



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 685 OF 2017 (OS)

(Formerly Machakos ELC No. 219 of 2012 'OS')

IN THE MATTER OF LAND REGISTRATION ACT 2012 SECTION 68 (II)

In the matter of Land Parcels: Kajiado/ Kitengela/ 6137; Kajiado/ Kitengela/ 23949; Kajiado/ Kitengela/ 23950; Kajiado/ Kitengela/ 23951; Kajiado/ Kitengela/ 23952; Kajiado/ Kitengela/ 23953

BETWEEN

DANIEL NGANGA NJOROGE.....1ST PLAINTIFF

JAMES GITEMA NJUGUNA2ND PLAINTIFF

VERSUS

LEMUTAKA OLE NTILALEI.....1ST DEFENDANT

NKASHEMA OLE SADURU.....2ND DEFENDANT

GIDEON LAMUTAKA.....3RD DEFENDANT

JACOB MALIT.....4TH DEFENDANT

JUDGEMENT

By an Originating Summons dated the 20th June, 2012 the Plaintiffs' pray for judgement against the Defendants for the following orders:

1. That it be declared that 30 acres out of the property Kajiado/ Kitengela/ 6137 and now subdivided into Kajiado/ Kitengela/ 23949 (8.09 Ha), Kajiado/ Kitengela/ 23950 (6.07 Ha), Kajiado/ Kitengela/ 23951 (18 ha), Kajiado/ Kitengela/ 23952 (7.55 Ha), Kajiado/ Kitengela/ 23953 (4.046 Ha) belongs to the Plaintiffs by virtue of a court order of Kajiado SRM Court, Misc. Application 4 of 2000 on 8th November, 2000.
2. That by virtue of orders of Kajiado Resident Magistrate Court Miscellaneous Application 4 of 2000, the land parcels Kajiado/ Kitengela/ 23949, Kajiado/ Kitengela/ 23950, Kajiado/ Kitengela/ 23951, Kajiado/ Kitengela/ 23952, Kajiado/ Kitengela/ 23953 be revoked and the Land Registrar Kajiado do register the Plaintiffs' portion of 20 and 10 acres respectively out of the original parcel Kajiado/ Kitengela/ 6137.

The 1st Defendant LEMUTAKA OLE NTILALEI opposed the originating summons and confirmed that the 2nd, 3rd including 4th Defendants are his sons and are not privy to the agreement he entered into with the Plaintiffs. He stated that he entered into a Sale Agreement on 18th March, 1985 with the 1st Plaintiff for the sale of 6 acres and one on 5th March, 1985 for the sale of 20 acres to the 2nd Plaintiff. He confirms receiving Kshs. 10, 000 for the purchase of 6 acres and Kshs. 10,000 for the purchase of the 20 acres but the Plaintiffs never completed the sale. He claims after 14 years, the Plaintiffs obtained an order from the Kajiado Land Disputes Tribunal for the subdivision of Land Parcel Number Kajiado/ Kitengela/ 6137 without his knowledge and consent. He contends that on 25th May, 2010, he obtained a court order procedurally for the removal of a caution and therefore did not subdivide his land fraudulently. He insists the Plaintiffs' claim is bad in law since they entered into a sale agreement in 1985 and since it was a contract for sale of land, it was to be concluded within 90 days in accordance with the Law Society Condition of Sale. Further, that the Plaintiffs' claim is bad in law since the Land Control Board consent to transfer was not obtained within six month. He reiterates that the Land Dispute Tribunal did not have jurisdiction to entertain a dispute on a registered title as it purported to do so vide their ruling made on 26th September, 2010 and adopted by the Senior Resident Magistrate.

The Plaintiffs filed a further affidavit where they averred that they sued the 2nd, 3rd and 4th Defendants as proprietors of Kajiado/ Kitengela/ 23950; Kajiado/ Kitengela/ 23951 and Kajiado/ Kitengela/ 23952 respectively, which portions were resultant subdivision from Kajiado/ Kitengela/ 6137. They insist that they tried to contact the 1st Defendant to point out the beacons for subdivision culminating in their hiring a private surveyor who together with the government surveyor surveyed the land and issued them with mutation forms for Kajiado/ Kitengela/ 6137 to effect transfer. They reiterate that the 1st Defendant was present during the Kajiado Land Dispute Tribunal Sitting and aware of the deliberations including findings of the matter. Further, that the 1st Defendant did not serve them with the application to lift the caution against the suit land and acted in a fraudulent manner. They reiterate that the cause of action is not time barred as the subdivisions by the Defendant herein were effected in 2010 to defeat the registration of their 20 acres and 10 acres respectively. They contend that their grievances are not pegged on the sale of land herein but on the orders granted on 8th November, 2000 which the 1st Defendant effortlessly tried to defy. Further, that the 1st Plaintiff had bought 10 acres from the 1st Defendant as there was a Sale which was executed before an advocate.

