



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 500 OF 2013

NELLY CHELIMO MATELONG.....PLAINTIFF

VERSUS

GRACE CHERONO MATELONG.....DEFENDANT

JUDGMENT

By a plaint dated 5th September 2013 the plaintiff herein sued the defendant seeking for the following orders:

- a) A permanent injunction against the defendant from utilizing property described as NGERIA/KESSES/BLOCK 3 (KABABET)/42 to the exclusion of the Plaintiff.
- b) Declaration that the subject property was held in trust by the defendant for the benefit of the plaintiff.
- c) Declaration that the defendant engaged in acts of fraud and cancellation of title to all the property known as NGERIA/KESSES/BLOCK 3 (KABABET)/42
- d) Claim of half share of NGERIA/KESSES/BLOCK 3 (KABABET)/42

PLAINTIFF'S CASE

PW1 gave evidence and stated that their father bought the subject land and the same was registered in her fathers' name in the farm register. She stated that the defendant is her sister and that she was married but after the marriage failed she returned and resided on the suit land where she has been in occupation todate. It was further her testimony that her parents constructed a house on the suit land for her and that her sister also had a house on the suit land. PW1 also stated that their father passed away in 1985 before subdividing the land between them but had instructed them to subdivide and take half share each.

PW1 further stated that she still lives on the suit land where their parents were buried but it is currently registered in the name of the defendant. It was also her evidence that the defendant had initiated further subdivision amongst her children but the process was stopped by the court. She refuted that the suit land belonged to the defendant as it was family land. PW1 further stated that the defendant caused the change of names in the register fraudulently.

PW 1 also testified that their father had land at the shopping centre which the defendant sold without consulting her. She therefore urged the court to order that the land be divided into two equal shares between her and the defendant.

On cross examination by Counsel for the defendant, PW1 confirmed that she got married for one year to one Michael Tanui but came back to her home when the marriage did not work. She further stated that the suit land was bought by her father and not the defendant. Further that the defendant had fraudulently changed the father's name in the register to hers after the death of her father.

PW 1 also stated that according to Nandi customs if there is no son then one girl has to remain in the home without marrying to take care of the home. She denied that she is only entitled to 1acre where she has a house. She further stated that her ex-husband is deceased and that she is not a party to the succession cause in respect of his estate.

PW2 Edward Keter testified in court that he was one of the people who bought land in Kibabet farm which was a land buying group. He stated that he was the secretary to the group and Kipleting Matelong was known to him as he was the one who took money to the manager of the subject land. He confirmed from the register that Kipleting Matelong's name had been overwritten with the defendants' name and at the

time of Kiprotich's death titles had not been processed.

PW3, who was the Secretary to the Kibabet land buying group for 9 years stated that the changes in the register were made by his predecessor. Further that Matelong had cleared his debts and that there was a process for replacement of members who had passed away. It was his evidence that there was no replacement of Kipleting Matelong. He stated that he attended the meeting on subdivision of the land and at the time the land was in the defendant's name. He confirmed that the District Officer had ordered it be divided into two equal portions. The plaintiff therefore closed her case and urged that court to grant the orders as prayed.

DEFENCE CASE

DW1 adopted her statement as her evidence before the court and stated that she bought the suit land at a consideration of 3,800/-. The defendant produced a copy of the title deed to prove ownership of the suit land. DW1 also stated that she is the one in occupation of the suit land and that the land did not belong to the late father.

DW 1 also stated that she did not know how her father's name was inserted in the farm register. It was her evidence that the plaintiff stays on a parcel of land which she bought near her parcel of land. She further stated that they welcomed the plaintiff on the land when she came back home after her marriage collapsed.

DW1 admitted that she is the one who allowed the plaintiff to stay on the land and she later built her house on the suit land. She finally stated that she is ready to give the plaintiff one acre of the suit land which the plaintiff uses.

On cross examination the defendant admitted that she did not have any documents to prove that she was a member of the Kibabet farm and that she got a plot at the shopping center which she sold and never shared with the plaintiff. The defendant also confirmed in cross examination that they went to the D.O's office for resolution of the dispute and it was resolved that she gives half share of the land to the plaintiff.

DW2 one of the village elders gave evidence and stated that he knows the plaintiff and the defendant who are sisters. On cross examination he admitted that the name on the farm register was changed after the death of Matelong the parties father. DW2 also stated that he attended a meeting where he advised that the two sisters should solve the matter amicably and share the land.

DW3 and 4 gave evidence and confirmed that they were aware of the dispute in court and that the name of Matelong had been erased in the farm register. The defendant therefore closed her case.

