



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 844 OF 2012

ERNEST KIBIWOTT KIPKOSGEL.....PLAINTIFF

VERSUS

DAVID BETT.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

By a plaint dated 11th April 2012 and amended on 3rd September 2012 and further amended on 20th February 2013, the plaintiff herein sued the defendant seeking for the following orders:

- a) An order of permanent injunction restraining the 1st defendant by himself, his servants and/or agents from interfering, intermeddling and/or in any other manner dealing with (he plaintiff's use, possession and/or ownership of all that parcel of land **E/Marakwet/Kessup B/597 measuring 0.44 Ha.**
- b) An order for cancellation of registration of land parcel **E/Marakwet/Kessup B7597 measuring 0.44 Ha** thereabout in the defendant's names and in its place the registration be made in the plaintiff's names.
- c) An order of certiorari issuing against the 2nd defendant quashing the title deed issued to the 1st defendant.
- d) Any other relief that this Honourable Court may deem fit to grant in the circumstances.
- e) Costs of the suit.

This matter was at one point dismissed for want of prosecution on 20th July 2017 but was later reinstated upon application by the plaintiff.

Plaintiff's Case

The plaintiff adopted his statement as part of his evidence in chief and stated that he is the registered owner of land parcel number E/Marakwet/Kessup "B"/597 measuring 0.44Ha of which he produced a copy of the title. He further testified that the 1st defendant unlawfully registered the suit land in his name and that is in occupation of the land illegally

It was PW1's evidence that he visited the suit land in 2011 and found out that the 1st defendant was in occupation of the land and utilizing the same. He stated that he investigated and established that the defendant had another title to the suit land which he claimed had been acquired fraudulently as the father PW2 had not sold the land to the 1st defendant. He claimed that the father had previously leased the land to the 1st defendant and not sold the same. Further that PW2 did not go to the Land Control Board to obtain a consent to transfer the land to the 1st defendant.

PW1 also testified that they went to the Lands office with PW2 who transferred the land to him as a gift.

On cross examination by Counsel for the 1st defendant PW1 confirmed that the sale agreement has PW2's name, the defendant's name and the rubber stamp of the Assistant Chief. He further stated that he does not know whether land rates have been paid.

On cross examination by Mr. Odongo for the 2nd defendant, PW 1 stated that after land adjudication the suit land was transferred directly to him at the Lands office in Iten. PW 1 was shown the green card of the suit land which indicated that the land was transferred to Richard

Kipkoskei Kandie and not PW1 as he had claimed and that the card was opened on 1st October 1994.

PW 1 also admitted that he could not remember whether a transfer was signed in his favour and that they did not go to the Land Control Board to obtain a consent. Further that he did not have any document to show that there was a transfer from PW2 to him. He also stated that he did not report the matter to the police for investigation of the 1st defendant's title.

PW2 the plaintiff's father testified and stated that he did not sell the suit land to the 1st defendant. It was his testimony that the money that the 1st defendant paid him was for the lease of the land and not for sale. He also stated that he transferred the land to the plaintiff as a gift but did not obtain the Land Control Board consent. Further that the plaintiff did not threaten him in respect of the case.

On cross examination he confirmed that he has 10 children who are not witnesses in this case and that he has alternative parcel of land in Irong and that he did not sell the suit land to the 1st defendant. The plaintiff therefore closed his case.

Defence Case

DW1 testified and stated that he entered into an agreement for sale with the plaintiff's father which was done at the Chief's office on 11th February 1980 of which he produced as an exhibit. DW1 further testified that they went to the Land Board with the plaintiff's father in 1995, issued with a consent, title deed and has been paying land rates since then. It was his evidence that he has been occupying the suit land together with his sons since 1980.

DW2 Antony Ng'etich testified that he went to the Land Board with the plaintiff's father and the 1st defendant in regard to the suit land and there was no objection to the transfer. DW3 John Kipchumba testified that he has stayed on the suit land since 1980 and that the land belongs to his father. DW4 Abraham Kiplagat Kipkeo also confirmed that the defendant's two sons have been staying on the land since 1980.

DW5 Hellen Kharemwa the County Land Registrar Elgeyo Marakwet gave a brief history of the suit land as per the records in their possession. She stated that the adjudication record dated 18th September 1979 and 21st January 1977 indicate that the land was given to Richard Kipkosgei Kandie, PW2 and that there were two registrations in respect of the same land. She produced two green cards in respect of Richard Kipkosgei Kandie and David Kipruto Bett. The second entry was transfer by way of gift. She did not have the original transfer documents in respect of this transaction. She stated that there was no entry on 7th December 1994 for the transfer of the land to Ernest Kibiwott Kipkosgei. Further that she did not have a transfer form, a copy of application or letter of consent, and no evidence of payment of stamp duty.

DW5 also stated that the transaction was not recorded in the presentation book. On cross-examination she testified it was not normal to have two green cards in respect of one parcel of land. It was her opinion that the land should revert to the original owner for regularization. The 1st defendant therefore prayed that the court finds that the suit land belongs to him.

