



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 14 OF 2007

ELIJAH K. TARAGON.....PLAINTIFF

VERSUS

GEORGE KIPTANUI CHEBOI.....DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant seeking the following reliefs:

(a) A declaration that the defendant did not have any authority and or consent from the plaintiff to transfer the suit lands KITALE MUNICIPALITY BLOCK 15/ KOITOGOS/ 264 & 201 to himself.

(b) An order that the defendant give vacant possession of the plot No. KITALE MUNICIPALITY BLOCK 15/ KOITOGOS /264 Kibomet farm and title deeds bearing the names of the defendant i.e. KITALE MUNICIPALITY BLOCK 15/ KOITOGOS/ 264 & 201 be cancelled and the land be registered in the names of the plaintiff.

(c) Costs of this suit and interest thereof.

(d) Any other suitable or alternative relief this court may deem fit and just to grant.

The Plaintiff

2. In his amended plaint, the plaintiff averred that he is a member of **Koitogos Estate Limited** which is the legal owner of **LR Nos. 1839, 5553/4, 3709 and 6145/5** and that the plaintiff was listed as **No. 137** which he was entitled to get **19 acres** from the company after subdivision of its lands; that the plaintiff was allocated his two portions of land which given new numbers as plot **No. 201 and 264**, Kibomet Farm; that in **1986**, the plaintiff appointed his caretaker, the defendant with the instruction to take care of and cultivate the said land on his behalf; that on **7th January 1986**, the defendant forged a letter claiming that it was written by the plaintiff to transfer the land to himself; that the plaintiff reported the matter to the authorities where the defendant was charged in court but later on the case was terminated by the Attorney General and that the plaintiff later filed a civil case in Kitale High Court which was terminated for want of prosecution. The plaintiff averred that the defendant fraudulently went ahead and paid survey fees using the names George K. Taragon and indicated that he was the plaintiff's son. The plaintiff set out the particulars of fraud on the part of the defendant in the amended plaint.

The Defence

3. The defendant filed a defence which he amended on **12/2/2016**. In the amended defence he denied all the allegations leveled against him. He averred that he moved into the suit land upon purchasing it from the plaintiff and like all members, applied for a title deed which was issued in **1993**. The defendant denied that the titles to the suit lands were issued fraudulently or erroneously and averred that since it is a first registration, the same cannot be impeached. He further reiterated that he has occupied and worked on the suit land since **1986** without any secrecy, evasion or interruption for over **30** years. The defendant contended that the plaintiff' suit was time barred contrary to **Limitation of Actions Act**.

The Plaintiff's Evidence

4. The suit was heard on between **26th November 2018** and **7th May 2019**. The plaintiff testified as **PW1** and stated that the defendant is his nephew. He averred that he is member number **137** in **Koitogos Estate Limited** having joined that company in **1971**; that he paid **Kshs. 5,600/=** and was given **18 acres** of land; that he authorized the defendant to stay on the suit land as a caretaker and watch over the survey process and everything relating to the suit land. The plaintiff explained that when he visited the land, the defendant brought him two titles deed both registered in the defendant's name; that he gave him the title for plot **No. 201** and told him he would transfer the title in his name later; that later in **1994**, he went with his son, one Michael and confronted the defendant on the issue title to plot **No. 264** and the defendant

informed him that he (the plaintiff) had sold it to him (the defendant) in **1986** for a consideration of **Kshs.5,600/=**. It was his testimony that he never entered into any agreement with the defendant and that the defendant had fraudulently transferred plot **No. 264** to himself.

5. In cross-examination, **PW1** contended that there was no agreement written to the effect that the defendant would be his caretaker; that the defendant lived in the suit land from **1986** and that he discovered that the land had been transferred to the defendant in **1994**; that he reported to the police and the defendant was arraigned in court. However he did not produce the documents to prove the arraignment.

6. **PW2** was **Emmy Taragon**, the wife to **PW1**. He reiterated what **PW1** had stated in his testimony.

