



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

ELC NO 45 OF 2013

JACOB GITHINJI KAMAU (suing as the legal representative of

KAMAU KANIA).....PLAINTIFF

VERSUS

PATRICK RERIMOI.....1ST DEFENDANT

MARY NDATA KAGWIMA.....2ND DEFENDANT

JUDGMENT

(Plaintiff claiming title held by 1st defendant; suit against 1st defendant abating; having abated plaintiff unable to sustain a suit for the title; dispute revolving over ownership of land in a land buying company; the company not acknowledging plaintiff as having good title to the land; evidence of the company given considerable weight; plaintiff obtaining ex-parte judgment against deceased 1st defendant but executing an eviction against 2nd defendant causing her loss; 2nd defendant entitled to both general and exemplary damages for the judgment and order of eviction were issued by deceit; judgment entered in favour of 2nd defendant as proper owner of the land having purchased it from the 1st defendant before his demise).

PART A: INTRODUCTION AND PLEADINGS

1. This suit has quite a chequered history.

2. The same was commenced through a plaint which was filed by one Kamau Kania on 10 January 1997, against one defendant, namely Patrick Rerimoi Kipkemei. Both these persons are now deceased and the plaint has been amended several times. In the original plaint, the late Mr. Kania pleaded that through a sale agreement dated 12 April 1995, he purchased from one Daniel Kiptanui, the elder (sic) son of one Tarus Kimagut, who was his agent, the land parcel Dundori/Muguathi/Block 2/139. It was pleaded that the said Tarus Kimagut was a fully paid up member of Kalenjin Enterprises Limited (a land buying company) and the allottee of a Plot No. 193, Koelel Farm, which became registered as Dundori/Muguathi/Block 2/139 (hereinafter referred to as 'the suit land'). Mr. Kania pleaded that upon purchase of the suit property, he took up possession and occupied it without interruption until December 1996 when he visited the land and found the agents of the original defendant (Patrick Rerimoi) constructing a temporary mud house. He further pleaded that the said Patrick Rerimoi had obtained a fraudulent title on 11 November 1996 inter alia by misrepresenting to the Land Registrar that he was the allottee of the suit land. In the suit, Mr. Kania, asked for the following orders (slightly paraphrased as the original plaint in the file is tattered and some words not legible but the import is not in doubt) :-

(a) A declaration that he is the lawful owner of the land Dundori/Muguathi Block 2/139.

(b) A declaration that the title deed obtained by the defendant (Patrick Rerimoi) on 11 November 1996, was obtained by fraud and hence null and void.

(c) An order be issued to the Nakuru Land Registrar directing him to cancel the title of Patrick Rerimoi and in place he (Mr. Kania) be registered as the lawful proprietor of the land and be issued with the title certificate.

(d) A permanent order of injunction to restrain the defendant (Mr. Rerimoi) from the suit land.

(e) Costs of the suit.

3. On 13 May 1997, an amended plaint was filed, now introducing one Mary Ndata Kawima (proper name being 'Kagwima'), as 2nd defendant. It appears as if the plaint was amended because the plaintiff realized that it is the 2nd defendant who was in possession of the land.

In the amended plaint, it is pleaded that the 2nd defendant's occupation of the suit land constitutes trespass and in his prayers, the plaintiff added a prayer for eviction.

4. No defence was filed by Mr. Rerimoi, but the 2nd defendant Ms. Kagwima, did file a statement of defence on 15 May 1997. She pleaded inter alia that the suit land belongs to her absolutely and that Mr. Kania is just a member of Kalenjin Enterprises Limited but has never attended before the allocating committee to be shown his plot. She averred that her entry to the land was with the permission of Mr. Rerimoi. I am unable to read other parts of her defence but I believe that she was pleading that she purchased the land from Mr. Rerimoi.

5. The matter lay quiet until the plaintiff (Mr. Kania) through his counsel, listed the matter for hearing before Koome J (as she then was) on 9 February 2006. Mr. Kahiga, learned counsel who appeared for the plaintiff, stated to the court that the 1st defendant (Mr. Rerimoi) had not filed any defence, and he wished to proceed as against the 1st defendant by way of formal proof. The court accepted this submission and directed the matter to proceed. Mr. Kania testified and also called one Maina Kirungui as his witness. He inter alia testified that he bought the suit land from Tarus Kimagut, and that the said Mr. Kimagut was a member of Kalenjin Enterprises. He thus asserted his right over the suit land.

