



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**CIVIL CASE NO. 148 OF 2015**

**ESTATE OF THE LATE**

**JACKSON LOMERI LOMACHAR (*Represented by*)**

**FLORENCE NASAMBU KHAEMBA and**

**ELIZABETH CHEMAKAL JACKSON.....PLAINTIFFS**

**VERSUS**

**SELINA CHELIMO JACKSON.....DEFENDANT**

**JUDGMENT**

1. The plaintiffs, suing in the capacity as the representatives of the estate of the late **Jackson Lomeri Lomachar**, filed a claim by way of an ordinary plaint dated **19/11/2015**. In that plaint they pray for judgment against the defendant for:-

- a) **A declaration that the land comprised in Title No. WEST POKOT/KERINGET A/2930 was on the 18/1/2010 fraudulently registered in the name of Selina CHELIMO JACKSON the defendant.**
- b) **An Order for the rectification of the register for WEST POKOT/KERINGET A/2930 by cancelling the registration of SELINA CHELIMO JACKSON as the owner of the said parcel and have the property transferred to the Estate of the late Jackson Lomeri Lomarchar.**
- c) **An order for the preservation of the suit property while pending the hearing and determination of this suit.**
- d) **Costs.**
- e) **Interest**
- d) **Any other relief that the court may deem fit to issue.**

2. The plaintiffs' case is that the plaintiffs and the defendant were the widows of **Jackson Lomeri Lomachar** and subsequently became the administrators of his estate upon his demise. The plaintiffs aver that prior to his death the deceased had purchased some land, that is a total of **4 ½ acres** from **West Pokot/ Keringet/32**. It is contended in the plaint that part of the money that finalised the consideration in respect of that purchase was raised from sale of plot No. **West Pokot/ Keringet A/325** and that upon purchase the deceased allowed the defendant to settle on the suit land but made it clear that the land was for the benefit of his children. It is also contended that by the time the deceased died the process of obtaining title in respect of the suit land was not complete. The plaintiffs aver that plot No. **West Pokot/ Keringet A/32** underwent a series of subdivisions resulting into various other parcels including Plot No. **2930** which is now registered in the name of defendant. The plaintiffs claim that Plot No. **2930** comprises the land purchased by the deceased and that the title was issued on **18/1/2010** after the demise of the plaintiff's husband. It is alleged that the defendant obtained this registration in her favour by way of fraud.

3. Further, the plaintiffs claim that with effect from **6/11/1992** the deceased was the registered owner of title No. **Kaisagat/Makhonge Block 1/Mwisho/81** measuring **3.215 hectares** which the defendant also fraudulently transferred into her name without any prior succession proceedings over the deceased's name. Interestingly enough, the plaintiffs aver at **paragraph 12** of the plaint that *despite* that alleged fraud they allowed the defendant to retain that land "*in terms of the wishes of the deceased.*" On the basis of that information the plaintiffs sought the reliefs set out in paragraph of this judgment.

**Defendant's Defence**

4. The defendant filed her statement of defence on **4/1/2016**. She pleaded that the suit is time barred and that she is the bona fide purchaser for value of the suit land which was transferred to her by one **Selina Cheposekor Kassachoon**. She averred that the suit land has never been registered in the name of the deceased and also states that vide a ruling delivered on **10/11/2015** in **Succession Cause No. 263 of 2011** the suit land was expressly excluded from the estate of **Jackson Lomeri Lomachar** and that she is the sole beneficiary of **Kaisagat/Makhonge Block 1/Mwisho/81**. She accused the plaintiffs of misrepresentation and prays that the suit be dismissed with costs.

5. The plaintiffs filed a reply to defence on **5/1/2016** in which they joined issues with the defendant in her written statement of defence. They averred that the only reason why the suit land was not made part of the deceased's estate is that it was not yet registered in his name at the time of his death. They denied the allegation of misrepresentation.

#### **Plaintiffs' Evidence**

6. **PW1, Florence Nasambu Khaemba** testified on **19/2/2018**. She reiterated the matter on the plaint. She identified herself, her co-plaintiff and the defendant as the widows to the deceased. She described herself as the 4<sup>th</sup> wife of the deceased. She stated that she comes to court on behalf of the estate of the deceased. According to her the deceased's estate was distributed except the suit property and the process of obtaining title in respect of the suit land in deceased's name was still ongoing as at the time of his demise.

