



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 214 OF 2016

ELIZABETH CEHPTANUI RONO (Suing as legal representative to the estate of **ANDREW KIPNGENO RONO- DECEASED**)...**1ST APPLICANT**

SAMUEL KIPKEMOI TOO (Suing as a legal representative of the estate of **ANDREW KIPNGENO- DECEASED**).....**2ND APPLICANT**

VERSUS

EDWARD KIPRONO RUTO.....**1ST RESPONDENT**

SALOMON YEGON.....**2ND RESPONDENT**

JUDGMENT

(Suit by plaintiffs seeking orders that a title they hold is the genuine title of the suit land; 1st defendant also holding a parallel title; the land being in a settlement scheme and both parties claiming to have purchased the suit land from the initial allottee; initial allottee not called by either party as a witness; from the evidence, there being doubts on the authenticity of the sale agreement of the 1st defendant; title deed of 1st defendant also doubtful having not provided for the fact that the land was initially owned by another person; 1st defendant's title cancelled and judgment entered for the plaintiffs)

1. This suit was commenced through a plaint which was originally filed in the Chief Magistrate's Court at Molo and registered as Molo CMCC No. 131 of 2015. It was later transferred to this court for disposal.

2. The plaintiffs are the legal representatives of one Andrew Kipngeno Rono (deceased). It is pleaded in the plaint that at the time of his death in the year 2011, the deceased was the proprietor of the land parcel Nakuru/Saino Settlement Scheme/64 which is land measuring about 1.6 Ha, having been issued with a title deed on 7 July 2006. It is contended that the 1st defendant fraudulently acquired title to the same land on 23 November 2012 and that the 2nd defendant is now in occupation of it. It is pleaded that the deceased had been in occupation of the land until the year 2011 when he became very sick and died. It is averred that it is after noting that the deceased is no more that the 1st defendant procured title to the said land while the plaintiffs still have possession of the original title deed. It is hinted that the 1st defendant obtained title through forgery. In the suit, the plaintiffs have asked for the following orders :-

- (a) A declaration that the 1st defendant's title to the land parcel Nakuru/Saino Settlement Scheme/64 is illegal, null and void and an order for its cancellation and same to revert to the names of the original owner Andrew Kipngeno Rono (deceased) pending confirmation of succession to his estate.
- (b) An order of eviction against the defendants, their agents, family members and/or employees from the plaintiff's parcel of land.
- (c) Any other or further relief that this Honourable Court may deem fit to grant.
- (d) Costs of this suit and interest.

3. The defendants filed a statement of defence through which they averred that the suit land was given to one Philip Rotich in the year 2005 and was later sold to the 1st defendant in the year 2012 and the said land is occupied by the 2nd defendant with the authority of the 1st defendant. It is pleaded that the 1st defendant got the property without notice of another person holding title to the same land. It is denied that

the deceased was in occupation of the land. The claims of forgery have been denied and the defendants have asked that the plaintiff's suit be dismissed.

4. PW-1 was Elizabeth Cheptanui Rono, the 1st plaintiff. She stated that she is the widow to Andrew Kipngeno Rono (the deceased) and that he died on 11 April 2011. She testified that her late husband got title to the suit land in the year 2006 and she produced the original title deed as an exhibit. She stated that they lived on this land until the death of her husband who was then buried in his ancestral home in Londiani. She went back to the land in the year 2014 and found the 2nd defendant in occupation. The 2nd defendant is father of the 1st defendant. She discovered that the 1st defendant had acquired a parallel title to the same land on 23 November 2012, and claimed to have purchased it from another person. She testified that her late husband purchased the suit land from the original owner, one Mr. Philip Rotich, and she had the sale agreement with her. She also had with her the list of allottees of land within the settlement scheme and pointed out that it was Mr. Philip Rotich who was allocated the suit land.

