



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 62 OF 2014

MARTHA CHELAL.....1ST PLAINTIFF

MICAH KIPYEGON.....2ND PLAINTIFF

(Legal representatives of the Estate of

KIPYEGOMEN CHELAL alias (KIPIAKOMENT CHELAL)

VERSUS

ELIJAH KIPKEMOI BOIYWO.....1ST DEFENDANT

JONAH KURGAT.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR UASIN-GISHU.....3RD DEFENDANT

JUDGMENT

By a plaint dated 27th February 2014 the plaintiff's herein sued the defendants jointly and severally seeking for the following orders:

- a) A declaratory order that the registration of **LR NO. MOIBEN/MOIBEN BLOCK 4(TUGEN) 115** in the name of the 1st defendant was fraudulently obtained and the same be cancelled and registered in the names of the plaintiffs herein by the 3rd defendant.
- b) A declaratory order perpetually restraining the 1st and 2nd defendants from entering, erecting structures or using **LR NO. MOIBEN/MOIBEN BLOCK 4 (TUGEN) 115** and to remove the fence erected on the land.
- c) Costs of the suit
- d) Any other or further relief that this ho court

The plaintiffs filed an application for injunction contemporaneously with the plaint which was heard and orders granted as the plaintiffs had established a prima facie case with a probability of success. The 1st and 2nd defendants filed a defense and counterclaim seeking for a declaration that the 1st defendant is the lawful and registered owner of the suit land, an order for removal of the restriction lodged on the suit land, general damages for wrongful entry on the suit land and costs of the counterclaim.

PLAINTIFFS' CASE

The plaintiff adopted her witness statement and stated that she is a legal representative of the estate of Kipyegomen Chelal (deceased) who was her late father. It was her evidence that her late father owned land in Tugen Estate Ltd of which they were shown in July 1999 before their father passed on.

It was her evidence that in 2000 they went to the farm to follow up the land issue whereby they were shown the parcel by one David Keitany who resides in Tugen Estate. That the said Keitany took them to the caretaker who showed them the boundaries of their parcel of land.

PW1 also stated that they went to one of the Directors of the farm who was also a Secretary who checked the register and confirmed that their father was member No. 52 in the register. That they were given a clearance certificate and proceeded to the Lands registry and

established that the name was in the black book but later in 2012 the caretaker's daughter called them and told them not to pay rates as the land had been allocated to someone else.

It was PW1's evidence that when they carried out a search they established that the land had been transferred to the 1st defendant. That the Directors of the farm invited them for hearing of the dispute and gave a verdict that the land belongs to their late father and were later given a letter by the officials and the Chief which they took to the Land Registrar but when they looked at the black book they noticed that the page where their father's name was in the register had been plucked and were not allowed to take a copy.

PW1 further stated that a letter by a Chief known as Mathew Koskei indicated that the land was vacant and was allocated to someone else. This necessitated the District Commissioner to summon the Chief and the parties to his office whereby the Chief indicated that he had been misled by the defendants. That the DC directed the Chief to write another letter revoking the earlier letter which was done and sent to the Land Registrar.

It was PW1's testimony that the Land Registrar heard the dispute and gave a verdict that the 1st defendant surrenders the title for cancellation within 21 days of which he did not comply. PW1 stated that the Registrar advised them to go to court to get an order for cancellation. The plaintiff therefore prayed for orders as per the plaint.

PW1's evidence was corroborated by PW2's testimony Elijah Siror who was a Director of Tugen Estate. He produced the members' register which indicated that the plaintiff's father was a member and had been allocated the suit land. That the plots were allocated in 1984 and people were given plots according to their shares of which the late Kibyegomen had 2500 shares equivalent to 9 acres. That the 1st defendant's father was given 7 acres and that nobody was allocated land after 1984. He therefore stated that the land belongs to the plaintiff's father and not the 1st defendant.

PW3 also corroborated the plaintiff's evidence and stated that the 1st defendant acquired the title to the suit land fraudulently and that it is not true that the subdivision of the land resulted into 4 blocks.

