



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT KERICHO

ELC CASE NO. 49 OF 2006

JANET TOWETT.....PLAINTIFF

VERSUS

JOHN KOECH.....DEFENDANT

AND

JULIUS KIPNGETICH CHEPKWONY....INTERESTED PARTY

JUDGMENT

Introduction

1. On 27th April 2006 the Plaintiff instituted suit against the Defendant claiming that the Defendant had trespassed and her land and sought the following reliefs:

a) A declaration that the defendant is a trespasser on the plaintiff's aforesaid parcel Kericho/Kabianga/1553, and an order that the defendant do deliver up vacant possession in default eviction orders do issue.

b) Costs of the suit and interests

2. As the Defendant had failed to enter appearance, the suit proceeded ex- parte on 27.2.2017 and judgment was subsequently entered against the defendant on 20th April 2017. However, upon application by the Defendant, the said judgment was set aside and the defendant was granted leave to file his Defence.

3. In his Defence dated 2.11.2017, the Defendant denied that the Plaintiff was the registered owner of land parcel no. KERICHO/KABIANGA/1553 and stated that the Plaintiff had unlawfully and fraudulently caused the said parcel of land to be registered in her name. He denied that he had trespassed on the Plaintiff's land claimed that he had lawfully acquired the said land from the beneficial owners of the original registered owner thereof. Even though he did not file a counterclaim, he prayed that the Plaintiff's suit be dismissed with costs, the Plaintiff's title be cancelled and that the Plaintiff be ordered to give the Defendant quiet possession of the suit land.

4. The suit was subsequently set down for hearing and both parties testified and called their witnesses.

The Plaintiff's Case.

5. The Plaintiff who is Primary school teacher testified that she is the registered proprietor of land parcel number KERICHO/KABIANGA/1553. She produced a copy of the title deed issued to her on 18.1.1995 and certificate of official search dated 8.8.2014. She testified that sometime in 2001 the Defendant trespassed onto her land and when she approached him and demanded that he vacates the land he was uncooperative. She then issued him with demand letters through her advocates but he still did not vacate. She reported the matter to the local chief who summoned him to his office but the defendant did not attend thus prompting the Plaintiff to file suit.

6. Upon cross-examination, the plaintiff stated that she was given the suit land by her late grandfather Kipsoi Arap Bargak who passed away in 1985. She said that her grandfather gave her the title deed during his lifetime. She stated that she was not the only grandchild of Kipsoi Arap Bargak. He had three daughters one of whom was her mother while one was the mother of the Julius Kipngetich, the third Party herein. She said that her grandfather had 3 parcels of land and the suit land had been given to her mother while had two aunts were given the other two parcels of land. She testified hat the interested party did not know how the land was divided by their grandfather as he was serving a prison sentence at the time their grandfather distributed his land. She stated that even though she did not obtain a grant of letters of administration, the land was transferred to her lawfully. In re-examination she maintained that the interested party lives in Litein on the land

that was given to his late mother.

7. PW2 David Kipkemoi Mutai testified that he is the Assistant chief, Chepkosilen location. He said that the Plaintiff had gone to his office to complain that the Defendant had trespassed onto her land. He summoned both the Plaintiff and the Defendant to his office for a meeting but only the Plaintiff attended. He stated that he was aware that the land originally belonged to Kipsoi Arap Bargak.

8. The Plaintiff's last witness, Richard Kiplangat Siele who testified as PW3 stated that he was a village elder who knew both parties to the suit. He relied on his witness statement dated 4.8.2016 which was adopted by the court. Upon cross-examination he stated that he knew the defendant in 2014 when he entered the suit land and constructed a house. He confirmed that the suit land originally belonged to Kipsoi Arap Bargak but he was not sure if Julius had a share in the suit land as he lived in Litein.

Defendant's Case

9. The Defendant (DW1) testified that he has been in continuous occupation of the suit property since 1996. He stated that he initially leased it from the interested party and the late Cornelius Chepkwony and later bought it pursuant to a sale agreement dated 23.1.1998. He produced the said agreement as defence exhibit 2. It was his testimony that the Plaintiff only complained about his occupation of the suit property in 2012 after which an elders meeting was convened. The said meeting resolved that he should continue staying on the suit property as he was occupying it with the consent of the beneficiaries of the late Kipsoi Arap Bargak. He produced a copy of the minutes of the said meeting as Defence exhibit 3. He stated that he only realized that the Plaintiff was the registered owner of the suit property when he was served with an eviction order in 2017.

10. Upon cross-examination he admitted that the sale agreement did not specify the land parcel number and it indicated that part of the purchase price would be used to purchase a tractor and pay medical bills. He stated that he did not conduct any search at the Lands office to establish its ownership before he bought the land. He said that the Plaintiff had complained to the chief about his occupation of the suit property but he denied that he was summoned by the chief. He said that the elders meeting was called to establish who was the owner of the suit property but neither him nor the Plaintiff attended. Even though he stated that the Plaintiff had fraudulently transferred the suit property to herself, he admitted that he had not reported the alleged fraud to the police.

11. DW2 Margaret Omullo Anita, the Land Registrar Kericho produced the green card in respect of the suit property which showed that the title was initially in the name of Kipsoi Arap Bargak before it was transferred to the Plaintiff through succession on 18.1.95. She stated that the transfer was irregular as the Succession case number was not indicated in the green card.