5. PW-2 was Samuel Kipkemoi Too, the 2nd plaintiff and a brother to the deceased. He testified that he was a witness to the sale agreement dated 3 March 2006 between the deceased and Mr. Philip Rotich. He stated that he resides about 300m from the suit land and confirmed that the 1st plaintiff lived on the land between 2006 and 2011 before the deceased fell ill and later died. He confirmed that it is the 2nd defendant who is currently in occupation of the land, having taken possession in the year 2014. He testified that the 1st defendant could not have obtained title to the suit land in the year 2012, as from the year 2009, there was a Government caveat stopping transactions in the Saino settlement scheme.

6. PW-3 was Mr. James Mosonik Chumba. He testified that he knows Mr. Philip Rotich as one of the persons who were settled in the Saino settlement scheme. He himself was also settled in the same scheme. He stated that he witnessed the sale agreement between Mr. Philip Rotich and the deceased.

7. PW-4 was Raymond Gitonga, a Land Registrar in Nakuru. He had the register of allottees of the Saino settlement scheme. He confirmed that Philip Rotich was allotted the suit land. He however could not find the Green Card to the said land as his efforts to trace it in the registry did not bear fruit. The two title deeds in issue were put to him, and he noted that the one that was issued first in time is that held by the plaintiffs, issued to the deceased on 7 July 2006. His entry is No. 4 and 5 in the title deed. He explained that this means that there were other pre-existing transactions being entries 1, 2 and 3, but he could not tell what entries these were for lack of the Green Card. He however presumed that since the land was under a settlement scheme, entry No.1 was a registration in favour of the Settlement Fund Trustees (SFT) and entries No. 2 and 3 would bear the name of Philip Rotich and issue of title deed to him, respectively. Entry No. 4 would thus be the name of the deceased and entry No.5 issuance of title deed to him. On the title held by the 1st defendant, he observed that it was issued on 23 November 2012. The 1st defendant is entered as No. 2 and 3 in the title deed, which would insinuate that the 1st defendant was an original allottee, assuming that the first entry would be in favour of the SFT or the Government. His name did not however appear in the original list of allottees of the scheme. He stated that if the position is that the 1st defendant purchased the land from another person, then he would be entered as No. 4 and 5 in the title deed. He further stated that it came to be within his knowledge that the Government had issued a caveat in the year 2009 for the parcels of land in this area and thus no dealings could be registered.

8. Under cross-examination, he stated that he heard that there was a lifting of the caveat in the year 2012. He also refuted a letter dated 29 September 2014, said to have been written by the then Land Registrar, one C.O Birundu, as the signature therein was not his signature. In the letter it was said that the bona fide owner of the suit land is the 1st defendant.

9. With the above evidence the plaintiffs closed their case.

10. DW-1 was the 1st defendant. He testified inter alia that in the year 2005, he was looking for land to settle his parents and he heard from one of his aunts who lived in the area of land being sold by Mr. Philip Rotich. He was given a copy of the title deed of the original owner (which he produced as an exhibit) and he did a search but he did not have a copy of it. They then wrote a sale agreement before an advocate in Kericho. He produced the sale agreement as his exhibit. He stated that consent of the Land Control Board (LCB) was then applied and consent was obtained. He however did not have copies of the documents lodged or issued by the LCB. He then stated that transfer forms were executed and he himself lodged them at the Nakuru land registry. He however did not have copies of the transfer instruments. All this was done in the year 2005 and he stated that he was told to wait for about 2 weeks for title to be processed. He stated that he travels a lot in and out of the country (he being an engineer), and he did not go back after the 2 weeks. He went back after 3 weeks and was told that there was a caveat and that he will have to wait until it is lifted before title could issue. He kept checking until the year 2012 when he was informed that the caveat had been lifted and he received a title deed in his name. He produced the same as an exhibit. The same indicates that it was issued on 23 November 2012. He stated that he was not aware that somebody else held title to the same land. After purchasing the land, he mentioned that he let his uncle graze his animals. In the year 2012, he settled his parents on the land, and he affirmed that the 2nd defendant is his father. In the year 2012, the 2nd plaintiff emerged and claimed to own the land. He (DW-1) engaged the village elder to settle the matter but the 2nd plaintiff refused. He also approached the Chief who wrote to the Lands office who responded by the letter dated 29 September 2014 addressed to the Chief. He also stated that the police did write a letter dated 24 November 2014 affirming that he is the owner of the land. He testified that he saw the Green Card in the Lands office and was surprised to hear that the same is no longer available.