7. She narrated the history of the suit land as follows: Before his death the deceased had bought land, by virtue of two agreements dated **1/9/1998** and **4/11/1998**, from one **Ezekiel Kassachoon's** son, **Amigos Boriot Kassachoon**; at that time the land was still registered as **West Pokot/Keringet/32** in the name of **Ezekiel Kassachoon**; the witness averred that the deceased sold title No. **West Pokot/Keringet/235** to pay for the suit land; all the original documents were in the defendant's house in the deceased's briefcase and they were not accessible to the plaintiffs. The copies of the agreements were produced in evidence as **"P. Exhibit 2, 3 and 4"**. The deceased took possession of the suit land between **1998** and **1999** and built a temporary three room house and a kitchen in which the defendant subsequently lived. The witness recalled in particular that in December, **1999** the four wives of the deceased celebrated Christmas on the suit premises and that after the celebration the deceased announced that the land was bought for the sake of his children; that the deceased retired in **2004**; that the eldest and the other wives were settled on their plots and this suit plot was meant for the whole family; that when asked about the defendant, the deceased said that her land would be a plot measuring **8 ½ acres** at Mwisho farm. The witness testified that the title to **plot No. West Pokot/Keringet/32** was closed upon subdivision on **22/12/1987**; that it was initially subdivided into four plots; that one of those, that is **plot no. 770** was also subdivided into **plot No. 2812** and others and a green card opened in the name of Ezekiel Kassachoon's wife; that by that time Ezekiel Kassachoon was deceased and that from that time until the time of hearing the defendant has been in possession of the suit land. It is her evidence that **plot No. 2812** was subsequently subdivided into nine plots including **Plot No. 2911**. The deceased's land remained in **plot No. 2911**. As at **2010** the **plot No. 2911** was still in the name of Selina Cheposekor Kassachoon; however title issued on **18/1/2010** and on the same date the land was subdivided into **plots Nos. 2929 to 2936**; that the deceased land remained on **plot No. 2930**. She produced a green card for plot No. **2930** opened first on **18/1/2010** in the names of Selina Kassachoon and subsequently transferred to the defendant. It is alleged the defendant got herself registered as the proprietor to the exclusion of all the other wives and that it is not true that she purchased the suit land. One of the arguments the witness advanced is that in **1998** there were no computers yet Selina's agreement is a printed document dated **4/11/1998**. However **PW1** admitted the first witness named in that agreement is the deceased and that the land bought is shown as **3 ¾ acres**; however she alleged that that agreement is forged as according to her, the deceased did not want any of his wives to buy anything by themselves. She added that the agreement was discovered only after succession proceedings commenced and consequently a search revealed that the defendant had taken titles for some other plots. She also alleged that **Kaisagat/Makhonge/Mwisho Farm/81** was registered in the name of the deceased but was transferred to defendant without the knowledge of her wives on **2/2/2010** without any prior succession proceedings. She prays that the suit land be reinstated to the estate of the deceased. With that the plaintiffs closed their case.

#### **Defendant's Evidence**

8. **DW1, Selina Chelimo Jackson** testified on **15/11/2018**. She stated that she is the third wife of the deceased. She adopted her statement filed in court on **4/2/2016**. She averred that she was a businesswoman; that she purchased the suit land measuring **3 ¾ acres** out of **West Pokot/Keringet/32** from Amigos Kasachoon; she produced the agreement dated **4/11/1998** as **D. Exh 1**; that part of the consideration was paid partly in kind by way of providing Amigos with goods from her shop and partly in cash; that when her land was secretly listed as part of deceased's estate in **Kitale High Court Succession Cause No. 263 of 2011** the court, upon her filing of summons for revocation and/or annulment of grant disallowed such inclusion and said the land is hers; that the summons for revocation was compromised by way of consent between the plaintiffs and the defendant. She prayed that the suit be dismissed with costs.

9. When cross examined she admitted to getting married to the deceased in **1984** by which time the deceased had a shop at Kishaunet operated by a young man known as Merkou; that the shop later relocated to Makutano; that the license was in the deceased's name; the deceased then put her into possession of the shop which she operated till **1998**; that when she bought the land the capital from the shop was used up and that business was closed; that the deceased also used to farm at Chepchoina but the land was the defendant's though it was registered in the deceased name as at the time of his death; that she lived at the shop from the time she got married till **1998**; that the structures on **plot No. 2930** were built and put into her possession by the deceased. She admitted that there was a Christmas gathering in **1999** on the suit land at which all the deceased's wives and children were present; that she bought the land in **1998**; that at first the deceased did not know of the purchase agreement between her and Amigos but later on she informed him; that there was no agreement between the deceased and Amigos; however she insisted that during Christmas celebration the deceased never spoke of the land as alleged by the plaintiffs; that by the time she got title for plot No. **2930** succession proceedings had not been filed.