The Plaintiffs called two witnesses while the Defendant had one witness.

Evidence of Plaintiffs

The 1st Plaintiff purchased 20 acres of land from the 1st Defendant and paid the full purchase price of Kshs. 40,000. They later executed an agreement dated the 18th March, 1985. The 1st Plaintiff did not take possession of the land he had purchased as the 1st Defendant failed to show him the exact portion. The 1st Plaintiff lodged a complaint with the local District Commissioner who set up a Tribunal to deliberate on the dispute. The Tribunal vide LDT case no. 4 of 2000 ruled in the 1st Plaintiff's favour and the award was adopted by the Kajiado SRM's Court. The Defendant did not appeal the Tribunal's Award nor the order of the Kajiado SRM's Court. They obtained the Consent of the Land Control and the District Surveyor undertook subdivisions, in 2012 based on the mutation forms, each of the Plaintiff's got their respective portions of land. The District Surveyor subdivided Kajiado/Kitengela/6137 into:

Land parcel number – 47101; 47102 and 47103 but however was unable to register the same since Kajiado/Kitengela/6137, which was in the 1st, Defendant's name was already subdivided by the 1st Defendant without their knowledge.

The 2nd Plaintiff Daniel Nganga who is deceased was represented by PW2 who obtained Letters of Administration Intestate in respect of his estate. She confirmed that the deceased bought 10 acres of land from the 1st Defendant and executed an Agreement dated the 5th March, 1985. The 1st Defendant never effected the transfer of the 10 acres to the 2nd Plaintiff compelling him to lodge a complaint at the Kajiado Land Disputes Tribunal that awarded him the land. She contended that her husband had informed her that he finished paying the purchase price and even took the children to the suit land. She relied on the affidavit sworn by the 1st Plaintiff who also purchased suit land from the 1st Defendant, to support her claim.

Evidence of the Defendants

The 1st Defendant admitted selling land to the Plaintiffs' and signing the two Sale Agreements but insisted they did not finalize paying the purchase price of Kshs. 30,000. He confirmed that he did not have title deed at the time of selling the land as the same was still registered in the name of the Group Ranch. He contended that he obtained the title deed to the suit land and subdivided to his family since the Plaintiffs had disappeared. He stated that they never went to the Land Control Board and that he applied for removal of caution over the land which application was allowed. He denied participating in the proceedings of the Land Disputes Tribunal and could not recall being directed by the Land Disputes Tribunal to transfer 20 and 10 acres of land to the 1st and 2nd Plaintiffs' respectively. He denied knowledge of the Kajiado SRM miscellaneous cause No. 4 of 2000. He confirms that he never appealed against the Court's decision. He admitted not serving the Plaintiffs' with the application he lodged in court to remove the caution over the suit land. He further denied being summoned by the Chief and the Surveyor to undertake subdivision of the land. He offered to refund the purchase price the Plaintiffs' had paid to him.

Analysis and Determination

Upon perusal of the Originating Summons, the supporting affidavits, witness testimonies as well as the submissions filed herein, the following are the issues for determination:

- Whether the Plaintiffs' claim is statute barred.
- Whether the Decree in the Kajiado SRM's Case No. 4 of 2000 is valid
- Whether the Plaintiffs are entitled to the prayers sought in the Originating Summons.