11. Cross-examined, he stated that there was no caveat in the year 2005 although he was informed later of the caveat when he went to collect his title deed. He got report that the caveat had been lifted in the year 2012 and found his title deed ready. He was asked why his defence mentions 2012 and not 2005 as the date of the sale agreement and he stated that this could have been a mistake when the defence was being drawn.

12. DW-2 was Solomon Byegon A. Maritim, the 2nd defendant. He confirmed that he is father to the 1st defendant and further confirmed that he is the one in occupation of the suit land. He stated that the land was bought by his son but he was not privy to the sale agreement. He started living on the land in the year 2013.

13. DW-3 was one Aaron Kiprono Cheruiyot. He testified that he witnessed the sale agreement between the 1st defendant and Mr. Philip, but he does not know what transpired thereafter. He stated that he lives near the suit land and that after purchase, the 1st defendant left the land to his aunt in the year 2005. She used to graze her animals on this land.

14. With the above evidence, the defendants closed their case.

15. I invited both Mr. Ogeto and Mr. Ngeno Lessan, the respective learned counsel for the plaintiffs and defendants, to file written submissions which they both did. I have gone through them and considered them before arriving at my decision.

16. The main if not sole issue is which of the two titles presented in this case is the genuine title. Is it that in the name of the deceased or is it the one in the name of the 1st defendant? Both persons claim that they purchased the suit land from the previous owner, one Philip Rotich. There is no dispute that Philip Rotich was the original allottee of the suit land. I am completely unable to tell how Philip Rotich sold the suit land to two people as he was never called as a witness by either the plaintiffs or defendants and I was not informed of his whereabouts.

17. In his submissions, Mr. Ogeto, for the plaintiffs, doubted the authenticity of the sale agreement that was displayed by the 1st defendant. He doubted if at all it was made in the year 2005 and insinuated that it was prepared much later, after this suit was filed. He also noted the discrepancy between the date of the sale agreement produced, which is the year 2005, and the fact that the defence mentions that the land was sold to the 1st defendant in the year 2012. He also observed that DW-3 who claimed to have attested the agreement did not produce his identity card when challenged in court to do so. I appreciate the submissions of Mr. Ogeto, for it is indeed true that in the defence, it is pleaded that the 1st defendant purchased the suit land in the year 2012. There is also a replying affidavit sworn by the 2nd defendant, in reply to an application for injunction, where it is deposed that the 1st defendant purchased the suit land in the year 2012. It is actually true that the sale agreement surfaced in the year 2018 when the 1st defendant filed it in his list of documents. You would expect some consistency in the pleadings of the defendants if indeed the 1st defendant purchased the suit land in the year 2005, and a prompt introduction of the sale agreement, early in the proceedings, for that is the foundation of their case. The signature said to be of Philip Rotich in the sale agreement displayed by the 1st defendant is also nowhere near the signature of Philip Rotich in the sale agreement displayed by the plaintiffs. In my view, the sale agreement displayed by the 1st defendant is highly suspect. I am aware that in his submissions, Mr. Ngeno tried to insinuate that the sale agreement of the plaintiff ought to be rejected because it was not drawn by a qualified person, following the provisions of Section 34 of the Advocates Act. I am afraid that Section 34 and 35 of the Advocates Act, do not apply for that refers to instruments that require registration and a sale agreement is not one which requires to be registered. What is registered is the transfer instrument.