10. **DW2 Amigos Kassachoon Boriot** testified on **20/11/2018**. He identified **D. Exhibit 1** as the agreement made between him and the defendant with the deceased being one of the witnesses. He averred that the agreement as executed before the then acting Chief Mr. Kapelikemei; that though the rest of the land was later inherited by his mother the portion he sold was his and his mother and the defendant knew one another well and approved of his sale of his land to the defendant. He acknowledged that part of the purchase was paid in kind through goods provided by the defendant from the shop whose value was recorded. He dismissed **P. Exhibit 4** as not genuine and maintained that his land was only **3 ¾ acres** in contrast to **4 ½ acres** alleged by the plaintiffs. He categorically denied having sold the deceased any land.

11. **DW3 Charles Kapelikemei**, testified on **20/11/2018**. He stated that in **1998** he was the assistant chief Tartar sub-location and acting chief Mnagei location; that the deceased, being the chief was his senior; that he knew all the four wives of the deceased; that an agreement, which he identified **D. Exhibit 1**, was made between the defendant and Amigos Kassachoon in his office at Makutano with the deceased being merely a witness; that the only money that changed hands in his office was **kshs.20,000/=**; that he does not know how the **kshs.138,000/=** was paid to Amigos. He denied any other agreement involving the suit land. He admitted that though the land was in Kishaunet which had its own Chief the parties came to his office for the execution of the agreement **D. Exhibit 1**. He denied having any quarrel with the plaintiffs and averred that on one occasion, he only refused a letter to facilitate succession proceedings simply because they had left the name of one widow. He further testified that by the time the deceased died each of the widow was settled on their own land.

12. The plaintiffs filed their submissions on **7/2/2019** while the defendant had filed hers on **29/1/2019**.

#### **Analysis of Evidence and Issues for Determination**

13. From the pleadings, the evidence and submissions herein from both parties, the issues for determination are as follows:

*(a) Is the plaintiff's claim time barred?*

*(b) Who purchased the suit land from Boriot Kassachoon?*

*(c) Was the transfer in the defendant's name fraudulent and should the title issued in the defendant's name be cancelled?*

*(d) What orders should issue?*

**(a) Is the plaintiff's claim time barred?**

14. The plaintiff's claim is based on fraud. The suit was filed in the year **2015** when the defendant became the registered proprietor of the suit land. The fraud it is based on allegedly took place in **2010**. A claim based on fraud must be instituted within seven years from the date on which the cause of action based on fraud occurred. Seven years had not elapsed between the date on which the fraud is alleged to have been committed and the date of filing suit. I find there to be no merit in this defence.

**(b) Who purchased the suit land from Amigos Boriot Kassachoon?**

15. I have painstakingly gone through the evidence in this case to determine who the buyer of the suit property was.

The plaintiff's counsel points to the defendant's transfer of a land parcel, **Kaisagat/Makhonge/Block 1/Mwisho/81** into her name without following the succession process and submits that it is evidence that the fraudulent transaction exposes the real character of the defendant; that the defendant is used to fraudulent deals. However this court is not ready to accede to such a request to judge the defendant by way of her past sins regarding a parcel that is not in dispute and simplistically and mechanically attribute fraud to her, but will look out for concrete evidence of fraud in respect of the disputed land.

16. It is noteworthy that the plaintiffs alleged that plot No **West Pokot/Keringet/235** being land on which the deceased had allegedly initially settled the 1<sup>st</sup> plaintiff was sold to finance the purchase of the suit land, no evidence of such sale was presented, or that the proceeds obtained through such sale financed the purchase of the suit land. That allegation is therefore dismissed.

17. The plaintiff's case is that by the time the deceased met his demise, the land belonging to **Ezekiel Kasachoon** had been subdivided to give rise to **Plot Number 770** which hosted the land allegedly purchased by the deceased. They admit that the deceased settled the defendant on the suit land. They aver that **Plot No 770** was subsequently further subdivided to give rise to **Plot Number 2812** which was further subdivided to give rise to among others plot **number 2911** which is the suit land and which was registered in the name of the defendant.

