



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT OF KENYA AT ELDORET

E & L NO. 245A OF 2016

FELINA KABAGA ANDAREYA AND JOHN ANDAREYA

(suing as the administrators of the Estate of

ANDREA AKIABARA CHWEYA PLAINTIFF

VERSUS

ESAU CHWEYA MASERA 1ST DEFENDANT

LAND REGISTRAR NANDI COUNTY 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

By a plaint dated 25th August 2016 the plaintiff herein sued the defendants seeking for the following orders:

- a) Nullification and revocation of title deed No. NANDI/KAPSENGERE/473 issued to the 1st Defendant by the 2nd and 3rd Defendants and that the same be vested back in the name of the deceased ANDREA AKIBARA CHWEYA.
- b) An order of permanent injunction restraining the 1st Defendant his agents ,servants and employees from trespassing onto Land Parcel No. NANDI/KAPSENGERE/473
- c) Costs and interest of this suit.

Plaintiff's Case

PW1 gave evidence and stated that he has sued the defendants for trespass on the suit land He stated that his father was at all material times the registered owner of land parcel NANDI/KAPSENGERE/473.

The plaintiff called 3 witnesses whereby PW1 stated that the suit land belonged to the deceased AKIABARA CHWEYA who was the registered owner.PW1 further stated that Henry Agini Mboku bought the suit from the deceased and he was refunded his consideration of Kshs. 300,000/- vide an agreement dated 13th October 1992 by the sons of the deceased. It was his evidence that he therefore renounced his claim on the land and it was vested back in the name of the deceased.

PW1 also testified that the adjudication section record produced in court confirmed that the suit land vested back to the deceased and it was upon the 2nd and 3rd defendants to ensure the adjudication register was amended to read the name of the deceased as Henry Mboku Agini did not have interest in the suit land to transfer the same to the 1st defendant.

It was PW1's evidence that the adjudication register was unlawfully and fraudulently changed on 18/01/2001 after the demise of the original owner. PW2, 3 and 4 reiterated the evidence of the plaintiff who thereafter closed his case.

On cross examination by Counsel for the 1st defendant, PW1 stated that his father died before he got the title to the suit land as the area had not been declared an adjudication section. He also stated that there was a case at the lands office and there was a resolution that the land be given to the plaintiff's father. He also confirmed that the 1st defendant is the one using the suit land.

When cross examined by Mr. Odongo Counsel for the 2nd and 3rd defendants PW1 stated that he was not aware that the suit land was not given to his father but to Henry Agini Mboku. He also stated that he did not have any evidence to show that his father had filed any complaint at the Adjudication office. He further admitted that his father's name was not on the green card.

1st Defendant's Case

DW1 stated that the suit land belongs to him and produced a copy of a title deed as an exhibit before the court. He stated that the land initially belonged to Henry Mboku who bought the same from Adreya the father to the plaintiff. It was his evidence that he bought the land from the plaintiff and money was refunded to Henry Mboku. He also stated that the verdict at the Kapsabet adjudication office was to the effect that the land belonged to DW1.

DW1 gave evidence and stated that Kipserem- Gambogi road passed through his parcel of land and was paid compensation by the government and that he has been cultivating the suit land since 1992

On cross examination DW1 stated that he got his title deed in 2003 and that he got the suit land from the plaintiff feline whom they went with to the Lands office.

2nd and 3rd Defendant's case

DW 2 who testified as the County Land Registrar Nandi, stated that the suit land was acquired through adjudication rather than allocation process. She further stated that adjudication started in 1980 and Nandi/Kapsengere Adjudication Section was completed in 1985 which process involved capturing individual's names. As regards Nandi/Kapsengere/473 the witness stated that it was first adjudicated in name of Henry Mboku Agini. Vide objection Noo 379 of 1985 the suit land was transferred to the 1st defendant and the records were signed on 2-1-1985-2DEX 1.

DW 2 stated that at the end of adjudication process the adjudication records were forwarded to the Chief Land Registrar who directed that registers be opened and title deeds issued. In respect of the suit land the register was opened on 25-2-2003 in the name of the 1st defendant and title deed issued on 15-10-2003-2DEX 2.

Counsel filed submissions and stated their respective clients' cases.

Analysis and Determination

The issues for determination in this case are whether the plaintiff has proved his case against the defendants on a balance of probabilities and whether there was fraud in the registration..

It was incumbent upon the plaintiff to prove the allegation that his father was the owner of the suit land and that the same was fraudulently transferred to the 1st defendant. The plaintiff's contention that the 1st defendant got the title to the suit land fraudulently in 2003 after demise of Andrea Akiabara Chweya without going through succession proceedings is not supported by any evidence.

Proof of fraud in transactions is not a walk in the park as fraud has to be specifically pleaded and specifically proved. There can never be a mere allegation of fraud without proof. It is not enough for a party to merely allege or infer to acts of fraud. The party must tender evidence to prove the acts of fraud. In the case of Vijay Morjiaria -versus- Nansingh Madhusingh Darbar & another (2000) eKLR Tunoi JA (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from facts. "

On standard of proof of allegations of fraud court in Ndolo -versus- Ndolo (2008) 1 KLR (G&F) 742 stated that:

We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities: but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases... " (Emphasis added).

The plaintiff did not prove that suit land was ever at any given time registered in the name of Andrea Akiabara Chweya. On the contrary, defendants and more particular DW 2 was emphatic on how the suit land was acquired. DW 2 produced adjudication records and certified copy of the register (green card) to prove that the suit land was never a property of Andrea Akiabara Chweya.

In the absence of evidence of ownership of the suit land by Andrea Akiabara Chweya it is safe to conclude that the suit land was never a property of Andrea Akiabara Chweya and therefore, upon his demise the suit land did not form part of the estate of Andrea Akiabara Chweya and the Law of Succession Act was inapplicable in the circumstances.

DW 2 the Land Adjudication Officer demonstrated that the suit land was acquired through adjudication process and all objections in respect

of suit land were addressed in 1985 during which time Andrea Akiabara Chweya was alive. There is no evidence that the said Andrea Akiabara Chweya ever lodged an objection during land adjudication. There is also no evidence that the adjudication was tainted with fraud.

In 1985 through to 2003 when 1st defendant's title was issued the applicable law was section 143 of the Registered Land Act Cap 300 which provided that first registration cannot be challenged unless evidence of fraud in the adjudication is proved. Section 26 of Land Registration Act, 2012 provides that no title shall be challenged or cancelled unless fraud is proved.

Further Andrea Akiabara Chweya never challenged decision made in 1985, therefore under 7 of Limitation of Actions Act Cap 22 this matter is time barred as the decision was made in 1985 and the plaintiff filed a suit in 2016 that is 31 years of slumber.

Having said that I find that the plaintiff has not proved fraud to the required standard and therefore the case is dismissed with costs to the 1st defendant. The plaintiff also went to on a deep slumber for 31 years therefore the suit is time barred.

DATED and DELIVERED at ELDORET this 13TH DAY OF NOVEMBER, 2019.

M. A. ODENY

JUDGE

JUDGEMENT read in open court in the presence of Mr.Mwinamo for the Plaintiff and in the absence of Mr.Athung'a for the 1st defendant and Mr.Odongo for 2nd and 3rd defendants.

Mr. Mwelem – Court Assistant