18. Apart from the doubt in the sale agreement displayed by the 1st defendant, his title is also suspect. It is unfortunate that the green card which would have shed more light on the entries and sequence of transactions was not available. In its absence this court has no choice but to refer to the documents produced by the parties in trying to determine which of the two title deeds is authentic. I note that in the title deed produced by the 1st defendant, his name appears in entry No. 2 in the title deed, but this cannot be, if indeed he purchased the land from an original allottee. As explained by PW-3, the Land Registrar, given that the land was in a Settlement Scheme, the first entry would be in favour of the government or the SFT. The original allottee's name would then be entered as entry No. 2 and entry No. 3 would be issuance of title deed to such allottee. A purchaser will thus be noted in entry No. 4 and entry No. 5 would be issuance of title deed to such purchaser. This sequence is not followed in the title deed displayed by the 1st defendant but is followed to the letter in the title deed relied upon by the plaintiffs.

19. I am also not persuaded by the explanation of the 1st defendant that he purchased the land in the year 2005 but was only issued with title in the year 2012 owing to a caveat. I have no evidence of any caveat having been in place in the year 2005, and the evidence of the Land Registrar was that the caveat was put in place in the year 2009. If at all the 1st defendant actually purchased the suit land in the year 2005, he ought to have been issued with title in the same year, 2005, or shortly thereafter. I also doubt whether the 1st defendant ever took possession of the suit land as alleged in the year 2005. He of course stated that he allowed his uncle and aunt to graze their animals until the year 2012 when he brought his parents to the land. In his evidence, he did state that the purpose of him buying the land was so as to settle his parents, and he has not given any explanation, if that was indeed the purpose, why his parents never settled on the land until the year 2012 or 2013. I believe the plaintiffs' evidence that it was the deceased who was in possession until the time he died in the year 2012. I am persuaded that it is after his demise that the defendants now moved to take possession of the land.

20. Given the above discourse, it is my finding that of the two title deeds produced, the one that is more authentic is the one produced by the plaintiffs. Having made that finding, the register and/or green card of the suit land ought to be constructed so as to reflect that the land is registered in the name of the deceased. The title of the 1st defendant is hereby cancelled and the register should not reflect the name of the 1st defendant as proprietor of the suit land. Having held that the 1st defendant holds a dubious title, the defendants cannot have any right to continue with possession of the suit land and they must immediately cease possession and hand the same to the plaintiffs and/or their nominees. I give them 30 days to so vacate. They are also hereby permanently restrained from the suit land. On costs, the plaintiffs shall have the costs of the suit against the 1st defendant.

21. I now make the following specific orders :-

i. That as between the title produced by the plaintiffs and the title produced by the 1st defendant over the land parcel Nakuru/Saino Settlement Scheme/64, it is the holding of this court that it is the title produced by the plaintiffs that bears the name of Andrew Kipngeno A. Rono which is the more authentic title.

ii. That the purported title of Edward Kiprono Ruto, the 1st defendant, is hereby cancelled.

iii. That the Land Registrar is hereby directed to reconstruct the register of the land parcel Nakuru/Saino Settlement Scheme/64 to reflect the name of Andrew Kipngeno A. Rono (deceased) as the proprietor.

iv. That the defendants and/or their servants/agents are hereby given 30 days to vacate the land parcel Nakuru/Saino Settlement Scheme/64, and in default they be forcibly evicted and any costs of eviction will be borne by the defendants.

v. That on expiry of the 30 day window above, the defendants are hereby permanently restrained from entering, being upon, utilizing, dealing, or in any other way interfere with the possession or title of the land parcel Nakuru/Saino Settlement Scheme/64.

vi. That the 1st defendant shall bear the costs of this suit.

22. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 13th day of June 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Ogeto for the plaintiffs.

Mr. Ngeno Lessan for the defendants.

Court Assistants: Janepher Nelima / Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU