



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 4 OF 2016

ISMAEL TUIYOT KATTANY.....IST PLAINTIFF

ELIZABETH JERUTO SUMUKWO.....2ND PLAINTIFF

VERSUS

JAMES KIMAIYO OREU.....DEFENDANT

JUDGMENT

By a plaint dated 21st December 2015, the plaintiff's herein sued the defendant seeking for the following orders:

- a) A permanent injunction restraining the defendant either by himself, his employees, agents and or servants from encroaching, trespassing onto fencing, ploughing, growing crops, alienating or otherwise dealing with that property known as **SERGOIT/KOWOPTAOI BLOCK 12 (KITALEL) 608**.
- b) Mesne profits for the illegal occupation and use between April 2015 and the dates the defendant will vacate the suit property.
- c) Costs of this suit and interests thereon at court rates.
- d) Any other reliefs the Honourable court shall deem fit to grant.

The plaintiffs filed an application under certificate of urgency seeking for a temporary injunction against the defendants restraining them from interfering with the suit land. The application was heard and orders granted pending the hearing and determination of the suit. The plaintiffs further filed an application dated 13th April 2016 seeking orders that the defendant be committed to prison for such a period as the court shall determine for contempt of court for disobeying the orders of the court issued on 5th April 2016. The application was heard and the court gave a ruling declining to grant the orders on the grounds that the plaintiffs had not proved or demonstrated that the walls were constructed after the court order was issued.

PLAINTIFFS' CASE

PW1 testified and stated that he has the authority of the 2nd plaintiff to plead and testify on her behalf. He adopted his witness statement and stated that he became a member of Kipsoen/Kapteren Youth Group 1992 and made the first payment on 1st May 1994 for Kshs. 20,000/ which was paid to the Director Barnaba Kilanya in the presence of Senior Chief Yusuf.

PW 1 further stated that he bought parcel of land (SERGOIT/KOIWOPTAOI BLOCK 12 (KATALEL)/608) while the 2nd Plaintiff purchased her portion subsequently after which the plot was registered and a title issued in their joint names.

It was PW 1's evidence that he was entitled to 2 acres but was only given one acre because the management decided to give less acreage. It was further his testimony that his name was included in the list of members and allocation of plot numbers whereby he was later issued with a title deed which he produced in court. He also stated that he wanted to occupy the suit land but the defendant resisted prompting him to file this case. He therefore prayed for an order of eviction of the defendant, mesne profits and costs of this suit.

On cross-examination by Counsel for the defendant, PW 1 confirmed that he has never taken occupation of the suit land as the defendant had denied him occupation. He also stated that it is the chairman of the Youth group who received his money for the purchase of the land and that the plot was given much later after the allocation had been completed.

PW1 also stated that the land was subject to an audit and that the directors had not decided on the purchase price so he paid a deposit of Kenyan shillings 20,000/ and a further 30,000/ but was never issued with a receipt by the directors.

On re-examination PW1 stated that the defendant does not live on the suit land but he cultivates it. He also stated that the chairman of the Youth group received the money

in his capacity as an official of the group. Further that there were some plots that remained after allocation which was subject to an audit and were later reallocated.

PW2 testified that he was the secretary of the Youth group from 1985 to date. He also stated that they prepared a list of members who had been allocated land and sent to the Ministry of Lands of which he produced the list as an exhibit before the court. He stated that the plaintiff's name appeared in the register as number 222 and that they were entitled to plot No.608. Further that the defendant's name appeared in the register as No. 225 and was entitled to plot No. 504 of which the defendant has not come to the committee to pick his title.

PW2 also testified that the defendant sued the directors at the Land Disputes Tribunal where it was ruled that the defendant be given 1 acre and that the award has not yet been set aside. He further stated that the defendant does not reside on the suit land and that the committee repossessed the 2 acres and gave other members.

On cross examination by Miss Tum for the defendant, PW2 confirmed that the defendant paid Kshs. 130/ as membership fees and Kshs. 5000/ for 1 acre. Further that he had paid Kshs. 8000/ but later asked for a refund of Kshs. 3000/. He also stated that the plaintiff was allocated the land after the committee repossessed it. He further confirmed that he was aware of the agreements and the balloting of the plots which was done in 1992.

PW 2 also stated during cross examination that he is the one who prepared the list and register that was used for balloting of the plots and denied having committed any fraud in the allocation of the plots.