6. In a judgment that was delivered on 8 December 2006, the learned judge found that the 1st defendant (Mr. Rerimoi) did not defend the suit and held that Mr. Kania had proved his case to the required standard. She further found that Mr. Kania had been in occupation of the land for well over 10 years before the 2nd defendant (Ms. Kagwima) came into the picture. She held that Mr. Rerimoi had irregularly obtained the title to the suit land which he then purported to sell to Ms. Kagwima. She thus granted the prayers (a) (b) (c) and (d) in the plaint and costs. The learned judge however clarified that she has not issued the order of eviction as the plaintiff proceeded with the suit only against the 1st defendant (Mr. Rerimoi) and the order of eviction was directed against the 2nd defendant.

7. Subsequently, an application dated 3 May 2007 was filed, seeking orders to have the Deputy Registrar, execute all transfer documents to transfer the land to the plaintiff. It was averred that Mr. Rerimoi had been served with the judgment but had not given effect to it by transferring the land to Mr. Kania. On 4 June 2007, the application went before Koome J, who allowed it as it was uncontested.

8. The matter thereafter went before the Deputy Registrar (Hon. H. Baraza) on 25 March 2008, for Notice To Show Cause, why the 1st defendant should not be evicted from the suit land. It was mentioned during the proceedings before the Deputy Registrar, that the 2nd defendant had also been served. Mr. Karanja, learned counsel who appeared for the plaintiff, sought orders that the 2nd defendant be evicted and for the plaintiff to be put into possession. The application was instantly allowed as prayed.

9. What followed after that is that Mr. Kania moved to evict Ms. Kagwima, the 2nd defendant, who was the one in occupation of the land. Ms. Kagwima promptly appointed counsel, M/s Gatu Magana & Company Advocates, and filed an application dated 18 April 2008 to stop the execution of the eviction order and the quashing of the said eviction order issued by the Deputy Registrar. She pointed out in her application that the plaintiff had moved to execute the decree against her when there was in fact no judgment against her. She further stated that auctioneers had descended upon her property and proceeded to demolish her homestead. She deposed in her supporting affidavit to the application that she had purchased the suit land from Patrick Rerimoi in the year 1996, and annexed copies of the sale agreement, consent of the Land Control Board, and transfer forms duly executed, but mentioned that she did not lodge the transfer instruments owing to this dispute. She further deposed that Patrick Rerimoi had in fact died in the year 1998, and that the proceedings against him since that time were null and void.

10. When the application came up before Koome J on 2 May 2008, she pointed out that she had never issued any eviction orders against the 2nd defendant. She found that the plaintiff (Mr. Kania) had engaged in an abuse of the court process and accordingly set aside the judgement of 8 December 2006 alongside all consequential orders. The judgment having been set aside, the parties were taken back to the position that they were in as if the matter had never proceeded.

11. Subsequently, Ms. Kagwima appointed a new counsel, M/s Mongeri & Company Advocates, and amended her statement of defence on 23 July 2012, to plead a counterclaim. She pleaded that on 14 November 1996, she purchased the suit land from the 1st defendant, who was then the registered proprietor, and took possession of it. She pleaded that in the year 2007/2008, the plaintiff unlawfully obtained judgement and proceeded to cause himself to be the registered proprietor of the suit land and a title deed was duly issued to him. She pointed out that the judgment that led to him being issued with title had been set aside. She pleaded that the registration of the plaintiff as proprietor was thus obtained by way of fraud inter alia by failing to disclose to the court that the 1st defendant was long dead by the time the plaintiff was proceeding with the case against him. She further pleaded that the plaintiff obtained an eviction order which he proceeded to wrongfully execute against her, and that in the course of the eviction, her 5 roomed residential house and various structures in the land, all valued at Kshs. 600,000/= were destroyed. She further pleaded that she lost furniture, clothing, beddings, electronic goods, upholstery, decorations, wall hangings and pictures, travelling bags/suit cases, and other household items of Kshs. 500,000/=. She sought orders that she be declared to be the rightful proprietor of the suit land, cancellation of the title issued to the plaintiff (Mr. Kania) and in place she be registered as proprietor, an order of permanent injunction against Mr. Kania, general damages for trespass to the land and to goods, punitive and/or exemplary damages, and special damages. She also asked for costs and interest.

12. The plaintiff filed a reply to defence and defence to counterclaim where it was denied that Ms. Kagwima had purchased the land from the 1st defendant and took possession. He pleaded that he is now the registered proprietor of the suit land and that the 2nd defendant has no claim over it. It was further pleaded that his entry into the suit land was lawful through an eviction order issued by this Honourable Court.

