



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC CASE NO. 112 OF 2017

EVALYNE NYANCHAMA NYASANI.....PLAINTIFF

VERSUS

EZRA KEMBOI.....1ST DEFENDANT

ELIUD KIPLAGAT.....2ND DEFENDANT

EMILY KAROSEE.....3RD DEFENDANT

JUDGMENT

By a plaint dated 14th March 2017, the plaintiff herein sued the defendants jointly and severally seeking for the following reliefs:

- a) An order of perpetual injunction restraining the Defendants from trespassing upon, working, tilling, cultivating and or in any other manner utilizing parcel of land . No. ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/740 approximately measuring 1.37 Ha.
- b) Declaration that the Plaintiff is the bonafide registered owner of Land Parcel No. ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/740 or thereabout.
- c) Mesne profits.
- d) The OCS Eldoret Police Station to supervise and enforce the above orders.
- e) Costs of the suit.
- f) Any other order the court may deem fit to grant.

The plaintiff filed an application under certificate of urgency for temporary injunction contemporaneously with the plaint. The application was heard and an order of temporary injunction was issued but a prayer for perpetual injunction against the defendants was declined by the court on the grounds that it would amount to granting final orders in the interlocutory application.

Plaintiff's Case

The plaintiff adopted her statement as part of her evidence in chief and stated that she was approached by the previous registered owner of ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/740 measuring 1.37 Ha with intent to have her exchange her land with his at Sosiani Soy Farm Cooperative SOY/SOY BLOCK 8(SERGOIT)/26 approximately measuring 8.8 acres with the suit land. She obliged and a memorandum of exchange (plaintiff exhibit 1) was drawn before M/S Buluma & Company Advocates,

The Plaintiff in turn surrendered her land at Soy Farm land parcel SOY/SOY BLOCK 8(SERGOIT)/26 approximately measuring 8.8 acres.

PW 1 further produced a copy of the title to the suit land in the name of Kibyego Tirop. It was also PW 1's evidence that they made an application to the Eldoret Land Control Board and got a consent to transfer which she produced as exhibits before the court. PW 1 also stated that she filled the transfer forms, signed and got a title deed in her name dated 21st December 2009.

It was the plaintiff's evidence that she complied with the provisions of the Land Control Act, the Stamp Duty Act and having obtained Consent and paid stamp duty and registration fees, procured a registration as the proprietor through M/S Buluma & Company Advocates.

PW1 further stated that she took vacant possession of the suit land and worked on the land till 2017 when the Defendants invaded the land and assaulted her workers.

PW 1 further stated that the defendants who invaded the land ploughed the land prompting her to approach the Court for injunctive relief that was granted. That the Defendants refused to obey the injunction order and assaulted PW1 and her relatives prompting the filing of contempt of Court proceedings and Criminal charges against the 1st Defendant which is on going at the Chief Magistrates Court Eldoret Criminal Case No. 1642 of 2018: Republic =Vs= Ezra Kipkemboi. The plaintiff therefore urged the court to grant the orders as prayed in the plaint.

On cross examination by Counsel for the defendant the plaintiff confirmed that the 3rd defendant has encroached on her parcel of land and that she did not have an agreement with the 3rd defendant. She stated that the 3rd defendant is in the MOU as a witness to the exchange of the parcels of land with Kibyego Tirop and that the land was vacant when she took possession.

At this juncture the witness was recalled to produce some documents with the consent of the Counsel for the defendant. The documents produced were in respect of letter of consent from Turbo Land Control Board to the 3rd defendant Emily Karosee Arusei, chief's letter and a consent to transfer land and an agreement.

On re examination she confirmed that there was no fraud and therefore the transaction was genuine.

PW2 who was the Chairman Sosiani Soy Farm Cooperative MR. KIPLANTING CHEPSOY confirmed the conveyance of the plaintiff's share in the Cooperative to the 3rd Defendant, and the subsequent attendance at the Soy Land Control Board where consent was issued.

Counsel submitted that the defendants' defence and statement amounts to mere denials and alleges lack of participation in the Succession Cause but she alludes that there was a contested succession where she participated. She neither furnished any particulars of the Succession Cause nor the Certificate of Confirmed Grant.

Defence Case

The 3rd defendant adopted her statement which she had recorded and filed in court and stated that her brother in-law took away her land and gave to the plaintiff. It was her evidence that the land was family land and that they were to exchange land in Soy of which they utilized the same for one year and left in 2011. The defendant denied having gone to the land Control Board to get consent.

DW1 further stated that they had a case with Kibyego Tirop and that he filed a Succession Cause without involving her. She finally stated that the 1st and 2nd defendants are her children and that the plaintiff should go back to her land.

On cross examination by Counsel for the plaintiff, DW1 confirmed that the 1st and 2nd defendants have been sued in a criminal case involving assault and that she did not know that the plaintiff has title to the suit land. She also stated that the late father in law had 24 acres and the land in question is 3 acres and that Kibyego had a right to inherit his father's land. She also stated that she was not involved in the Succession Cause and that she did not report the matter to the Chief. On re exam by her Advocate DW1 stated that she is entitled to 10 acres. The defence therefore closed their case.