PW4 also confirmed that the suit land belongs to the plaintiff's father and that Jonah Kurgat was not grazing on the suit land.

DEFENCE CASE

DW1 adopted his witness statement and stated that he is the registered owner of the suit land as the directors of Tugen Estate transferred the land to him. He produced minutes given to him by the directors of the farm. It was his testimony that he did not acquire the title fraudulently. He urged the court to dismiss the plaintiff's suit and allow his counterclaim as prayed.

On cross examination he denied that his father was given 7.6 acres and that he was compensated as his father was not given land. He admitted that there was a meeting at the Land Registrar's office and that he does not have any proof that the father was a member of Tugen Estate.

DW2 gave evidence and stated that he bought the suit land from the 1st defendant but did not produce any proof to establish the same. That he carried out a search but was not able to establish whether the land belonged to the 1st defendant or his father. That was the close of the defence case.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff filed submissions and submitted that the issues for determination in this case are as follows:

- a) Was due process followed in the transfer and subsequent acquisition of the suit land parcel by the defendants?
- b) Was the title to the suit land procured procedurally by the defendants?
- c) Is the 2nd defendant a bona fide shareholder of the Tugen Estates limited,

On the first issue Counsel submitted that LR **NO. MOIBEN/MOINBEN BLOCK 4 (TUGEN)115** belongs to Kipyegomen Chelal having been allocated to him by the directors of Tugen Estate Limited upon payment of Kshs. 2500/= in 1984 and given number 52 in the beneficiary's membership list.

Counsel reiterated the plaintiff's evidence and stated that the plaintiff had proved that the late father was allocated the land and produced documentary evidence namely limited grant, death certificate, search certificate, letter from directors dated 15/5/12, proceedings at the Land Registrar's office and a letter to the 1st defendant to surrender the title deed. Counsel took issue with the minutes that the 1st defendant produced as not authentic as this has been challenged.

Counsel further submitted that if it is true that the 1st defendant had a claim to the land then why did he have to wait 10 years to demand to take occupation. Further that if the defendant was allocated the land by the directors, then why he had to seek for a Chief's letter to confirm that the land was vacant during the Land Registrar's dispute resolution hearing.

Counsel also took issue with the fact that the 1st defendant stated that he was landless but purportedly sold the land to the 2nd defendant. It

was Counsel's submission that the 2nd defendant does not qualify as a bona fide purchaser as he did not prove the ingredients.

Further that he did not produce any agreement for purchase of the land. Counsel therefore urged the court to enter judgment as prayed for the plaintiff and dismiss the defendants' counterclaim with costs to the plaintiffs.

DEFENDANTS' SUBMISSION

Counsel relied on Section 26 of the Land Registration Act and submitted that the 1st defendant is the indefeasible owner of the suit land and should be protected. Counsel further submitted that the plaintiff alleged fraud in the acquisition of the suit land hence the burden of proof lies on the plaintiff to strictly prove the particulars of fraud on a balance more than that of probability.

Counsel cited the case of **PAUL MUIRA & ANOTHER VS JANE KENDI IKINYUA & 2 OTHERS(2014) eKLR** where the court cited with approval the Court of Appeal case of **MUSONGA Vs NYATI (1984) KLR 425 and in KOINANGE AND 13 OTHERS (1986) eKLR 23** where it was observed:

"Allegation of fraud must strictly be proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud"

Counsel further cited the case of **ELDORFT E & L No. 186 of 2017, GABRIEL S CHEPKWONY & ANOTHER VS GIDION NZIOKI IMBILI & ANOTHER [2018] eKLR** the court addressed the issue of fraud and observed;

"The plaintiff did not take steps to prove the allegation of fraud against the defendants. PW2 who was a witness from the County government did not help the case both because he admitted that the approvals that were done for the construction of the defendants' buildings emanated from their offices and that no construction can take place without their knowledge. The witness did not strike me as a person who knew why he had come to court and what type of evidence he was to tender. He was not a document examiner expert so he could not authenticate which document was genuine and which one was fake."

I therefore find that the plaintiff has failed to prove that the defendant fraudulently obtained the title to the suit land. Having found the same it follows that the plaintiff is not entitled to the orders sought.

" the 2nd issue as to whether the defendant fraudulently acquired the suit land, the plaintiff listed particulars of fraud on the part of the defendant as required by law but did not lead credible evidence to prove the allegation of fraud. When a person alleges fraud, this is a serious issue which is criminal in nature and it does not only require the particulars to be listed but must be specifically proved. How do you prove that a transaction was fraudulent" Do you just shout from the roof top that a transaction is fraudulent or you engage the relevant investigative agencies to help in unearthing the act"

It was Counsel's submission that the plaintiffs did not place any evidence and material to prove that indeed the 1st defendant obtained registration by fraud as it was not only incumbent upon the plaintiffs to prove that 1st defendant's title was procured by fraud but also to prove that the defendant was a party to such fraud or misrepresentation.

Counsel therefore urged the court to dismiss the plaintiff's claim and enter judgment as prayed in the counterclaim with costs to the defendants. Counsel also prayed that the defendants be awarded general damages for trespass of Kshs. 1.5million.

ANALYSIS AND DETERMINATION

The plaintiffs filed this case as the legal representatives of the estate of Kibyegon Chelal (deceased) and claimed that the 1st defendant fraudulently registered the suit land in his name. The evidence is as enumerated above and the issues for determination are as to whether the deceased was allocated the suit land by Tugen Estate Ltd, whether the 1st defendant is the rightful owner of the suit land, whether the 1st defendant acquired the suit land fraudulently and lastly whether the plaintiff is entitled to the orders sought.

The plaintiff filed this case contemporaneously with an application for injunction against the defendants which was heard and allowed on the ground that the plaintiffs had proved that they had a prima facie case against the defendants.

The main issue for determination is whether the 1st defendant fraudulently acquired the suit land and registered in his name. Once this is established then the other issues fall in place. From the evidence and documentation produced on record and the various processes that this dispute has been subjected to, it is evident that there was some lapse somewhere.

The plaintiffs led evidence to show how their father acquired the suit land by purchasing 2500 shares at Tugen Estates Ltd whereby he was allocated the suit land being No. 52 on the member's register. This was confirmed by PW2 and 3 who were directors in the farm.

Evidence was further led to show how they went to the farm and were given clearance to go and get a title from the lands registry. It was also their evidence that they found their father's name in the black book which is a register, but later when they went back they found when the name had already been removed from the register.

The documents and evidence adduced which was corroborated by the witnesses was that the land was allocated to the plaintiff's father and allocation of land was completed in 1984. The proceedings at the District Commissioners' office and the Land Registrar's are an indicator that the 1st defendant did not acquire the land procedurally. The chief who had written a letter for the defendant to acquire the land admitted

during the proceedings at the DCs office and the Land registry that he had been misled by the defendant. This led to the revocation of the letter.

The question is, if the 1st defendant was allocated the land by the directors of Tugen Estate, then why he would require a letter from a Chief and not a clearance from the directors. This makes his acquisition suspect and subject to unanswered questions. The DC's verdict was that the land belonged to the plaintiff's father, the Land Registrar also gave a similar verdict after hearing the parties and asked the 1st defendant to surrender the title for cancellation within 21 days but he did not comply necessitating the filing of this suit.

Section 26 of the Land Registration Act provides for indefeasibility of title and protection of title holders but it also provides for impeachment of titles that have been procured fraudulently, by mistake or by misrepresentation. The section provides as follows :-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

This Section has brought a sigh of relief to most litigants who can prove that their land was fraudulently transferred. The process of acquisition of a title is very important to prove that all due processes and procedures were followed without short cuts and impunity. The reforms of the Land laws have brought changes to protect the genuine land owners who were affected by fraudulent land transactions. The doctrine of indefeasibility of title and first registration could not be challenged even where there was evidence of fraud as the parties knew that the law would be on their side.