7. **Noah Mortis Arap Bett** testified as **PW3** and stated that he knew the plaintiff by virtue of the fact that they are shareholders of the farm. He averred that he was a member of the surveying committee and he was assigned to survey **area 'A'** where his land together with that of the plaintiff was situate. He stated that he was present when the survey was done and that the survey produced two parcels for the plaintiff, one measuring **13 acres** and another measuring **5 acres**. He stated that the defendant settled on the **13 acres** and farmed on the other **5 acres** after misrepresenting himself as the plaintiff's son. According to **PW3**, an acre in **1986** would have attracted a consideration of **Kshs.10,000/=** and therefore he brushed off the defendant's assertion that he bought **20 acres** in **1986** at **Kshs. 5,600/=**.

8. **PW4** was **Julius Kipkemei Chirchir** and he testified that he knows the plaintiff, the two having bought shares together in Koitogos Farm between **1970** and **1971**; that the plaintiff was given membership number **137** after he paid **Kshs. 5,600/=**; that **PW4** was charged with the responsibility of overseeing the survey process; that after members paid the purchase price, they were given their shares based on the payments they had made. He averred that when the defendant made his entry to suit land, he misrepresented himself as the son of the plaintiff and **PW4** therefore showed him the plaintiff's land; the defendant alleged that he had been given land by the plaintiff but **PW4** insisted that the defendant comes with the plaintiff before he could forward any request to the board of directors.

9. **PW5** and **PW6** also testified in furtherance of the plaintiffs claim. **PW 5** testified that the defendant came to live on the suit land as the plaintiff's son, and the defendant's name did not appear in the list forwarded to the Land Control Board. He averred that he had participated in the earlier stages of the dispute when it was brought before some elders. **PW6**, the plaintiff's son testified that he lives on one of the parcels subject matter in this suit which is known as plot number **201**. According to him the title for the parcel that he occupies is in his father's possession because it was voluntarily given to him by the defendant when the two visited the defendant in **1999**, and the defendant had agreed to transfer the two titles into the plaintiff's name. Also, according to him, the defendant was charged with forcible detainer in a criminal case which was later withdrawn when the defendant sued for peace and the plaintiff agreed that the same be withdrawn.

The Defendant's Evidence

10. The defendant, **George Kiptanui Cheboi (DW1)** testified and stated that he received information from **DW2** that his uncle, the plaintiff, was selling his share of land in Koitogos Farm; that on **7/1/1986** he travelled to the plaintiff's home in Ainabkoi where he met the plaintiff and explained the reason for his visit; that he gave money to **DW2** who in turn gave it to the plaintiff; that the plaintiff wrote a letter in Kalenjin language to the directors of Koitogos Company which letter was to the effect that **PW1** had sold **DW1** his share; that the plaintiff asked him to deliver the letter to the secretary of the farm which he did; that he took possession of and developed the land and has lived there since with no interference; that he had a valid title to plot **No. 264** which is charged to Agricultural Finance Corporation. The defendant however maintained that he does not know how the plaintiff obtained the original title to plot **No. 201** and that upon missing his title, he reported the loss to the police and thereafter a Gazette Notice was issued on **3/8/2012** under Gazette Notice No. **10651**. It was the defendant's testimony that based on the Gazette Notice, he was issued with a title deed in 2012 which has not been challenged to date and that he never committed any fraud. He testified that the plaintiff's son came to the area and occupied plot number **201** in the year **1999** and though he forbid him from doing so, he built a house on the land.

11. **DW2** was **Noah Telo**, who in his evidence reiterated that given by the defendant. In cross examination, **DW2** acknowledged that the land belonging to the plaintiff was on the other side though he alleged not to know the parcel number.

12. After the close of evidence, the parties made closing submissions in writing. The plaintiff filed its submissions on **17/9/2019** while the defendant filed his submissions on **10/6/2019**.

Analysis and Determination

13. This case proceeded to hearing whereby both parties gave evidence and produced several documents in support of their case which I have considered.

14. The issues for determination are whether the suit property was illegally or fraudulently transferred to the defendant and whether the plaintiff is entitled to the reliefs he is seeking.

15. From the evidence on record and the documents produced by the parties, it is evident that main plot from which the suit land was carved out originally belonged to Koitogos Farm in which members of the public bought shares in order to be given a share of the land. It is also not in dispute that the plaintiff was the original owner of the suit land before it was registered in the defendant's name. So was the registration of the title in the defendant's name effected fraudulently?