13. On 5 June 2015, Mr. Kania died. By that time, the plaintiff had changed counsel from M/s Mirugi Kariuki & Company Advocates, to M/s Ngigi Mbugua & Company Advocates. A hearing date was then taken for 27 September 2017 between the law firm of M/s Ngigi Mbugua & Company, now acting for the plaintiff, having taken over from M/s Mirugi Kariuki & Company Advocates and M/s Mongeri & Company Advocates for the 2nd defendant. On that date, Ms. Kinuthia, learned counsel for the plaintiff, informed the court that Mr. Kamau Kania, the original plaintiff, had died on 5 June 2015. I noted that this is more than 1 year ago, and made an order that the suit has abated and awarded

costs to the 2nd defendant recoverable from his estate. Later, an application dated 6 October 2017 was filed, by one Jacob Githinji Kamau, through the law firm of M/s Mirugi Kariuki & Company Advocates. He stated that he is a son of the late Mr. Kania, and his legal representative. He sought orders seeking the revival of the abated suit and for him to be substituted for the late Mr. Kania so as to continue the suit on behalf of his estate. The application was opposed but I allowed it through my ruling of 22 November 2017. At this time, the 2nd defendant was acting in person having withdrawn instructions from M/s Mongeri & Company Advocates. Having allowed the application, the suit is now being continued by Jacob Githinji Kamau, on behalf of the estate of Mr. Kamau Kania solely against Ms. Kagwima sued as the 2nd defendant. The suit against the 1st defendant abated since he died in the year 2004 (following a letter from a chief noted to be on record). It is on the above basis that I proceeded to take the evidence of the parties.

B. EVIDENCE OF THE PARTIES

(i) Evidence of the plaintiff

14. PW-1 was Jacob Githinji Kamau. He stated that he is a resident of Eldoret and a businessman. He is the son of Kamau Kania, the original plaintiff.

15. He testified that his late father purchased the suit land from one Dominic K. Tanui on 12 April 1985 for a consideration of Kshs. 30,500/=. He produced the said sale agreement as an exhibit. He stated that the shareholder for the said land was one Tarus Kamagut, the father of Mr. Tanui. He had a shareholder's card and a certificate of ordinary shares which indicated that Mr. Kamagut held 30 shares. He stated that Mr. Tanui transferred the 30 shares to his father (Mr. Kania) and he produced the instrument of transfer of shares. Upon this transfer, his father was to get title to the suit land and on 4 December 1996, he paid Kshs. 50/= for survey, and the receipt was produced as an exhibit. At the back of the receipt, Kalenjin Enterprises Limited confirmed clearance. His father then paid Kshs. 1,250/= at the Lands office so as to get the title deed and he produced the said receipt as an exhibit. His father did not however get title because the same had already been issued to Patrick Rerimoi on 11 November 1996. His father complained at the offices of Kalenjin Enterprises and the company issued a notice dated 13 March 1996 affecting 26 parcels of land including the plot in dispute. Mr. Rerimoi did not go to justify his title at the offices of the company and eventually Mr. Kania commenced this suit. He was aware that Mr. Rerimoi had sold the land to the 2nd defendant who was the one in possession.

16. Cross-examined by the 2nd defendant, he affirmed that what his father claims is the plot No. 139 and not the plot No. 193 which plot is indicated in the plaint. He stated that what his father bought was 30 shares and not one share. He was not aware if the plot in dispute only accounted for one share. Neither was he aware if Mr. Rerimoi ever lived on this land. He did not know whether Mr. Rerimoi was ever served with the notice dated 13 March 1996. He was questioned on the demolition of the structures of the 2nd defendant but stated that he could not remember when this was done. He was ignorant of whether Mr. Rerimoi had died when the matter proceeded against him.

17. I questioned the witness and he affirmed that he was born in the year 1985 and was not present when the transactions in issue took place because he was still young. I noted that the documents he had produced showed plot No. 143 and not Plot No. 139 and I wondered whether the two had any connection but he was unable to give any explanation.

18. PW-2 was Mr. Daniel Maina Kirugui. He testified that he is a member of Kalenjin Enterprises Limited and that in the year 1998, he was elected as director and secretary of the company, a position that he served until the year 2008. He testified that members bought shares in Kalenjin Enterprises Limited up to the year 1975 when issuance of further shares was stopped. He stated that the company had 404 members and that land was allocated according to one's shares. A person got 1 ½ acres for 25 shares and each share was Kshs. 20/=. Thus for payment of Kshs. 500/= one got 25 shares equivalent to land measuring 1 ½ acres. He testified that when one purchased shares, he was issued with a share certificate. A member could sell his shares so long as he sold all his shares and upon such sale, the purchaser would be entitled to the land. He had with him a list of allottees and the said list had two numbers, one which he termed as an old number, which is the number in the share certificate, and a new number, that given by the surveyor after the land was surveyed. He stated that according to his list, the suit land bore an old number 143 and a new number 139, in the name of Kimagut Torus. The acreage is 0.6 Ha. He stated that when the list was prepared, Mr. Kimagut was already dead. He identified the shareholder card and share certificate in the name of Mr. Kimagut which the plaintiff had produced.

19. He mentioned that he knew the late Mr. Kania and was aware that he had purchased the suit land from its former owner. He later came to the offices of the company to complain that Mr. Rerimoi was in occupation of his land. He stated that there were 27 such cases, and the directors informed these people to return their titles, as they had been issued erroneously, through the notice dated 13 March 1999. Mr. Rerimoi did not however return his title. He testified that Mr. Rerimoi's name does not appear in the list of allottees nor in the members register which he produced as an exhibit. He identified the survey receipt of Kshs. 50/= and stated that the company cleared Mr. Kania on 4 December 1996 for the plot No. 139 and endorsed the same at the reverse of the receipt. He stated that a person who was not cleared could not get title and thus the title of Mr. Rerimoi was not a good title.

20. Under cross-examination, he was challenged to confirm his credentials but he had nothing to show that he was elected a director of the company. He explained that the old numbers were given by the company and the new numbers after survey. He affirmed that for the plot in dispute, the old number is 143 and the new number is 139. He stated that survey started in the year 1981 and completed in the year 1983 and the agreement for sale of the land to Mr. Kania was in the year 1985 after the land had already been surveyed. He confirmed that the agreement mentions the plot No. 143 and not No 139. He thought it may have been a clerical error for the sale agreement to bear the old number. He asserted that he was elected director in the year 1998 although he joined as a member in the year 1980. He clarified that it is actually his wife who is noted as member and not himself. He stated that the surveyor carved out plots according to the shares owned by the members and not according to ground occupation. He stated that all members have old and new numbers for their plots. He was challenged to tell the old and new number for one Kombich Kibon but he could not as he did not have the register. A receipt dated 22 August 1996 in the name of Kombich Kibon was put to him and he affirmed that the same was a receipt for payment of survey. The reverse of the receipt was endorsed by the directors of Kalenjin Enterprises but he stated that this was erroneous as the land was owned by Mr. Kania. He confirmed that the receipt of Mr. Kibon was earlier in time than that held by Mr. Kania. He was questioned on the tribal composition of the original shareholders of Kalenjin Enterprises and he stated that there were some original members who of Kikuyu origin, those who were

employees in at Koelel Farm. He was questioned on the acreages and shares and he testified that Mr. Kimagut had 30 shares and the acreage of the land is 0.6 Ha.

21. With the above evidence, the plaintiff closed his case.

22. DW-1 was the 2nd defendant. She testified inter alia that she was born in Limuru and in the year 1996, she came to Rift Valley to look for land as she had been informed of land available for sale. She found the selling agent and she was shown 4 plots including the suit land which she preferred over the rest. She was given a copy of the title and she did a search. She was also advised to confirm ownership at the offices of Kalenjin Enterprises which she did. She discovered that the original owner of the land was one Kombich Kibon who had sold his interest to Mr. Rerimoi. She had a copy of the share certificate and survey receipt. She stated that Mr. Rerimoi was unwell and he was selling the land to get money for his treatment, and that at the time she entered into the sale agreement, Mr. Rerimoi was actually hospitalized. She paid his hospital bill and the following day they wrote a sale agreement and she paid him the balance. She produced the sale agreement as an exhibit. After about one week, she commenced developments and that is when Mr. Kania emerged and told her that she was developing in Plot No. 193 and not No.139. She had by that time booked the Land Control Board (LCB) for 17 April 1997 for consent which date she shared with Mr. Kania. Mr. Kania did not however show up at the Land Control Board and consent to transfer was given. She produced the application for consent of the LCB, the consent and transfer documents executed in her favour by Mr. Rerimoi. After she was served with summons, she saw Mr. Kimatta, then counsel for the plaintiff, and he assigned his clerk to go with her to the offices of Kalenjin Enterprises to find out the root of the problem. She stated that Mr. Kania was claiming the plot No. 193 and he was told that the said plot had not been assigned to anyone but that the plot No. 139 was assigned to Mr. Rerimoi. She tried to transfer the land into her name but found that Mr. Kania had placed a restriction. One morning in the year 2008, some persons descended on her property and demolished her house and left behind an eviction order. She then appointed Advocate Gatu Magana. She stated that it could not be that the matter properly proceeded against Mr. Rerimoi as he had already died in the year 2004. She asked that she be allowed to transfer the land to herself as she has all requisite documents.

