint that the Defendant fraudulently got registered on the whole parcel of land. They insisted in the Land Registry, the suit land was indicated as measuring 8.8 hectares and that was their borne of contention. However, as I have alluded above that the Transfer Form and the Application for Consent to Transfer which were produced as exhibits all indicated the transaction was for the whole parcel of land Kajiado/ Mailua/ 57 which measured 2.2 hectares. The burden of proof was upon the Plaintiffs' to adduce evidence from a Land Registrar or Surveyor to confirm the exact acreage of the suit land in 1978 and why there was an anomaly, which evidence they did not provide. It was DW1's evidence that no one had complained about his registration until after the deceased demised. None of the Plaintiffs' witnesses itemized the alleged acts of fraud against the Defendant. The Plaintiffs' further failed to canvass any evidence to prove the steps they took against the Defendant when they discovered the alleged fraudulent registration. It is interesting to note that one of the Plaintiffs' witnesses had not even been borne when the transaction occurred and relied on what his mother told them. As regards standard of proof of fraud, the law is quite clear. In ***R. G. Patel v. Lalji Makanji [1957] EA 314*** the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

The Court takes judicial notice of the fact that despite the Plaintiffs' claiming the Defendant got fraudulently registered on the whole of the suit land in 1978. They only commenced action in 2011 almost nine (9) years after their father had died. They did not tender any evidence as to whether they made any reports to the Police to commence investigation. It is against the foregoing and relying on the above cited authority, I find that the Plaintiffs' have failed to discharge the burden of proof to prove the allegations of fraud levelled against the Defendant.

As to whether the Plaintiffs are entitled to the orders sought. The Plaintiffs are seeking injunctive orders against the Defendant as well as revocation of his title in respect of Kajiado/ Mailua/ 57. Section 80 of the Land Registration Act which provides as that:

'(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'

From the evidence presented by PW1, PW2 and PW3 there is no doubt that any member of the deceased family ever complained about the Defendant's ownership of the suit land from 1978 when he was registered as its proprietor. The complaint only arose in 2011, several years after the deceased demise. The Defendant obtained his title in 1978 and took actual possession of the suit land as confirmed by DW1 and DW2 in Court. He even charged the suit land and has been cultivating it. The deceased who was the vendor died in 1992 and never alleged any fraud nor disputed the Defendant's title.

Further, Section 26 of the Land Registration Act provides as follows: **'(1) 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.'

Section 25(1) of the Land Registration Act also provides as follows:-

'25. (1) The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject.....'

In the case of **Ahmed Ibrahim Suleiman and another v Noor Khamisi Surur [2013] eKLR, where it was held that: 'The Plaintiffs having been registered, as proprietors and having been issued with a certificate of lease over title No. Nairobi/Block 61/69 are in terms of section 26 (1) of the Registration of Lands Act entitled to the protection of the law.'**

From the evidence presented, the legal provisions cited above as well as the authority I have quoted, I find that the Defendant's title is valid as he obtained the necessary consent before the land was transferred to him. I hold that his title is prima facie evidence of his ownership and he is entitled to protection of the law. Based on my findings above, I will decline to issue injunctive orders against the Defendant in respect of his title, nor make an order to cancel his title. I will proceed to declare the Defendant's title over land parcel number Kajiado/ Mailua/ 57 as legitimate.

Who should bear the costs of the suit.

Costs generally follow the event, and in this instant case, I find that it is the Defendant who has been inconvenienced and will proceed to award him costs of the suit.

It is against the foregoing that I find that the Plaintiffs have failed to prove their case on a balance of probability and will proceed to dismiss it with costs to the Defendant.

Dated signed and delivered in open court at Kajiado this 19th day of February, 2019

CHRISTINE OCHIENG

JUDGE