12. The Interested Party who testified as DW3 stated that the Plaintiff was his maternal cousin. He said that the suit property belonged to their grandfather but the Plaintiff had fraudulently transferred the title to herself. He stated that him and his late brother Cornelius Chepkwony were beneficially entitled to the suit property and had been taking care of it before they leased it and subsequently sold it to the defendant. He stated that they had not taken out letters of administration in respect of his late grandfather's estate. He said he been unable to trace the title deed for the suit property. He denied that the Plaintiff was given the suit property by their late grandfather.

13. Upon cross-examination he stated that he was an interested party in the suit because the suit property belonged to him. He claimed to have inherited it from his late mother. He said he exchanged the suit land for a parcel of land in Litein where he was currently living. He confirmed that no succession had been done in respect of his late grandfather's estate and that his share in the suit land could only be established after succession.

14. The 4th witness Elizabeth Chepkurui testified that she was the only surviving daughter of the late Kipsoi Arap Bargak an aunt to the Plaintiff and Interested Party. She stated the suit property originally belonged to her late father and she did not know how it was registered in the plaintiff's name. She said her father gave the land to her sister Lily who was disabled. Lily was the mother of Julius Chepkwony (Interested Party) and Cornelius Chepkwony. She stated that her father gave Julius Chepkwony the authority to take care of the suit land.

15. At the close of the Defendant's case the parties were given time to file their written submissions which I have considered.

Issues for determination.

16. The following issues fall for determination:

- i. Whether the plaintiff has a valid title land parcel number KERICHO/KABIANGA/1153
- ii. Whether the Defendant is unlawfully occupying the suit property
- iii. Whether the plaintiff is entitled to the reliefs sought

Analysis and Determination

17. Learned counsel for the Plaintiff submitted that the Plaintiff had proved that she had a good title to the suit property which should be protected by the law. He relied on section 26 of the Registration of Titles Act (sic). I believe he meant the Land Registration Act, 2012 which provides as follows:

“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

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 grounds of fraud, or misrepresentation to which 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.”

18. He submitted that the defendant had failed to prove the acts of fraud alleged against the Plaintiff that are particularized in his defence. He argued that fraud being a criminal offence ought to have been proved to the required standard. He further submitted that any challenge to the Plaintiff's title on the ground that no Succession was done in respect of the suit property ought to be dealt with by the High Court and not the Environment and Land Court.

On the other hand, Learned counsel for the Defendant and Interested Party submitted that the Plaintiff does not have a good title as the said title was obtained without letters of administration been issued in respect of the estate of Kipsoi Arap Bargak who was the first registered proprietor of the suit land. It is his submission that the Plaintiff colluded with the Land Registrar and had the title fraudulently registered in the Plaintiff's name. It is his further submission that the said registration having been effected contrary to the provisions of section 45 of the Law of Succession Act amounted to intermeddling with the estate of a deceased person and was therefore unlawful. As such the plaintiff's title is illegal and ought to be cancelled. Counsel cited the case of **Arthi Highway Developers Ltd vs Westland Butchery Limited & 6 others 2015 eKLR** where the Court of Appeal dismissed the appellants appeal as in a case where crooks fraudulently acquired title, court ordered that such title be cancelled and revert back to original owners.

19. It is common ground that the plaintiff was registered as the owner of the suit property long after death of the Kipsoi Arap Bargak. By her own admission, she had not obtained a Grant of letters of administration at the time of the said registration. Section 45 (1) of the Law of Succession Act is couched in the following terms:

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of or otherwise intermeddle with any free property of a deceased person”.

20. From the foregoing it is abundantly clear that the plaintiff's title was not acquired procedurally or lawfully. Even if her late grandfather gave her the land as alleged, she ought to have followed due process by obtaining a grant before having it transferred to her.

21. Having said that, the defendant is no better position as he is occupying the suit land contrary to the provisions of section 45 of the Law of s Succession Act. The interested Party just like the plaintiff both claim to have a beneficial interest in the suit property since they are grandchildren of Kipsoi Arap Bargak but they must apply for letters of administration before their interests can crystallize.

22. In the circumstances, the inescapable conclusion is that the plaintiff does not have a good title and she is therefore not entitled to the reliefs sought. In order to enable the plaintiff and the interested party pursue their interest in the suit property I exercise the powers conferred on this court by section 80 of the Land Registration Act, 2012 and direct that the title issued to the plaintiff in respect of land parcel number KERICHO/KABIANGA/1553 be cancelled. The said title shall revert to the name of the original proprietor Kipsoi Arap Bargak –deceased.

23. The upshot is that the Plaintiff has failed to prove her case on a balance of probabilities and the suit is hereby dismissed and I make the following final orders:

- a) The registration of the Plaintiff as the owner of land parcel no. KERICHO/KABIANGA/1553 is illegal and unprocedural
- b) The said registration is hereby cancelled and the title shall revert to the name of Kipsoi Arap Bargak-Deceased.
- c) A copy of this judgment shall be served on the Land Registrar, Kericho under whose jurisdiction the suit land falls to effect the necessary amendments to the said title.
- d) In view of the peculiar circumstances of this case where both the Plaintiff and the Defendant are at fault, each party shall bear their own costs.

Dated, signed and delivered at Kericho this 27th day of March, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Cheruiyot for Mr. Terer for the plaintiff
2. Miss Ngeno for the Defendant and Interested party.

3. Court Assistant: Rotich.