It is not in dispute that the Plaintiffs entered into a Sale Agreement for purchase of land from the 1st Defendant who owned the said land. It is also not in dispute that the Plaintiffs lodged a complaint before the Kajiado Land Disputes Tribunal to compel the 1st Defendant to transfer to them their respective portions. The Plaintiffs' contend that the 1st Defendant was present during the proceedings at the Kajiado Land Disputes Tribunal and an Award therefrom was adopted by the Kajiado Senior Resident Magistrate's Court. From the evidence herein, the 1st Defendant never appealed the impugned decision of the Tribunal nor the Decree of the SRM's Court, nor sought for orders of judicial review to quash the Tribunal's decision, hence as it stands, there exists a Decree yet to be executed. It is the Plaintiffs' contention that the 1st Defendant with an intention to defeat the Decree, lodged a miscellaneous cause and obtained an order for removal of the caution which they had registered to secure the land, which fact the 1st Defendant admitted in Court. The 1st Defendant thereafter proceeded and subdivided the suit land and distributed to the 2nd, 3rd and 4th Defendants who are his sons. This action he undertook with the full knowledge of the

existence of the Decree against him. The Plaintiffs seek to enforce the Decree adopting the Award of the LDT which the 1st Defendant opposes. From a cursory look at the proceedings in the LDT, I note the 1st Defendant LAMTAKA OLE NTILALEI was present, which fact he has denied in court. From the said Land Dispute Tribunal proceedings, I hold that the 1st Defendant indeed participated in the proceedings and was well aware of the outcome but still fraudulently proceeded to subdivide his land and distribute to his Children to defeat the Decree of the Court. From these evidence it is clear, the 1st Defendant did not act in good faith towards the Plaintiffs.

The Defendants insist the Plaintiffs' claim is statute barred. However, where fraud is alleged, it is trite law that limitation cannot be invoked. I note the subdivisions were done in 2010 after the Decree had been issued and initial subdivision undertaken by the Surveyor in the implementation of the Court Order dated the 8th November, 2000. Further from the first Mutation Form, it emerges that the suit land was subdivided into 47101; 47102 and 47103 which mutation was registered on 16th January, 2012. However, the 1st Defendant also proceeded to obtain a fresh mutation and registered the resultant subdivisions into his children's names. The 1st Defendant denied being summoned by the Chief and District Surveyor to effect subdivisions but from the Court record, I note there are various correspondence between the District Officer and Surveyor in respect of implementation of the Court Order, where the parties concerned are put on copy. The 1st Defendant contends the suit is time barred but from the proceedings I have highlighted above, I hold that the period of limitation only commenced running in 2010 after the 1st defendant had subdivided the land to defeat the decree of the SRM's Court.

It is the 1st Defendant's contention that the transfer was not completed for lack of consent of the Land Control Board. I note there was consent of Land Control Board issued on 14th November, 2000 for subdivision of the land into three portions. Further, the transfer forms had already been executed by the Executive Officer but the 1st Respondent still failed to transfer the land to the Plaintiffs. From the letters on record from the District Officer, I can decipher that the 1st Defendant was elusive in the process of effecting transfer of the suit lands to the Plaintiffs and that perhaps is the reason of delay.

As to the validity of the decree in Kajiado SRM's Court, from the proceedings, I note the 1st Defendant was well aware of the Decree and still proceeded to subdivide the land. I find that he did not have clean hands when he did so. Since the 1st Defendant failed to appeal the decision of the Land Disputes Tribunal, nor apply to quash it, I hold that the same still stands and he cannot raise the illegality of the impugned Tribunal's decision if he never did so before and opted to participate in its proceedings.

From the actions of the 1st Defendant, he was hell bent to defeat the Decree herein but I opine that Court Orders are sacrosanct and cannot be defeated by merely being elusive to avoid its implementation. Since this is a declaratory suit, and I have already held that the Decree in the SRM's Court is still valid, I find that the Plaintiffs' have proved their case on a balance of probability and will proceed to make the following orders:

1. That by virtue of the Decree in the Kajiado Resident Magistrate Court Miscellaneous Application 4 of 2000, the Land Registrar, Kajiado be and is hereby directed to revoke titles to land parcels Kajiado/ Kitengela/ 23949, Kajiado/ Kitengela/ 23950, Kajiado/ Kitengela/ 23951, Kajiado/ Kitengela/ 23952, Kajiado/ Kitengela/ 23953 and the same reverted to the original parcel Kajiado/ Kitengela/ 6137.
2. A Declaration be and is hereby made that the Plaintiffs are entitled to 30 acres of land out of land parcel number Kajiado/ Kitengela/ 6137.
3. The Land Registrar Kajiado, be and is hereby directed to register the 1st and 2nd Plaintiffs as absolute proprietors of their respective portions of 20 and 10 acres respectively
4. Costs of the suit is awarded to the Plaintiff.

Dated and delivered at Kajiado this 19th Day of March, 2019

CHRISTINE OCHIENG

JUDGE