16. The defendant has argued that he has a valid title which is indefeasible by virtue of it being a first registration. The plaintiff on the other hand has maintained that the defendant transferred the title to himself fraudulently by way of misrepresentation.

17. **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.

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

"...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."

19. The plaintiff called witnesses in support of his case including former officials of Koitogos Estate Limited who all agreed that indeed the plaintiff was a shareholder and had been given a membership number to that effect.

20. The defendant on the other hand called one witness whom he stated in his evidence that he had informed him of the plaintiff's intention to sell his shares and that the agreement to have the shares transferred to him was made in his presence.

21. Much doubt arises in respect of the defendant's version of events.

22. First and foremost, his reliance on the letter purportedly written by the plaintiff, apparently dated 7/1/86 must fail for the reason that he never called an independent witness to corroborate his allegation that the plaintiff wrote that letter; the only witness purported to have been present at the writing of that letter was DW2, who was the husband to his sister. I do not consider that witness to be an independent witness. Secondly, despite denial by the plaintiff that he never wrote that letter, the defendant never established by way of expert evidence that the handwriting contained in that letter belonged to the plaintiff. He therefore never established on a balance of probabilities that the plaintiff ever wrote that letter.

23. The second point is that there is no good explanation that the defendant has given as to how the plaintiff came into possession of the title to the parcel number 201. The fact that the plaintiff's son entered into possession of the said parcel of land without any evident demur on the part of the defendant is also quite telling. The defendant did not show that he attempted to evict the plaintiff's son. No evidence of any proceedings for eviction against him was presented. That is not the conduct of a person who feels that they have right to the land that has been wrongfully invaded by a stranger. There must be some proper explanation for the defendant's apparent temerity or acquiescence in the face of the plaintiff's son's entry into the suit land. In my view there is greater probability of truth in the plaintiff's version that the defendant at one time acknowledged his right over the land by giving him one of the titles and undertaking to transfer them into his name.

24. Having examined all the documents produced as exhibits in this case, I am not satisfied that the plaintiff could simply transfer his shares in the farm without informing the directors. The alleged letter written in Kalenjin language and addressed to the secretary, in my view is suspect. If it was genuine, there would have been minutes confirming the same, or even a letter addressed to the plaintiff by the directors verifying the assertion that the land was sold. It is quite evident from the evidence on record that the defendant misrepresented himself to the company officials as the plaintiff's son yet he was an impostor. This is a case where the defendant took advantage of the plaintiff's generosity to deny him his land by causing the same to be transferred to himself.

25. 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.

26. Having considered the pleadings, the evidence on record, and the submissions by Counsel, I do not see how the titles issued in the name of the defendant can be upheld. I have come to the conclusion that the plaintiff has proved his case against the defendant on a balance of probabilities and I issue the following orders:

(a) A declaratory order is hereby issued that the defendant did not have any authority and/ or consent from the plaintiff to cause the suit lands, that is, KITALE MUNICIPALITY BLOCK 15/KOITOGOS/ 264 & MUNICIPALITY BLOCK 15/KOITOGOS/201 to be transferred to himself.

(b) An order directing the defendant to give vacant possession of the plot No. KITALE MUNICIPALITY BLOCK 15/KOITOGOS/264 and surrender to the Land Registrar Kitale the title deeds bearing the names of the defendant i.e. KITALE MUNICIPALITY BLOCK 15/ KOITOGOS/264 & KITALE MUNICIPALITY BLOCK 15/KOITOGOS/201, and the Land Registrar shall cancel the titles in respect of KITALE MUNICIPALITY BLOCK 15/ KOITOGOS/264 & KITALE MUNICIPALITY BLOCK 15/KOITOGOS/201 registered in the name of the defendant and instead register them in the

name of the plaintiff.

(c) The defendant shall pay to the plaintiff costs of the suit.

Dated, signed and delivered at Kitale on this 13th day of November, 2019.

MWANGI NJOROGE

JUDGE

13/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Onyancha for the plaintiff

Mr. Onyancha for the defendant

COURT

Judgement read in open court at 2.40 p.m.

MWANGI NJOROGE

JUDGE

13/11/2019