PLAINTIFF'S SUBMISSION

Counsel for the plaintiff reiterated the evidence of the parties and submitted that the defendant admitted in the 3rd paragraph of her statement that she was present when her father told the surveyor that she could be registered as the owner yet she claims to have paid for the land on her own. That would not have been necessary if she had purchased the suit land as she claimed. Further that their father died in 1985 while the survey was done in 1984 and the change in the register in 1986.

Counsel also urged the court to note that the defendant could neither explain why her name was not originally in the farm register nor the reason why it had been overwritten on the one of Kipleting Matelong. Counsel submitted that the registration of the defendant was not done procedurally as it was done by fraud.

Counsel therefore cited the case of **Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiwa & 5 others, Civil Appeal No. Nai. 60 of 1997** where the court laid out the basis of challenging a title under the Registration of Titles Act.

Mr. Bitok further submitted that the court is empowered to take judicial notice of Nandi Customary law as applicable and that the defendant ought to have known that the plaintiff being a sister she ought to have derived a benefit from their parents parcel of land. Counsel further relied on the case of **Kiarie v Geoffrey K inuthia & Another (2012) eKLR** where on the ingredients for a trust was established.

It was Counsel's further submission that the defendant had no documents in support of her allegations that she bought the land on her own and that she actively participated in alterations of the register whereas she knew she did not purchase the land. Further that there was ample evidence from the farm books that the shares were entered in the names of Kipleting Matelong and that the demise of Matelong would only have been regularised through proper succession of his estate and not deleting his name from the register. Counsel finally submitted that the deletion of Matelong's name from the farm register was an act of fraud and the court had authority to revoke the title under section 80 of the Land Registration Act.

DEFENDANT'S SUBMISSION

Counsel for the defendant submitted that the plaintiff did not any evidence before the court to prove that a customary trust as an overriding interest existed. Counsel cited the case of **Peter Muthuri Ogutu v Elmeda Basweti Motanda & 3 others [2013] eKLR** on proof of trusts.

Mr. Kiboi submitted that the Constitution protects ownership of property and that once a person is registered as a proprietor of land such person is regarded as an absolute owner of the property.

Counsel further relied on sections 24(a), 25 and 26 of the Land Registration Act, 2012 which states that a 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 easements and encumbrances.

Further that the title can be challenged on the grounds that it was procured fraudulently, by misrepresentation, procedurally or by a corrupt scheme.

Mr. Kiboi relied on the case of **Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiuwa & 5 others, Civil Appeal No. Nai. 60 of 1997** and submitted that the plaintiff had not discharged the burden of proof with regards to allegations that the title was acquired fraudulently. Counsel further cited the case of **Koinange & 13 others v Koinange [1986 [eKLR]** and the case of **Mike Maina Kamau Vs Attorney General [2017] eKLR**.

It was Counsel's submission that the Land Registrar was not called to testify in this case. Finally Counsel urged the court to dismiss the plaintiff's case with costs to the defendant .

ANALYSIS AND DETERMINATION

This is a case involving two sisters over the suit parcel of land. From the pleadings and the evidence on record the issues that arise for determination in this case are as follows:

- a) Whether the suit parcel of land belonged to the plaintiff and the defendant's father
- b) Whether the defendant's registration was done procedurally.
- c) Whether a customary trust existed
- d) Whether the defendant's title should be cancelled

This is a case that should not have taken this long in court if the two sisters embraced alternative dispute resolution. They could have put their differences aside and solved this matter amicably in the spirit of sisterhood. This was not to be as during the hearing of the case there was a lot of acrimony between the sisters.

Having said that the first issue for determination is as to whether the suit land belonged to Kipleting Matelong the father of the plaintiff and the defendant. It is clear from the record that this land was from a land buying group known as Kibabet Farm group where members came together to purchase land. PW2 and PW3 gave evidence and stated that they were members of the group and also bought land at Kibabet farm. In fact PW3 was a Secretary of the farm for 9 years. He confirmed that Matelong cleared all his debts and that there was a process of replacement of a member who had passed on from the register. He also stated that there was no replacement of Kipleting Matelong in the register. That he attended a meeting for subdivision and at that time the land was in the name of the defendant where the DO orders the land to be shared equally between the plaintiff and the defendant.

It is also on record that the farm register which was produced in court was tampered with and the name of Kipleting Matelong erased and replace with that of the defendant. This shows that the land originally belonged to Kipleting Matelong.

The defendant gave evidence that she had bought the land for Kshs 3800/ but she did not produce any proof of payment of the land. She did not also prove that she was a member of Kibabet farm. She only produced a title deed which she did not lay a basis on how she came to be registered as an owner.