The courts have held previously that where a person intends to challenge a title on the grounds of fraud then he or she must prove that the person was involved in the fraudulent transaction. I have also held that where a title has been acquired illegally and unprocedurally or through a corrupt scheme the party need not prove that the party was part of the scheme.

My view is that to stem fraudulent land transactions which have been rampant in our land registries, once it is established that there were unprocedural dealings and processes in the acquisition of the title which belonged to party who is entitled to the land then there would be no need to establish that the party colluded or was a party to the illegality.

In the case of ***Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012*** Munyao J stated as follows :-

"...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."

I also subscribe to the same school of thought that when we are glaring at a fraudulent transaction or one that is tainted with illegality, we must stand up to be counted to do justice as we are aware that the fraudsters are always ahead in their tricks and strategies of circumventing the law. We do not want to be helpless and say that our hands are tied and yet nobody has tied our hands to do justice.

The court is alive to the new technologies which the government wants to put in place like the blockchain technology that records details of every transaction into a digital ledger which cannot be deleted or manipulated. This technology seeks to address double selling of land, corruption by middlemen and proper record keeping in the lands registry. If this was the case, then the plaintiff's name would not have been plucked from the black book and the register.

There has been resistance to digitization of records but the time has come when everyone must embrace new technologies or else they will be left behind and will not be part of globalized world.

The 1st defendant was not able to explain the process how he got registered as an owner of the suit land. His evidence together with that of the DW3 whom he purportedly sold land too were not credible. Why did he not take possession of the suit land immediately he got it. He only realized after 10 years that he had been allocated some parcel of land which he quickly sold to the 2nd defendant who did not provide any proof of purchase of the land, the amount of the purchase or any relevant evidence that could assist his claim.

In the case of ***Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR*** the Court of Appeal upheld a decision of the Nairobi Environment and Land Court which had cancelled all titles and ordered the land to revert back to the original owner due to fraudulent transactions. A court would not hesitate to cancel titles if it is

established that they were illegally or fraudulently acquired.

The 2nd defendant was hiding behind the 1st defendant to sanitize his title. He cannot benefit from a dirty transaction reeking of illegality. If he actually bought land from the 1st defendant as he claims, then his claim lies elsewhere not with the plaintiff but with the person that he entered into a transaction with.

The court is empowered under Section 80 of the Land Registration Act to rectify or cancel titles. It provides as follows:

80. (1) Subject to subsection (2), the court may 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.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

The 2nd defendant cannot benefit from this provision as he is not in possession and he shied away from giving tangible evidence to support his claim as a bona fide purchaser. He did not prove that he was a bona fide purchaser.

Having said that, I find that this is a clear case where the court must find that the 1st defendant obtained the title to the suit land illegally, through misrepresentation by his actions and must be cancelled. It follows that the defendants' counterclaim must also fail for lack of proof.

I have considered the pleadings, the evidence on record, submissions by Counsel and the relevant authorities and come to the conclusion that the plaintiffs have proved their case against the defendants on a balance of probabilities and make the following orders:

- a) A declaratory order is hereby issued that the registration of **LR NO. MOIBEN/MOIBEN BLOCK 4(TUGEN) 115** in the name of the 1st defendant was fraudulently obtained.
- b) That an order is hereby issued directing the Land Registrar Uasin Gishu to cancel the title in respect of **LR NO. MOIBEN/MOIBEN BLOCK 4(TUGEN) 115** registered in the name of the 1st defendant and instead register in the names of the plaintiffs
- c) A permanent injunction is hereby issued restraining the 1st and 2nd defendants from entering, erecting structures or using **LR NO. MOIBEN/MOIBEN BLOCK 4 (TUGEN) 115** and to remove the fence erected on the land.
- d) Defendants' counterclaim is dismissed with costs to the plaintiffs.
- e) 1st and 2nd defendants to pay costs of the suit.

Dated and delivered at Eldoret on this 7th day of August, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Mr. Bundotich for 1st and 2nd Defendants and in the presence of the Plaintiff.

Ngalamoi – Court Assistant