18. According to the pleadings and the documentary evidence in this case, the only decipherable chronological sequence of the subdivisions leading to the suit land's registration in the defendant's name is as follows:-

**a. Plot number 32 was subdivided on 29/10/1986 into plots numbers 770, 1074, 1075 and 1076.**

**b. Plot no. 770 was subdivided on an unknown date but one of its subdivisions, no. 2911, was registered on 18/1/2010.**

**c. Plot no. 2811 was allegedly subdivided to give 2930.**

**d. Plot 2930 was registered on 18/1/10 in the name of Selina Cheposeker Kassachoon and on the same day it was transferred to the defendant.**

19. The agreement between the defendant and Boriot Kasachoon is clear that the **3.75 acres** bought were to be excised out of plot **number 32**. The evidence of the plaintiff produced as **PEXh 2** and **PEXh 3** identified the land an aggregate of **4.5 acres** being purportedly purchased by the deceased were to be excised from as no **32**. However the land finally delivered to the defendant was **3.26 acres** in contrast to the **4.5 acres** mentioned in the plaintiff's evidence.

20. Though the agreements produced as **PEXh 2** and **3** were admitted in evidence **DW2** subsequently disowned them and conceded only to

have executed the agreement in favour of the defendant produced as **DExh 1**. None of the witnesses to the said two agreements whose copies were produced as **PExh 2** and **3** were called to testify in this suit.

21. Legally, the seller's position at the dates of the three alleged agreements could only have been considered as that of an intermeddler. However, this is resolved by the fact that the seller with whom the agreements were made was not the ultimate transferor of the **3.26** acres to the defendant. However, by virtue of her position as administrator of the Ezekiel Kassachoon's estate, the seller's mother was legally empowered to transfer the land to the defendant. That leaves the plaintiffs claim quite exposed in that perchance the agreements with Amigos Kassachoon were deemed genuine, he transacted without authority and his actions were not subsequently endorsed or ratified by the legal administrator of the Late Ezekiel Kassachoon's estate.

22. Concerning the written agreement **D.Exh1**, the submission of the plaintiff recited **Section 91** of the **Evidence Act** which provides as follows:

**“97. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.”**

23. The plaintiff's counsel submits that although the consideration was reflected as **Kshs. 138,000/=** it ought to have been **Kshs. 40,000/=** and that though the documents states that the consideration was paid in cash that turned out to be untrue. It is submitted that although the agreement provided that there was no balance outstanding as at its execution **D.Exh 2(a)** showed that by **21/12/1998** the defendant was still supplying the seller with goods as consideration for the land. Further it was averred that the agreement itself did not state that the consideration was to be paid through provision of shop goods to the seller. For these reasons the plaintiff submits that it must be rejected.

24. However the court notes that the alleged transactions in this matter date back many years ago. Though no explanation is put forward by the defendant for that discrepancy, it is observable that even the most reliable human memory sometimes fades and leaves some occurrences without a proper explanation. The agreement produced by the defendant in this case can not therefore be rejected simply because of discrepancies found in the other documentary evidence produced because it is a standalone document.

25. In her evidence the defendant avers that she purchased the suit land using proceeds from a shop at Kishaunet whose licence was issued in the name of the deceased, and which the deceased had put her in charge of. There is no doubt therefore that Amigos Kassachoon was the seller and that he was advanced goods on credit from the shop. Though much was made by the plaintiff's counsel of the fact that the shop initially belonged to the deceased even before the defendant got married to him, and that the licence was admittedly in the deceased's name, I think that those grounds alone do not suffice to support a conclusion that the purchase of the land was entitled to benefit the defendant and not the entire estate of the deceased.