23. Cross-examined, she stated that she executed an agreement with Mr. Rerimoi and not Mr. Kombich Kibon, the original owner noted in the register. She mentioned that Mr. Kombich had already sold his shares to Mr. Rerimoi. She herself never met Mr. Kombich. She denied the claim that there were old and new numbers for plots in the area. She took possession of the land in the year 1996, and it was in December of the same year, that Mr. Kania emerged and found her constructing. She stated that she gave Mr. Kania the date for the LCB hearing so that he can appear and meet Mr. Rerimoi and state why he was also claiming the land. She was not aware of any notice issued by the company to Mr. Rerimoi to return his title and she was not told this when she went to the offices of the company in the year 1997.

24. DW-2 was one Elijah Kiplagat Kipkemei Chelaite a director of Kalenjin Enterprises Limited. He testified that survey for the land Dundori/Muguathi was done in the years 1984/1985. It is after survey was done that numbers for the plots were given and he stated that these numbers have never changed. He testified that the plot No. 139 (the suit land) was originally owned by Kombich Kibon. He identified his name in the members register. He testified that in the year 1996, the 2nd defendant came with documents showing that she had bought the land from Mr. Rerimoi and they confirmed from their records that this was in order. They stamped the survey receipt that she had, and at that time, Mr. Rerimoi already had title to the land. They therefore only stamped the receipt to confirm its authenticity. The name of the 2nd defendant was not however inserted in the register. He stated that after about 6 months, someone else came claiming to own the same plot and produced the share certificate of Kimagut Tarus. He identified the name of Kimagut in the members register and stated that he was also a genuine member of the company and they had stamped his documents for the plot No. 139, not remembering that they had 6 months earlier, stamped the documents of the 2nd defendant but having not inserted her name against Plot No 139, their register was hence blank. Following this, the name of Kamau Kania was inserted against Plot No. 139. He stated that they later discovered that Mr. Kania had purchased the shares of Kimagut Tarus and thus what was sold to Mr. Kania was actually Plot No. 143. He acknowledged that the company stamped documents for both Mr. Kania and the 2nd defendant for ownership of the Plot No. 139. He asked that Mr. Kania does go and occupy plot No. 143 and the 2nd defendant retain the suit land, appreciating that both Mr. Kania and the 2nd defendant are members of the company.

25. He however denied that DW-2 was ever a director of the company. He testified that there is a fraudulent register in the Lands office which bears old and new numbers. According to him, Mr. Kania purchased the plot No. 143 and the 2nd defendant the suit land (Plot No. 139) and each should go and occupy their correct parcels of land.

26. Cross-examined, he testified that he became a member of the company in the year 1969 and has served as director since the year 2001 and became chairman of the company in the year 2008. He had a letter from the Registrar of Companies to prove this. In the year 1996, he served as a committee member and he explained that between the years 1985 and 1997, directors had been suspended and what was in existence was a task force overseeing the affairs of the company. He testified that DW-2 is not a member of Kalenjin Enterprises. He stated that in 1998, the High Court had ordered an election and DW-2 and others purported to have been elected but they were never registered as directors. In 1999, a new group of directors were elected replacing the group of DW-2. He refuted that there were old plot numbers before survey. He stated that it is only Barut and Rhonda Farms of Kalenjin Enterprises which bore old and new numbers but the farm where the suit land is located (Koelel Farm) and other farms of the company did not have old and new numbers. He stated that before survey, no one had been assigned any land although some people lived here. He testified that Kombich Kibon was an original member and had a share certificate. The company did not have the sale agreement between Mr. Kombich and Mr. Rerimoi but he stated that Mr. Rerimoi must have retained Mr. Kombich's share certificate. He testified that the company does not hold all sale agreements. He explained that to be cleared to get title, one needed to get a clearance certificate from the company. He affirmed that the company cleared Mr. Kania for the suit land in November/December 1996, but clarified that this was a mistake, as they had earlier cleared the 2nd defendant in June 1996. He stated that it was the task force which cleared people in the year 1996. He stated that what caused the error is that they did not write the name of the 2nd defendant in the register and the register bore no name against the Plot No. 139. This he explained, was an oversight. He mentioned that it was by error that the name of Mr. Kania came to be inserted against the plot in the register. He was not aware of the notice dated 13 March 1999, asking some people to return their titles. He declared fraudulent, the list of allottees that DW-2 produced, and asserted that what he had was the only true register. He explained that there are about 4 registers but only one is genuine.

27. With the above evidence the 2nd defendant closed her case. I directed both parties to try and see whether in view of the allegation that the Plot No. 143 was available, the matter could be settled. The report that I got was that the search for the said land shows that it measures 4

acres and is in the name of one Ndirangu Njenga. It was noted that the acreage is different and the land was not available, it being in the name of somebody else. Having receipt of that information, I directed parties to file written submissions which was done.

