



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 119 OF 2004

1. SAMUEL PKIECH

2. WILSON K. LONGORKAMAR..... PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF

WEST POKOT.....DEFENDANT

JUDGMENT

1. The plaintiffs filed a plaint dated **29/11/2004** which they later amended. On **7/2/2019** they filed in court an amended plaint dated **2/2/2019**. In their amended plaint they seek the following orders against the defendant:-

(a) An order that the defendant's registration as proprietor of Title No. West Pokot/Chemwochoi/131 was obtained fraudulently;

(b) An order requiring the defendant to execute Land Control Board and Transfer Forms to retransfer the land to the plaintiffs and in default the Executive Officer of the court do execute such documents.

(c) An order preventing any dealings over Title No. West Pokot/Chemwochoi/131 pending hearing and determination of this suit.

(d) Costs of the suit

(e) Any other relief the court deems fit and just to grant.

2. According to the amended plaint, the plaintiffs are administrators of the Estate of **Longorkamar Loitaruk** (deceased); that the deceased owned land parcel No. **West Pokot/Chemwochoi/131** measuring **16.5 hectares** or thereabout; that in or about **1980** the defendant requested the deceased to allow them plant trees on the suit land which request was granted by the deceased on condition that no settlement would be done on the land and that after harvesting the trees the land would be given back to the deceased; that on or about **23/5/1980** the defendant, contrary to the agreement between the parties fraudulently transferred the land into its name without the deceased's knowledge with an intention of depriving him of the same.

3. The plaintiffs further states that they repeatedly sought an out of court settlement with the defendant so that the land can be transferred to them but the defendant has refused yet the defendant has no proprietorship rights over the suit land.

4. The defendant filed its defence on **4/4/2005**. It denied the contents of the plaint and stated that at no given time had the plaintiffs approached its servants or agents for negotiation and that the claim is barred and the suit should be struck out.

5. Further it stated that the land adjudication was done in **1975** when the suit land was reserved as a picnic site and there were no complaints from the deceased; that the defendant is the first registered owner which status cannot be challenged and that there is nothing to show that the deceased had proprietary interest before the said registration; that the defendant never committed the alleged fraud and that the suit herein is frivolous, vexatious and meant to embarrass the defendant. It is also averred that the said trees planted on the suit land have not been harvested to date.