26. Though it is also submitted by the plaintiff's counsel that the defendant had no money of her own with which to buy the land as the shop she ran was licenced in the name of her husband. This however is a questionable submission. At least there is evidence that the seller obtained shop goods from the shop as consideration for the land. Who was entitled to the money the defendant was the earning from the shop? In considering this issue it is worthy of note that whilst the defendant was applying her labour in a shop for quite a long time - if the evidence is correct, a period of **14** years - not much is mentioned in this suit of what her co-wives were doing on the land they had been settled on, or where the proceeds thereof went. It is also obvious that the deceased was busy administering his duties as a chief and he could not run the shop by himself. It is possible that the licence, which was not produced in evidence in this suit, was issued in the name of the deceased but the labour was the defendant's. It is not indicated that she ever sought, or was paid a salary for her services of operating the shop. Should this fact be ignored? In my view, I think not, for the defendant was not a slave but a spouse. If the shop goods and profits financed the purchase of the land her contribution to the running of the shop must be considered to be an economic exercise equivalent to what her co-wives were also undertaking on the premises that they were settled on. There is direct oral evidence from **DW2** that the deceased signed the agreement produced as **D.Exh1** as a mere witness. No evidence was called by the plaintiff to controvert the allegation that the signature of witness on the agreement marked **D.Exh1** was the deceased's. I conclude that that signature belonged to the deceased. The fact that the deceased witnessed the agreement between her and Amigos Boriot Kassachoon implies that he approved of that purchase. I do not therefore think that the fact that shop proceeds financed the purchase of the land leads to the conclusion that the land was to be part of the estate of the deceased.

27. In my view all the sale agreements produced either by the plaintiffs or by the defendant fall short in many material respects. However, the defendant's sale agreement appears to be supported by the corroboration by the evidence of the seller. The very fact that a third party, the seller's mother did actually transfer the suit land to the defendant bespeaks knowledge on her part of what transpired.

28. Her averment that the suit land has never been registered in the name of the deceased is correct. However she also admitted that when the shop business closed in **1998**, she went to reside on the suit land and that the deceased built for her a house on the land; that by **1999** she was living on the suit land. The facts in this case reveal that the deceased met his demise in **2006**. She also admitted that the deceased larger family met in the suit land in the Christmas period of the year **1999** and the deceased was present. However, in my view, that meeting portends nothing as far as the plaintiffs' alleged entitlement to the land as beneficiaries was concerned. Though the plaintiff's counsel emphasizes on the importance of the meeting at the defendant's home, it can not be ignored that the deceased appears to have preferred to live with the defendant at the suit property and that if the meeting happened, the probability is that the deceased would have naturally needed to summon everyone to the home where he lived in rather than meet elsewhere. In my view besides the 1<sup>st</sup> plaintiff's averment that the deceased intimated that the land was meant for the benefit of his children, more credible and specific evidence to corroborate that allegation needed be tabled before court, and this was not done. The defendant did not agree with PW1 that she was given the Mwisho farm plot at the **1999** Christmas family gathering. However, both parties are in agreement, whatever the source of that common ground is, that it was the deceased's wish that the defendant's do own the plot measuring **8 ½ acres** at Mwisho farm. The court can not, by virtue of the general consensus of the parties regarding the Mwisho farm plot and the allegation that it was given to the defendant at the **1999** Christmas gathering, assume that the plaintiff's unproved allegation regarding the deceased's alleged utterances at the same gathering in respect of the

suit land are true. Each fact must be proved on its own accord.

29. Agreements for transactions made by laymen rather than professional lawyers are more often than not faulty documents. There is no reason to make this court believe that the defendant concealed the originals of the agreements produced by the plaintiffs. I must consider that it was open to the plaintiffs to call the evidence of the witnesses to those agreements who could have indicated whether they were genuine or not and thus countered **DW2's** evidence. The state of affairs now is that **DW2's** evidence stands uncontroverted, and it is stronger than that of **PW1**.

30. Consequent upon the above analysis I must find that only the agreement dated **4/11/1998** produced as **D.Exh 1** appears credible, and that the suit land was purchased by the defendant.

***(c) Was the transfer in the defendant's name fraudulent and should the title issued in the defendant's name be cancelled?***

31. The transfer of the suit land in the defendant's name was effected by the seller's mother. She has not been enjoined in this suit as a co-defendant. It would also be inapt to find the defendant guilty of fraud given my finding to the effect that she bought the suit land. In my view, what was transferred to her is what she had purchased. I therefore find that the defendant was not guilty of fraud and that her title is not therefore liable to cancellation on the premise that it was fraudulently obtained.

***(d) What orders should issue?***

32. In the final analysis I find that the plaintiffs' suit is unsupported by crucial evidence and that they have therefore not established their claim against the defendant on a balance of probabilities. The plaintiff's suit is therefore dismissed but as the parties are family members there shall be no orders as to costs.

**Dated, signed and delivered at Kitale on this 13<sup>th</sup> day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**13/03/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for plaintiffs

Mr. Bisonga for defendant

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**13/03/2019**