On reexamination PW2 confirmed that the plaintiffs were not part of the original ballot but came in after the audit and that they do not have issues with Luca Kangogo and Agnes Magut as they are not parties to this case. That 15 people were also affected by the repossession. The plaintiffs therefore closed their case.

Defence Case

DWI adopted his statement and testified that he purchased shares for allocation of land on 20th January, 1985 from KIPSOEN/KAPTEREN YOUTH GROUP. He also said that other members approached him to buy their shares which he bought from Luka Kipyego Kangogo and her sister Agnes Magut Ngeringwony and surrendered their receipts of Kshs.5,000/= and Kshs.4,000/= respectively, he confirmed that balloting was done 9th April, 1991 and was issued with ballot for plot number 105 measuring Three (3) acres by KIPSOEN/KAPTEREN YOUTH GROUP .

DWI stated that the Plaintiffs acquired their parcel after survey had been done and boundaries marked and prayed that the court award him his land measuring Three (3) acres as he had genuinely paid for it and cancel the title deed issued to the Plaintiffs.

On cross examination DW1 confirmed that the tribunal gave an award that he is entitled to 1 acre and that he did not file an appeal. He further stated that he does not stay on the suit land

DW2 gave evidence in support of the DW1's case that he bought 3 acres of land from the Youth group. DW3 also reiterated the evidence of DW1 in support of his case. He stated that he was not a member of the Youth group and does not know much about the group. That the defendant stays on a different parcel of land.

Plaintiffs' Submissions

Counsel for the plaintiffs reiterated the evidence adduced by the parties and listed the following issues for determination by the court:

- a) Whether the suit property lawfully belongs to the Plaintiffs;
- b) Whether the directors of Kipsoen/Kapteren Youth Development Group were necessary parties to this suit;
- c) Whether the Defendant has locus standi to lay any claim for third parties;
- d) Whether the Plaintiffs' claim should be allowed;
- e) Whether the Counter-Claim has merit;
- f) Who will bear the costs of the suit.

On the 1st issue as to whether the suit property lawfully belong to the Plaintiffs, Counsel submitted that the plaintiffs produced a title deed which shows that the suit property is owned jointly by both Plaintiffs. He relied on Section 24(a) of the Land Registration Act (No. 3 of 2072) provides thus:

"Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto..."

Section 26(1) of the Land Registration Act (No. 3 of 2012) further provides:

"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."

Counsel submitted that the plaintiffs presented cogent evidence to demonstrate how they acquired title to their property. The 1st Plaintiff paid for shares in 1994 while the 2nd Plaintiff bought her portion from the directors in the year 2006. They were subsequently issued with a joint title in the year 2013 after a survey was undertaken.

Mr. Magut further submitted that no evidence was presented by the Defendant to discredit the manner the title was acquired by the Plaintiffs. That the evidence presented by the defendant was that he paid for one share entitling him to one (1) acre and thereafter purchased shares belonging to two other persons, namely, Agnes Magut Ngeringwony and Luka Kipyego Kangogo who were neither parties to this suit nor called as witnesses hence the receipts in their respective names were rejected as evidence herein.

On the 2nd issue as to whether the directors of Kipsoen/Kapteren Youth Development Group necessary parties to this suit, Counsel submitted that in view of the Defendant's Defence and testimony in court, he ought to have sought orders to enjoin the directors of the said Youth Group as parties to this suit. The non joinder was fatal to the Defendant as he could not blame them for alleged fraud or collusion with the Plaintiffs more so considering that the alleged particulars of fraud on paragraph 9 of the Defence mentions them specifically.

On the 3rd issue as to whether the Defendant has locus standi to lay any claim for third parties, Counsel submitted that the defendant made reference to payments made in the names of Agnes Magut Ngeringwony and Luka Kipyego Kangogo which he sought to claim to be his entitlement as he had bought them out. Further that from the Tribunal Award in case No. 31 of 2007 it was found that the defendant had no right to claim ownership beyond one acre of land and that Agnes Magut Ngeringwony and Luka Kipyego Kangogo were entitled to their respective shares individually.

Counsel also submitted that it is apparent that those persons were crucial parties to this suit if the Defendant was keen on having his side carry the day. Further the defendant admitted that no appeal was preferred against the said Award hence it remains binding on all parties and the Defendant cannot be allowed to deviate from the said decision.