C. SUBMISSIONS OF COUNSEL

28. In his written submissions, counsel for the plaintiff inter alia submitted that the true owner of the land is the plaintiff, having acquired it from Tarus Kamagut, who was represented by his son, Dominic K. Tanui. He referred me to the sale agreements of the parties. He submitted that Tarus Kamagut had a shareholder certificate from the company and the transfer of shares entitled Mr. Kania to ownership of the suit land. He submitted that survey fees was paid and endorsed by the company who stamped on it. He referred me to the register produced by DW-2 and pointed out that the same bears the old Plot No. 143 and new number 139 as that owned by Kamagut Tarus. He submitted that DW-2 could not have knowledge of the survey in the years 1984/1985 as he was not a director at that time. He submitted that the plot No. 143 is a different plot for it measures 1.8 Ha which is bigger than what was assigned to the plaintiff and he thought that DW-2 was not being honest to the court. He thought that the 2nd defendant has not proved good ownership to the land as she failed to adduce evidence of the transfer between the 1st defendant and the original owner and further that she did not produce the original title deed to ascertain that it was owned by the 1st defendant. He submitted that the 2nd defendant failed to exercise due diligence in acquiring information about the land that she was buying so as to know whether the 1st defendant had a good title. He submitted that the 1st defendant did not have a good title as he acquired the land illegally and unprocedurally and he was not in a position to transfer it to the 2nd defendant. He relied on the cases of *Sophie Wanjiku John vs Jane Mwhaki Kimani (2013) eKLR*; *Alice Chemutai Too vs Nickson Kipkurui Kipkorir & 2 Others (2015) eKLR*; *Esther Ndegi Njiru & Another vs Leonard Gatei (2014) eKLR*. He further submitted that the 2nd defendant has not proved any special damages and referred me to the case of *Kenya Power & Lighting Company Limited vs Clement Likobe Shikondi (2018)eKLR* where it was affirmed that special damages must not only be specifically pleaded but must also be specifically proved. He submitted that the 2nd defendant never adduced any evidence that her property was destroyed by people under the plaintiff's authority and that her claim for damages cannot stand based on mere allegations. He asked that judgment be given in favour of the plaintiff with costs.

29. I did not see any submissions filed by the 2nd defendant.

D. ANALYSIS AND DECISION

30. Before I go too far, it is important to put some issues into their proper context. It will be recalled that the plaintiff had earlier on proceeded and obtained judgment on 8 December 2006 in his favour. It is pursuant to that judgment that he later moved the court to have the title to the suit land transferred to him and that is how he came to be registered as proprietor. It should be further recalled that on 2 May 2008, the court set aside the judgment of 8 December 2006 and all consequential orders. This means that even the title of the plaintiff was quashed by that order and the suit could only properly proceed on the presumption that title was still with Patrick Rerimoi, the 1st defendant, because that was the status of the title to the suit land, before the judgment of 8 December 2006. In other words, through the setting aside order, the parties were put back to the position that they were before the judgment, and the position before the judgment was that it was Patrick Rerimoi who was registered as proprietor of the suit land with the plaintiff having this litigation seeking orders that he be registered in place of the said Patrick Rerimoi.

31. I have evidence presented by the 2nd defendant that Patrick Rerimoi died in the year 2004, and it follows that the suit against him abated one year after his demise. There was never any substitution after his death. What this means is that the plaintiff cannot sustain any action against Mr. Rerimoi for the suit against him abated. The plaintiff's suit seeks a cancellation of the title of Mr. Rerimoi, but there is technically no suit against him, for the same already abated, and I do not see how the plaintiff can be able to seek a cancellation of title if the suit against the person with title has already abated. When a case abates because of death, it simply means that the other party can no longer sustain an action against the person who has died. The action can only be continued after the abated suit has been revived against the estate of the party who is deceased. In this case, there has never been made any order reviving the suit against the 1st defendant and there has never been any substitution of the deceased 1st defendant. It means therefore that the plaintiff cannot sustain any prayers that are directed towards the deceased 1st defendant. I have already pointed out that the main prayer that the plaintiff sought against Mr. Rerimoi, was a cancellation of his title to the suit land. Owing to the abatement of the suit against the 1st defendant, that prayer cannot be sustained and any orders sought against the 1st defendant are hereby dismissed. With that dismissal, the plaintiff's suit must fail, for the whole of the plaintiff's case was premised on the allegation that the title of Patrick Rerimoi was a bad title which needed to be cancelled. Once this prayer fails, the substratum of the plaintiff's case must fail and the case of the plaintiff must therefore be dismissed. Even the prayer for the eviction of the 2nd defendant cannot stand, for that prayer can only be granted once there is an order in favour of the plaintiff that he is the rightful owner of the suit land, and as I have explained above, the plaintiff cannot get that prayer because the person holding title is deceased and the suit against him has abated. For that reason alone, the plaintiff's suit is hereby dismissed with costs to the 2nd defendant.