Plaintiff's Submissions

The plaintiff filed written submissions and stated that he had followed due process to acquire the title and relied on section 26 of the Land Registration Act which provides for indefeasibility of title. Further that the 1st defendant had failed to secure consent from the Land Control Board as provided by section 6 of the Land Control Act. The sale agreement was done in 1980 and the purported land consent in 1995 which was a delay of 15 years thus the transaction was null and void.

Counsel cited the case of David ***Sironga Ole Tukai v. Francis Arap Muge & 2 Ors (2014)eKLR*** and *Wamukota v. Donati [1987] KLR 280*. Counsel urged the court to rely on the evidence of DW5 The County Land Registrar who confirmed that they did not have the documents in relation to the transaction of both the plaintiff and the 1st defendant in the file.

Counsel submitted that the court should cancel both titles and order the land to revert back to the original owner Richard Kipkosgei Kandie. PW2 the plaintiff's father.

1st Defendant's Submission

Counsel submitted that the 1st defendant proved that he entered into the sale agreement with the plaintiff's father on 11th February 1980 at the consideration of Ksh 1,450/= . It was also Counsel's submission of the 1st defendant has been in occupation of the suit land since then.

Further that the Land Registrar who testified as DW5 could not explain the disappearance of the documents from the registry. He therefore urged the court to uphold the 1st defendant's title and cancel the plaintiff's.

2nd defendant's submission

Counsel submitted that the plaintiff's claim is based on fraud which was not brought forth during trial. Counsel cited the case of *Vijay Morjaria v. Nnasingh Madhusingh Darbar & Anor (2000) eKLR* where it was stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable

to leave fraud to be inferred from facts. '

Counsel also cited the case of **Ndola v. Ndolo** (2008) 1KLR where the standard of proof of fraud was held that:

We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay square/y on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obvious/y higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certain/y not one beyond a reasonable doubt as in criminal cases... "

Mr. Odongo therefore submitted that the plaintiff having failed to demonstrate how he acquired his title, his title cannot enjoy protection accorded by section 26 of Land Registration Act, 2012 on indefeasibility and conclusive nature of title pursuant to Article 40(6) of Constitution. His title must, as a matter of course, be cancelled. Secondly, that the plaintiff failed to prove any or all of the allegations of fraud pleaded in his further amended plaint to the required standard and the plaint should be dismissed with costs

Analysis and determination

I have considered the pleadings and the evidence adduced and frame the following issues for determination:

- a) Whether the 1st defendant entered into a sale agreement with Richard Kipkosgei Kandie the plaintiff's father.
- b) Whether the plaintiff has proved fraud on the part of the 1st defendant.
- c) Who between the plaintiff and 1st defendant is the lawful owner?
- d) Whether the 1st defendant has proved his counterclaim

On the 1st issue as to whether the 1st defendant entered into a sale agreement with Richard Kipkosgei Kandie the plaintiff's father, the 1st defendant produced an agreement dated 11th February 1980. The agreement indicated that the plaintiff's father sold to the 1st defendant the suit land at the consideration of Kshs. 1450/ the same was witnessed by an Assistant Chief Kessup location.

The plaintiff and the father denied knowledge of the sale agreement and also testified that they did not obtain the consent of the Land Control Board. The 1st defendant also produced a copy of the title in his name and a receipt for payment of rates.

The plaintiff admitted that the 1st defendant has been in occupation of the suit land and he only discovered that he was in such occupation in 2011. It was the plaintiff's evidence that the father did not sell the land to anyone. The plaintiff had no evidence to disprove the existence of a sale agreement of the suit land. It was his word against the 1st defendant's documentary evidence which was not challenged as a forgery. Why did the plaintiff wait from 1980 to 2011 to bring this claim?

If the 1st defendant was merely leasing the suit land as the plaintiff and his father would like the court to believe, why did they not lead evidence to prove the same? The plaintiff and the father did not produce a lease agreement for the suit land, how much they were leasing the land for and the period for the lease. I find that the 1st defendant and the plaintiff's father one Richard Kipkosgei Kandie entered into a sale agreement for the suit land.

On the second issue whether they plaintiff has proved fraud on the part of the 1st defendant, it is trite law that fraud must be specifically pleaded and specifically proved. The plaintiff pleaded in the further amended plaint but fell short of the required standard of proof.

In the case of **Ndolo v Ndolo(2008) 1 KLR (G&F) 742** the Court stated that:

"...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."

Similarly in this case the plaintiff alleged that the 1st defendant fraudulently registered the suit land in his name. It was incumbent upon him to prove the alleged fraud on a balance of probabilities. There was no evidence that he had reported the matter to the investigative agencies to carry out the necessary inquiry. The plaintiff himself being a police officer is well acquainted with the procedures where someone suspects that there is a forgery. Why did he not report this matter when he realized that the 1st defendant had another title in respect of his parcel of land? Could it be that he was the one holding an irregularly acquired title. This leaves a lot to be desired.

In the case of **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000)** Tunoi JA (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable

to leave fraud to be inferred from the facts.”

The plaintiff also testified that the father did not transfer the land to the 1st defendant as they did not attend the Land Control Board to obtain a consent to transfer. I find that this is not true as the witnesses corroborated the fact that the plaintiff's father PW2 sold the land and it was witnessed by an Assistant chief and went to the Land Control Board.

The plaintiff admitted that the transfer of the suit land to him by his father did also not benefit from the consent of the Land Control Board. His evidence on the process of his transaction for transfer was also suspect. He had contradictions on how he acquired the land from his father giving doubts about the legality of the same. I find that the plaintiff and his witness have not proved fraud against the 1st defendant.

On the third issue on who between the plaintiff and the 1st defendant is the rightful owner of the suit land, both the plaintiff and the 1st defendant produced title deeds for the suit land which is unusual. A parcel of land cannot have two titles, what this means is that one must have been obtained irregularly.

DW5 the Land Registrar who gave evidence shed light on the current status of the parcel of land according to their records. It was her evidence that there were two green cards in respect of the same parcel of land and that the documents for transfer were missing in the file. She however stated that the two green cards had two entries each. One was for Richard Kipkosgei Kandie and Ernest Kibiwot and the second had Richard Kipkosgei Kandie and David K Bett the 1st defendant herein.

Further DW5 confirmed that during adjudication the land was transferred to the plaintiff's father which contradicted what the plaintiff had stated in his evidence in chief that the land had been transferred to him directly. These are some of the contradictions that made the plaintiff's evidence to lack credibility.

It should be noted that the Land Registrar was not able to explain the anomaly to green cards being opened in respect of the same parcel of land. Further she was not able to explain why the documents of registration like transfer, consent of the Land Control Board were missing in their file. She gave an opinion that in view of the above, the land should revert to the original owner who is the plaintiff's father.

Counsel for the plaintiff bought this line of argument and urged the court to order that the land reverts to the original owner. This submission is suspect as it is meant to lock the 1st defendant out of the suit land. Reverting this suit land to the plaintiff's father is like giving the plaintiff the land because there is no likelihood that the father will in any way transfer this land to the 1st defendant.

In this case where there are two titles the court has a duty to refer to the documents produced. In the case of **Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others** [2016] eKLR, Munyao J held as follows;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

From the two titles produced, the plaintiff's title is not easily traceable due to the break in the chain of the procedure used in its acquisition and his own admission and contradictions on how he got the title. The demeanor of PW 2 who is the plaintiff's father also showed a person who was under duress to give evidence on behalf of his son. Faced with the two titles the one that has some credibility on the process of acquisition is the 1st defendant's who was armed with a sale agreement, rates payment receipt and a title deed to boot. His title is protected by Section 26 of the land Registration Act which provides for indefeasibility of title. There was no evidence of fraud on its acquisition.

It is not in dispute that day 1st defendant and his sons are in occupation of the suit and has been paying land rates of which he produced payment receipts. It is further not disputed that the plaintiff and the father do not stay on the suit land. In the case of **Benja Properties Limited -versus- Syedna Mohammed Burhannudin Sahed & 4 others** (2015) eKLR, the Court of Appeal unanimously held that:

‘It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta-Ofel -versus- Danquah (1961) ALL ER 596 at page 600, the slightest amount of possession would be sufficient.’

I am guided by the above authority on the issue of possession of the 1st defendant as against the plaintiff. The plaintiff's title shows that he was gifted the land in 1994, but it was his testimony that he went to the suit land in 2011 when he found the 1st defendant, this does not add up. The fact that the plaintiff is willing to have his title cancelled makes his claim suspect as earlier stated by his counsel. What is he upto?

Having said the above I find that the 1st defendant is entitled to the suit land and that his occupation and title should be regularized. The court is empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

The 1st defendant filed a counterclaim to be declared the owner of the suit land and from the evidence adduced and the documents on record

it is clear that the 1st defendant has proved his counter claim to the required standards. I therefore find that the plaintiff has not proved his case and is dismissed with costs to the 1st defendant. The 2nd defendant's testimony and submissions were very helpful in this case as it brought to fore the history of the suit parcel of land from adjudication and registration which unearthed the double titling and the contradictions of the plaintiff. The 2nd defendant also supported the 1st defendant's quest to be declared as an owner of the suit parcel of land.

I find that the 1st defendant has proved his counterclaim against the plaintiff and therefore his claim succeeds with costs. I therefore make the following orders:

- a) A declaration is hereby issued that the 1st defendant is the legal owner of land parcel No. ELGEYO MARAKWET/ KESSUP "B" /597 measuring 0.44Ha.
- b) The title in respect of parcel No. ELGEYO MARAKWET/ KESSUP "B" /597 registered in the name of the plaintiff is hereby recalled/revoked for cancellation by the Land Registrar and the 1st defendant's title to be deemed as valid.
- c) Plaintiff to pay costs of the counterclaim.

Dated and delivered at Eldoret on this 15th day of May, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ in open court in the presence of Mr.Kuria for 2nd Defendant and in the absence of Counsel for the Plaintiff and 1st Defendant.

Mr.Mwelem – Court Assistant