DEFENDANTS' SUBMISSION.

Counsel for the defendants filed written submissions and reiterated the evidence of the defendants and relied on the defence filed on 22nd August 2017 whereby the defendant denied the plaintiff's claim. Counsel submitted that the defendants claimed that the subdivision of the original parcel ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/740 fraudulent.

Counsel filed the following issues for determination

1. Whether or not there was a valid contract between the Plaintiff and one Kipyego Tirop (deceased).
2. Whether Land Control Board Consent was obtained in favour of the alleged transaction
3. Whether or not the subdivisions and transfers in respect of land parcel No. ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/528 were valid.

On the 1st issue Counsel submitted that from the evidence there is no doubt that the disputed land parcel was initially registered in the name of Kipchombel Arap Barichok (deceased) and that the 3rd Defendant testified that she was never involved in the Succession proceedings in respect of the estate of the deceased. Counsel referred to Rule 26 of the Probate and Administration Rules states as follows:-

"a) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

a) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

b) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree. '

Further that Section 76 of the Law of Succession Act provides that:-

"a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion :-

a) that the proceedings to obtain the grant were defective in substance;

b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. "

It was Counsel's Submission that the fact that all beneficiaries were not informed at the time of the filing of the petition confirms that the Grant was indeed obtained by concealment of material facts to other beneficiaries.

Counsel relied on the case *AL-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & Another* (2013) e KLR where it was held that the law of Succession by virtue of Rule 26 requires that any application for issue of grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate. Counsel therefore submitted that the letters of administration issued to one Kipyego Tirop were defective in substance and it follows that the alleged transaction between Plaintiff and himself were null and void.

On the 2nd issue as to whether the Land Control Board Consent was obtained in favour of the alleged transaction, Counsel submitted that there was no evidence to prove that there was a Land Control Board meeting for the alleged transaction. Counsel cited the case of *Republic-vs-Provincial Land Disputes Appeal Committee For Central Province Exparte Margaret Beatrice Murigi*[2013]eKLR while referring to the case of *Jacob Michuki Minjiire —Vs-Agricultural Finance Civil Appeal No. 61 of 1982* held as follows:-

"if the consent of the Land Control Board is not obtained the parties are restored to status quo ante

On the 3rd issue as to whether or not the subdivisions and transfers in respect of land parcel No. ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/528 were valid, Counsel submitted that failure to involve the Defendants at the time of filing the petition, failing to list them among the beneficiaries or seek their consent or renunciation was made in bad faith and amounts to concealment of material facts. Counsel therefore urged the court to dismiss the plaintiff's case with costs to the defendant.

Analysis and determination

This is a case where the plaintiff approached the court for an injunction restraining the defendants from interfering with the suit land. The plaintiff filed an application under certificate of urgency and an order of temporary injunction was issued.

It is not in dispute that the plaintiff entered into an exchange agreement with one Kibyego Tirop as per the agreement that was produced in court. It is further not in dispute that the plaintiff followed due process and got the requisite consents for the Land Control Board which she produced in court. The plaintiff also stated that she took possession of the suit land upon the exchange and the same was vacant.

It is also evident from the record and the exhibits produced that the plaintiff got registered as an owner of the suit land. The law is very clear on indefeasibility of title as per Section 24, 25, and 26 of the Land Registration Act.

Section 26 of the Land Registration Act provides that 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally. There was no evidence that the title was procured fraudulently.

The 3rd defendant alluded to fraud but she fell short of establishing that the plaintiff got her title fraudulently. The 3rd defendant admitted that they exchanged the land and she moved to the land and stayed for 1 year and came back in 2011. It is on record that the 3rd defendant was also a witness in the exchange agreement therefore she should not be heard to complain that there was fraud. Her claim is an afterthought which cannot be allowed to deny the plaintiff peaceful enjoyment of her land.

The submission of Counsel on the issue that the grant was fraudulent for lack of involving the beneficiaries is not for this court to determine. If the defendants were aggrieved then they should have approached the court that gave the grant for revocation of the same. For now we cannot deal with issues which are neither here nor there. The Succession Cause number was also never disclosed to the court.

I have considered the evidence adduced by both parties, the submissions and the authorities cited and find that the plaintiff has proved her case against the defendants save for the order of mesne profits which is a special damage which must be specifically pleaded and proved. The same was not proved and is therefore declined. I therefore make the following orders.

a) An order of perpetual injunction restraining the Defendants from trespassing upon, working, tilling, cultivating and or in any other

manner utilizing parcel of land. No. ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/740 approximately measuring 1.37 Ha.

b) Declaration that the Plaintiff is the bonafide registered owner of Land Parcel No. ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/740 or thereabout.

c) Costs of the suit.

Dated and delivered at Eldoret on this 26th April, 2019

M.A. ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Mr. Too holding brief for Mr. Angu Kitigin for the plaintiff and Mr. Lang'at holding brief for Mr. Melly for defendants.

Mr. Mwelem – Court Assistant