On the 4th issue as to whether the Plaintiffs' suit has merit, Counsel submitted that the Plaintiffs have demonstrated that they acquired title to their property in an open, transparent and lawful process and no fraud, collusion, illegality or corrupt scheme has been proved or that they were parties to any such conduct. It has also been demonstrated with the Defendant's own admission through evidence he presented in court that it has been ruled by a competent tribunal that he is entitled to only one (1) acre which is what he already has (SERGOIT/KOIWAPTAOI BLOCK

On the 5th issue whether the Defendant's Counter-Claim has merit, it was Counsel's submission that no basis has been laid by the Defendant for his claim for the Plaintiffs' land and as such he is only entitled to one acre which has already been allocated to him. Further that the defendant is claiming more than what the Plaintiffs own. He is claiming for 2.2 Acres yet the suit land measures only 2.0 Acres. Counsel urged the court to dismiss the defendant's counterclaim and allow the plaintiffs suit with costs.

DEFENDANT'S WRITTEN SUBMISSION

Counsel for the defendant filed written submissions and reiterated the evidence of the parties together with the pleadings. Counsel listed the following issues for determination by the court

Whether James Kimaiyo Ore Purchased Shares Amounting to Three (3) Acres from Kipsoen/Kapteren Youth Group in the year 1991 in L.R.No.9130. On the 1st issue Counsel responded in the affirmative

On the 2nd issue whether the second allocation was unlawful, Counsel submitted that KIPSOEN/KAPTEREN YOUTH GROUP had a procedure of land allocation to members who had paid for membership and balloting which the defendant participated in and payment of survey fees. Counsel submitted that the defendant followed all the procedures.

On the issue as to whether the Plaintiffs' Title Deed issued in respect of the said Parcel is invalid and ought to be cancelled Counsel submitted that the officials of KIPSOEN/KAPTEREN YOUTH GROUP used corrupt schemes to allocate land to the Plaintiffs herein who later registered themselves as the proprietors of the suit parcel.

Counsel therefore urged the court to find that the plaintiff's fraudulently acquired the suit land and registered in their names and therefore ought to be cancelled. She urged the to dismiss the plaintiffs' claim and allow the defendant's counterclaim with costs.

Analysis and determination

This is a case where the plaintiffs have sued the defendant for an order of injunction, mesne profits and vacant possession of the suit land. This is a matter that was finalized at the tribunal and the award should have been implemented.

The issue for determination is whether the plaintiffs are the rightful owners of the suit land, whether they fraudulently acquired the suit land and whether the defendant's counterclaim has merit.

The plaintiffs produced a title deed in their name which showed ownership of the suit land. They explained the process of acquisition of the land which culminated in the issuance of the title deeds.

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.

If there is tangible evidence that the title was acquired fraudulently then the court would not hesitate to cancel it. The process of acquisition of title is also as important as the end result of the title. A person cannot be allowed to dangle a title and expect protection of the law if it is tainted with illegality.

The court is also 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.

From the evidence on record and the documents produced I find no evidence of illegality or fraud. The defendant just alleged fraud but did not go a step further to prove the same. He blamed collusion with people who were neither parties nor witnesses in this case. No criminal case or investigation was done in respect of the fraud.

The award that was given by the Land Disputes tribunal and later adopted as the judgment of the court is very clear that the defendant was only entitled to 1 acre and no more. This award was not appealed against and the same was adopted as the judgment of the court. This follows that the defendant was satisfied with the decree. If he was aggrieved, then he should have preferred an appeal. As we speak the decree still stands. His counterclaim therefore must fail as he had already been given a verdict in a case where he had sued for the land.

I have considered the pleadings, the evidence, the documents produced and the submissions of Counsel and find that the plaintiffs have established their case to the required standard apart from proof of mesne profits which is a special damage which must be specifically pleaded and proved. The same was not proved and therefore is declined. I enter judgment in their favour in the following terms:

a) An order of permanent injunction is hereby issued restraining the defendant either by himself, his employees, agents and or servants from encroaching, trespassing onto fencing, ploughing, growing crops, alienating or otherwise dealing with that property known as **SERGOIT/KOWOPTAOI BLOCK 12 (KITALEL) 608**.

b) Mesne profits is declined

c) Costs of this suit and interests thereon at court rates.

Dated and delivered at Eldoret this 07th day of May, 2019

M.A ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Magut for the Plaintiffs and Miss.Tum for the Defendant.

Mr.Mwelem – Court Clerk