6. There was no reply to the defence.

7. The hearing of this suit commenced on **18/7/2019** when **PW1, Wilson Kakuko Longorkamar**, the **2nd plaintiff** testified. His evidence was that Longorkamar Loitaruk who was his grandfather had a parcel of land at Kapkoris in the Chemwochoi Adjudication Section measuring **16.5 Hectares**; that he was living in the suit land with his three wives and children; that in **1980** they were informed of a presidential directive to plant trees in all open areas so as to attract rainfall; that the trees were to be planted even on private farms; that the exercise was conducted successfully and it was the understanding of the owners of the land that after the trees matured they would belong to the land owners; that their family therefore moved to other lands they owned paving the way for the project; that after their grandfather died the family unsuccessfully attempted to retake possession of the land whereupon the defendant demanded evidence of an agreement over the land; that thereafter the family conducted and found the land had been assigned title No. **West Pokot/Chemwochoi/131** and registered on **23/5/1980** in the name of the County Council of West Pokot the predecessor to the current defendant. PW1 alleged that the county council never informed them of the registration and it is fraudulent.
8. **PW2, Fredrick Liman Loyatum** testified on **18/7/2019**. He adopted his witness statement dated **26/2/2019** as his evidence-in-chief. His evidence is that the suit land is the family land and that there was a baraza to inform people to plant trees in hilly areas; that trees were planted on private land; that no trees were planted on his land but trees were planted on Loitaruk Longorkamar's land as well as other private farms; that the other private lands were reinstated to their owners with the trees thereon; that when a tree-cutting exercise was discovered to be taking place on the suit land, that is when it was found that Loitaruk's land had been taken by the defendant.
9. **PW3, Kalemunyang Ngolengulia**. He testified on the same date as PW2. He adopted his witness statement dated **25/3/2019** as his evidence-in-chief. His evidence is that he knew Longorkamar Loitaruk who had a farm at Kapkoris where he used to reside with his family; that in 1985 - 1985 the then District Commissioner who was named Kiplagat instructed land owners of the land to plant trees on hilly areas which was done; that the trees are still on the land.
10. **PW4, Bernard Nyakundi**, the Land Adjudication Officer West Pokot, testified on **28/7/2019**. His evidence is that he has worked in West Pokot for 14 years; that demarcation was done in Chemwochoi in **1974**; that the land is now registered and residents have titles; that parcel No. 131 (the suit land) is owned by the County Council West Pokot and measures 17.10 hectares; that the entry was made on **30/8/1975**; that there is no entry showing that Loitaruk Longorkamar was the owner of the land; that the record does not show that there was any complaint raised against the registration of the defendant as the proprietor. He testified that he was not aware of any tree planting directive between 1974 and 1975.
11. With the above evidence, the plaintiff closed his case. The defendant did not offer any evidence and its case was marked closed on 16/9/2019 when Mr. Onyancha holding brief for Mr. Barongo indicated that Mr. Barongo was unable obtain any witnesses.
12. On the defendant filed submissions in compliance with orders issued on **16/9/2019**.
13. I have considered the pleadings and the evidence and the submissions of the defence in this case. The issue that arises is whether the defendant fraudulently obtained the registration of the suit land in its favour and the expense of the plaintiff's family.
14. Proof of fraud is a matter of evidence without which a claim based on fraud may fail. Have the plaintiffs presented any evidence that would lead to a conclusion that the defendant employed fraud in order to be registered as owner of the suit land? An examination of the particulars of fraud that the plaintiffs required to prove is necessary.
15. The particulars of fraud on the part of the defendant are set in the **paragraph 5** of the amended plaint as follows: going against the mutual agreement between the parties to give vacant possession of the land after harvesting the trees; failing to inform the deceased that the Council had applied to be registered as proprietor of the land, and secretly and in collusion with land officials preparing a title deed in its favour and falsely representing the Council as an allottee of the land.
16. No agreement was produced in this matter by the plaintiffs of evidence of any dealings between their family and the defendant. The first particular of fraud must be weighed in the light of that fact. If there was no evidence of an agreement then the defendant could not be said to have reneged on any agreement at all.
17. Secondly it is alleged that the defendant failed to inform the deceased that the council had applied to be registered as the proprietor of the land. In stating this, the plaintiffs would have this court believe that the registration of the land in the defendant's name was effected after the afforestation exercise that is alleged to have occurred in the 1980s. However the evidence of PW4 who was plaintiff's own witness indicated that suit land was part of the Chemwochoi Land Adjudication Section in which demarcation was done in **1974** and that the entry reflecting the County Council of West Pokot as the owner was made on **30/9/1975** way before the alleged afforestation exercise. The adjudication record which should bear witness to any registration of a proprietor and any objections ever lodged to his proprietorship during the adjudication process was also said to be not reflective of any proprietary interest on the part of Loitaruk Longorkamar or any objection raised by him against the registration of the defendant. In short, the adjudication exercise was concluded and the defendant's proprietorship of the suit land confirmed without any demur on the part of any person, Loitaruk Longorkamar included. It is therefore difficult to comprehend the plaintiff's allegation that the defendant failed to inform the deceased of its intention to be registered as proprietor of the land.
18. The alleged collusion in **paragraph 5 (c)** of the amended plaint was not demonstrated by way of evidence. Neither was it established by way of evidence that the defendant falsely represented itself as an allottee of the land. That could not have been the case in any event because the date of the afforestation programme provides the plaintiffs with the crucial timeline for their version of alleged illegal deprivation of their land; the adjudication process had already ended in favour of the defendant by that date.
19. Having examined the evidence presented by the plaintiff it is difficult for this court to see how the orders sought in the plaint can be granted. To start with it is a recognized principle that even where a civil claim has not been opposed it is incumbent upon a claimant to establish his claim to the required standard of proof which is on a balance of probabilities. This was the holding in the case of **Hon. Daniel Toroitich arap Moi -vs- Mwangi Stephen Muriithi (Civil Appeal No. 240 of 2011 eKLR)**.

20. I find that the plaintiffs have failed to discharge their burden of proof in the instant case and I hereby dismiss the suit with no orders as to costs.

Dated, signed and delivered at Kitale on this 28th day of November, 2019.

MWANGI NJOROGE

JUDGE

28/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Barongo for Defendant

N/A for the plaintiff

COURT

Judgment read in open court at 2.50 p.m.

MWANGI NJOROGE

JUDGE

28/11/2019