32. I however opt to go into the other issues raised just in case I am wrong in my above holding.

33. The core of the dispute is whether or not Mr. Kania is entitled to hold title to the suit land. His case, as presented by his legal representative, is that Mr. Kania purchased the suit land from one Dominic K. Tanui (Mr. Tanui) on 12 April 1985. Now, Mr. Tanui was never an owner of any land in Kalenjin Enterprises, and the plaintiff acknowledges that what Mr. Kania purchased from Mr. Tanui, was the share of one Tarus Kamagut (Kamagut), who was the person identified in the register of Kalenjin Enterprises. Despite the dispute over which register is authentic, as between that produced by the plaintiff and that produced by the 2nd defendant, both registers do acknowledge Mr. Kamagut was a member of Kalenjin Enterprises and entitled to some shares and land purchased by the company. It was said that Mr. Tanui was an agent or son of Mr. Kamagut but I have not seen any document evidencing that he was ever an agent of Mr. Kamagut. It is not clear from the evidence when Mr. Kamagut died, and I am unable to tell whether Mr. Kamagut had died at the time of the sale agreement between Mr. Tanui and Mr. Kania. If he was alive, Mr. Tanui could not sell the land to Mr. Kania, for the rightful seller would be Mr. Kamagut, unless there was a power of attorney displayed by Mr. Tanui, and no power of attorney has been produced in this case. The outcome would still be the same if Mr. Kamagut was dead at the time of the sale agreement, for unless and until Mr. Tanui held a grant of letters of administration with authority to sell, or a confirmed grant which transmitted the land to him, Mr. Tanui could not be said to have had any

capacity to sell the shares or land of Mr. Kamagut to any other person, for doing so would be intermeddling with the estate of a deceased person. In other words, Mr. Tanui could not lawfully sell the property of Mr. Kamagut, and that being the position, I do not see how Mr. Kania can claim to have properly purchased the shares of Mr. Kamagut. The plaintiff cannot thus assert good title to the suit land, for if it is his case that the land was owned by Mr. Kamagut, then he needed to purchase the shares or land from Mr. Kamagut himself, or from his legal representative, and he has not demonstrated that he did as such. Again, his suit must fail for the reason that he has not shown that he purchased the shares or land from their rightful proprietor or legal representative.

34. Putting aside the foregoing, and assuming that there was a good sale agreement between Mr. Kania and Mr. Tanui which could be enforced, I am still not persuaded that the plaintiff has demonstrated that the estate of Mr. Kania is entitled to the suit land. The plaintiff relies on the register produced by PW-2 showing that Mr. Kamagut was entitled to the plot identified as old plot No. 143 and new plot No. 139. This register is seriously contested by DW-2. Being a director and the chairman of Kalenjin Enterprises, his evidence on what is the authentic register cannot be taken lightly. In as much as PW-2 claimed that he sat as Director and Secretary of the company between the years 1998 to 2008, he produced no evidence that he sat as Director or Secretary, though DW-2 did acknowledge that he may have been Director between 1998 and 1999. Without proof that PW-2 was actually the secretary, his evidence on company matters, as compared to the evidence of DW-2 who proved that he is a Director of the Company and the current chairman, must be given much less weight.

35. DW-2 testified that both Mr. Kamagut and Mr. Kombich, the predecessor of the title acquired by Mr. Rerimoi were both members of Kalenjin Enterprises. It will be recalled that DW-2 testified that there was only one genuine register and that there were never two numbers issued to plots within Koelel Farm, where the suit land was carved from. For the reasons that I have mentioned above, I opt to give much weight to the evidence of DW-2, and I am persuaded by his evidence that they did clear Mr. Rerimoi and the 2nd defendant to obtain title to the suit land, identified as Plot No. 139, and that it was by error that they also cleared Mr. Kania for title to the same plot. He explained that the company did authenticate the documents of Mr. Rerimoi, and the 2nd defendant, and cleared them to obtain title to the suit land, but due to an oversight, the name of the 2nd defendant was not entered in the register against the Plot No. 139. I am persuaded by this evidence and I have no reason to doubt it. I am aware that there are question marks about the acreage and ownership of the Plot No. 143, which DW-2 stated is what ought to have been assigned to Mr. Kania, but I cannot delve too much into that, because the plaintiff was not litigating over the said land, and the current registered owner is not a party to this case. But as I have said, I am persuaded by the evidence of DW-2 that the correct owner of the suit land was Patrick Rerimoi and they do acknowledge that he sold the said land to the 2nd defendant.