On this issue I find that the land belonged to Kipleting Matelong who was a member of Kibabet Farm.

On the 2nd issue as to whether the defendant's registration was done procedurally, having found that the land belonged to Matelong the father of the plaintiff and the defendant, it follows that the defendant was under a duty to explain how she got registered as an owner of the suit land yet it belonged to their deceased father. The farm register indicates that the name that was on the list was for Matelong and it was erased and the defendant's name inserted. How was her name inserted after the death of Matelong without following proper procedures? PW3 confirmed that the name was inserted after the death of Matelong which was unprocedural.

Section 26 of the Land Registration Act provides;

(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.

The defendant's title has been challenged on grounds of fraud and therefore the title cannot be considered as prima facie evidence of an indefeasible title. The defendant' registration reeks of illegality and fraud.

In the case of **Munyu Maina.Vs.. Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, the Appeal Court held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

The import of this decision is that the defendant must go beyond the instrument to prove the legality of how the title was acquired in order to demonstrate that it was legal. The defendant was unable to explain how the suit property was registered in her name. Her accounts of the division of the suit land is also inconsistent. She claims to have purchased the suit land but at the same time stated that her father told the surveyor to have the property registered in her name. This is very peculiar in light of the claims that she purchased the land on her own. Further, it is contradictory that her witness statement referred to the name their father wished to have his land registered in as hers yet she claims that she is the one who had acquired it.

The defendant has failed to prove that her registration was lawful. There is no proof of a sale agreement or any contribution towards the purchase price that has been tendered.

In **Kibiro Wagoro Makumi v Francis Nduati Macharia & another [2018] eKLR** the court held;

It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition quoting with approval the cases of Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489 it is stated that: -

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (I). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

It should be noted that the pleadings contained the particulars of fraud and to that extent they have been distinctly pleaded. The plaintiff further led evidence to show that the defendant acquired the title in a dubious way. That there was cancellation of her father’s name in the register after death without proper procedures and lack of a succession Cause. It is clear that there was some mischief involved in the acquisition of the suit land in the name of the defendant. Further the defendant also offered to give the plaintiff one acer out of the suit parcel of land which measures 11.4 acres. This was a show of greed and not thinking about her only sibling. The evidence of the witnesses also corroborated the fact that the defendant was not lawfully registered as an owner of the suit land. I find that the defendant’s registration was not procedural.

On the issue of customary trust exists, from the records provided, it is clear that their father was the main contributor in the purchase of the land through the land company. Further, it is evident that the parties were both occupants on the suit land after acquisition and long after their fathers’ death. The defendant also admitted that the plaintiff in in occupation of the suit land where she built a house and cultivates. She however sated that she could only surrender one acre to the plaintiff and remain with 10 acres.

In the case of **Peter Gitonga v Francis Maingi M’ikiara [2007] eKLR** the court held;

A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged.”

Section 28 of the Land Registration Act provides;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (b) trusts including customary trusts”.

Looking at the circumstances around the registration it is apparent that the land was to be divided among the two sisters. By conduct, their father wanted them to both live on the land and it does not appear plausible that he would exclude one of his two only daughters and give the land to one of them. Upon his demise, the land had not been registered in his name and the only proof of ownership was the payments made as indicated in the register. The only way to deal with the property at that point would have been through succession and not cancellation of their fathers’ name.

I find that the defendant held the land in trust for the plaintiff and is entitled to half share of the land. I have considered the pleadings, the evidence adduced and the submission by Counsel and come to the conclusion that the plaintiff has proved her case on a balance of probabilities and therefore make the following orders:

a) A permanent injunction is hereby issued against the defendant from utilizing the property described as NGERIA/KESES/BLOCK 3 (KABABET)/42 to the exclusion of the Plaintiff.

b) A declaration is hereby issued that the subject property was held in trust by the defendant for the benefit of the plaintiff.

- c) A order is hereby issued for the cancellation of title of parcel of land known as NGERIA/KESSES/BLOCK 3 (KABABET)/42.
- d) An order for registration of half share each of land parcel No. NGERIA/KESSES/BLOCK 3 (KABABET)/42 in the names of the plaintiff and the defendant.
- e) Each party to bear their own costs as they are sisters.

Dated and delivered at Eldoret this 23rd day of May, 2019

M.A ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Miss.Bonareri holding brief for Mr.Kiboi for Defendant and Mr.Nyamweya holding brief for Mr.Bitok for the Plaintiff.

Mr.Mwelem – Court Assistant