36. Owing to the above, I do not find any fault in the manner in which Mr. Rerimoi obtained title to the suit land. I also do not find any fault in the sale agreement between Mr. Rerimoi and the 2nd defendant. At the time that the land was sold to the 2nd defendant, it was Mr. Rerimoi who was the registered proprietor and the 2nd defendant was perfectly entitled to enter into a sale agreement with him. It indeed does appear that Mr. Rerimoi was the one in possession of the land at the time of sale, and that is how the 2nd defendant obtained entry into the suit land and commenced developments before Mr. Kania emerged, claiming to have purchased the same land. The 2nd defendant conducted due diligence before entering into the sale agreement including making inquiries at the company offices, all of which gave her a green light to proceed with the sale transaction. The two did apply and obtained consent to transfer from the Land Control Board and Mr. Rerimoi executed the transfer instruments which however could not be registered because of this case. I see absolutely no problem with the sale between Mr. Rerimoi and the 2nd defendant and I have no reason not to allow the sale to be executed so that the title to the suit land is transferred to the 2nd defendant.

37. In addition to the prayers that she should be the one to be registered as proprietor of the suit land, the 2nd defendant also counterclaimed for compensation for damages that she suffered when the plaintiff descended on her property with an eviction order.

38. Now, there can be no question that the eviction order was improperly obtained by Mr. Kania. Mr. Kania misled the court that he was entitled to an order to evict the 2nd defendant when in fact he had no such order. His move to appoint an auctioneer to evict the 2nd defendant was therefore illegal. The 2nd defendant mentioned in her pleadings that during the eviction exercise, her house worth Kshs. 600,000/= was destroyed and that she also lost items worth about Kshs. 500,000/=. In her evidence the plaintiff did not produce any evidence of loss, and I do agree with the submissions of counsel for the plaintiff, that these being special damages, the same not only needed to be pleaded, but also needed to be specifically proved. In absence of specific proof, I am unable to give judgment for this loss. However, the plaintiff did plead for general damages for trespass to land and to goods and punitive and/or exemplary damages. I am of opinion that she is entitled to general damages for trespass, for it is apparent that the plaintiff trespassed into the suit land, when he did not in fact have a proper eviction order, and tried to evict the 2nd defendant from the suit land. It was an act of trespass for the plaintiff to enter the suit land and hire agents to affect the 2nd defendant's possession of the suit land when he had no authority or proper authority to do so. I am afraid that the plaintiff cannot hide behind the court order which granted the order of eviction for it is him who misled the court to grant the same. In asking and in obtaining the eviction order, he was not acting in good faith and he was not innocent. He cannot therefore escape payment of general damages for trespass. In my discretion, and considering the surrounding circumstances under which the plaintiff obtained the eviction orders, I do award the 2nd defendant, the sum of Kshs. 1,000,000/= as general damages for trespass.

39. I am further of the view that the acts of deceit that the plaintiff engaged in, in order to obtain the court order, including causing to be filed a false affidavit to state that the 1st defendant had been served when he was in fact dead, ought to attract exemplary damages. It should serve as a lesson to others that one ought not to try and obtain court orders in their favour through deceit. Again taking into consideration all factors, I do grant the 2nd defendant exemplary damages in the sum of Kshs. 2,000,000/= payable by the estate of Mr. Kania.

40. In summary, pursuant to the reasons that I have alluded to above, I am of the view that the 2nd defendant is the one who ought to be the rightful proprietor of the suit land. The title that was obtained by the plaintiff must be cancelled, and I have already explained, that the order that awarded him the title was set aside.

41. I now make the following specific orders :-

(a) That it is hereby declared that it is the 2nd defendant, who ought to be registered as the proprietor of the land parcel

Dundori/Muguathi Block 2/139.

(b) That the Land Registrar is hereby directed to cancel the title of the plaintiff, and instead enter the name of the 2nd defendant as the proprietor of the land parcel Dundori/Mugwathi Block 2/139 and issue her with a title deed to the said parcel of land.

(c) That judgment is hereby entered for the 2nd defendant against the estate of Mr. Kamau Kania, for the sum of Kshs. 1,000,000/= in general damages for trespass, and Kshs. 2,000,000/= as exemplary damages, and the said sums to attract interest at court rates from the date of this judgment.

(d) That a permanent injunction is hereby issued restraining the estate of Mr. Kamau Kania, and/or their servants/agents from entering, being upon, or in any other way, interfering with the possession of the land parcel Dundori/Mugwathi Block 2/139.

(e) That the estate of Mr. Kamau Kania shall bear the costs of this suit.

42. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 12th day of June 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :

Ms. Kinuthia for the plaintiff.

2nd defendant : Acting in person.

Court Assistants- Janepher Nelima/Patrick Kemboi

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU