



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO. 1 OF 1997

KITUR ARAP TESOT.....PLAINTIFF

-VERSUS-

DANIEL KIPROP KENDUIYWO.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff instituted this suit against the defendant on 21st January 1997. The Plaintiff was later amended on 18th February 2000. The plaintiff's claim against the defendant is that the defendant trespassed onto the plaintiff's parcel known as L.R No. KERICHO/KIPCHORIAN/LELU BLOCK 5 KEBENETI/154 and fraudulently had himself registered as the owner thereof. The plaintiff seeks an eviction and a permanent injunction to restrain the defendant, his agents, representatives and assigns from trespassing on L.R No. KERICHO/KIPCHORIAN/LELU BLOCK 5 KEBENETI/18
2. The plaintiff further prays for rectification of the register to reflect that the 8 acres comprised in L.R No. KERICHO/KIPCHORIAN/LELU BLOCK 5 KEBENETI/154 belong to him.
3. In his Amended Defence and Counterclaim dated 28th May 2001, the defendant denies the plaintiff's claim and states that he purchased the plaintiff's share in Kebeneti Limited which translated to 34 acres of land. He denies the allegations of fraud attributed to him and maintains that the title for the 8 acres comprised in L.R No. KERICHO/KIPCHORIAN/LELU BLOCK 5 KEBENETI/154 was properly registered in his name. In his counterclaim against the plaintiff, he alleges that he purchased the plaintiff's share at Kshs. 2600 in 1965. He then took possession of the suit property and has been in occupation ever since. He avers that it is the plaintiff who fraudulently had 26 acres registered in his name and is therefore holding the title in respect of L.R No. KERICHO/KIPCHORIAN/LELU BLOCK 5 KEBENETI /18 in trust for the defendant. He prays for rectification of the register to reflect that the 26 acres comprised in L.R No. KERICHO/KIPCHORIAN/LELU BLOCK 5 KEBENETI /18 belong to the defendant.

PLAINTIFF'S CASE

4. A brief background of the case is necessary in order to put the case into perspective.

The Plaintiff who testified as the sole witness on the Plaintiff's side stated that he was a member of Kebeneti Company Limited (hereinafter referred to as "the Company"). The said company which consisted of 50 members owned land acquired from a white settler and members were required to each pay Kshs. 2,800/= in order to become shareholders. The Plaintiff paid Kshs. 2,000/= to the company. However, in 1965 before he could clear the balance of Kshs. 800/= he decided to dispose his shares in the company and as such he sold his shares to the Defendant. He said they did not enter into any written agreement.

5. The Defendant paid the Plaintiff Kshs. 1,800/= after which he disappeared. The Plaintiff wrote a letter to the defendant through his advocate in 1973 requesting the defendant to collect a refund of his money but the defendant did not respond, prompting the plaintiff to write to him informing him that the land he intended to buy had already been sold. He denied that the defendant had paid Kshs. 800/= to the Company, at the request of the Plaintiff.

6. The Plaintiff further testified that the company divided the land among the shareholders in 1981 after which the defendant occupied the suit property. He testified that he does not know how the defendant had himself registered as the owner of the 8 acres that belong to the plaintiff. He stated that the company was never made aware that he had sold part of his shares to the defendant. The plaintiff produced a number of documents including the share certificate, membership list, letter requesting the defendant to collect his money, and title deed in respect of L.R No KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/18, chief's letter dated 9.11.1981, a letter from the director of Kebeneti Company Limited requesting the plaintiff to pay survey fees, a copy of the green card in respect of LR No KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/154, a certificate of official search in respect of L.R No KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/18 dated 22.10.2010 and an objection to the notice to file the decision of the

Elders filed in court on 23.8.1983.

7. In re-examination the plaintiff stated that he later topped up his shares by an amount of Kshs. 8400 which entitled him to 34 acres. He stated that the defendant occupied his land with the assistance of the chief who was his relative. He stated that the defendant was not registered as shareholder of the company. He stated that each shareholder was entitled to three cows which he was given.

DEFENDANT'S CASE

8. The Defendant testified and called 2 witnesses. He said that the plaintiff had sold him his shares in Kebeneti Company Limited on 14th February 1965. He testified that he paid a sum of Kshs.1800 to the Plaintiff and later paid Kshs 800 to the company since the plaintiff had not paid for the shares in full. He produced a letter by the plaintiff indicating that he wanted to sell his shares. He also produced a letter dated 16.4.1965 that he wrote to the company informing them that he wished to buy shares in the company.

9. By its letter dated 15.12.1972 the company wrote a letter to the Chairman Kericho District Land Control Board to inform him that some members wished to transfer their shares to other people. He produced the said letter and a list showing that he was one of the transferees. He stated that he was later given the suit land in 1983 and he took possession thereof. He stated that the plaintiff filed a case at the D.O's office but it was determined in the defendant's favour. He said he paid an additional amount of Kshs. 7, 430 to the company.

10. He said he had developed the suit property by planting tea bushes, coffee and blue-gum trees. He has also put up 6 residential houses for his sons. He said that his two sons who stay on the suit property are married and they live on the suit property with their families. He admitted that he had never got a title to the suit property. He stated that he had filed a counterclaim against the plaintiff claiming the suit property and he would like the title issued in his name.

11. Upon cross-examination he said that he did not enter into a written agreement with the plaintiff. He said the reason why the plaintiff did not transfer the suit property to him was because he still owed the plaintiff a sum of Kshs. 200. He admitted that his name did not appear on the list of shareholders. He said the letter dated 15.2.1965 did not mention his name because the plaintiff had not sold him his share. He said the Plaintiff did not write to the company indicating that he had sold his share to the defendant. He said that every shareholder was given three cows but his were taken by the plaintiff.

12. He testified that he was not aware that the plaintiff had been told to pay survey fees. He said that he had a title for 8 acres issued to him on 14.5.1993. Even though he said he had a letter from the plaintiff transferring the 8 acres to him, he never produced it as an exhibit. He admitted that he never challenged the issuance of the title for 26 acres to the plaintiff. He said he did not have the letter from the company transferring the 26 acres to him and he had no evidence that he was a shareholder of the company in 1972.

13. The defendant's brother Sammy Kenduiyo testified as DW2. He said that the defendant paid the plaintiff Kshs.380 while he (DW2) paid the plaintiff Kshs.1620 to make a total of Kshs. 1800 as part payment for the share in Kebeneti Company Limited. He later paid the company Kshs. 800. Upon cross-examination, he said that he made the said payments to assist his brother to buy a share in the company. He stated that he was not aware that the defendant had requested for a refund of the money he had paid the plaintiff. He said part of the land had been transferred to the defendant though he did not know who signed the transfer in his favour.

14. Zachary Ngeny who testified as DW3 stated that he was a member of Kebeneti Company Limited. He said he bought shares for Kshs. 2800 after which he was given a parcel of land and three cows. He testified that he knew both the plaintiff and the defendant and they both attended a shareholders' meeting where he learnt that they were both claiming the same parcel of land. He said the Plaintiff and defendant were each given three cows by the company thus contradicting what both the plaintiff and defendant had said. He claimed the suit land belonged to the defendant though he was not present when the defendant bought his share. DW3's testimony marked the close of the defendant's case after which the parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

15. Having considered the pleadings, oral and documentary evidence as well as the rival submissions, the following issues fall for determination:

- i) Who is the lawful owner of L.R. KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/18?
- ii) Did the plaintiff acquire the said title fraudulently?
- iii) Who is the lawful owner of L.R. KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/154?
- iv) Did the defendant acquire the said title fraudulently?
- v) Is the plaintiff entitled to the reliefs sought in the Plaintiff?
- vi) Is the defendant entitled to the reliefs sought in the Counterclaim?

ANALYSIS AND DETERMINATION

16. With regard to the first issue, the Plaintiff produced a title deed dated 1st October 1990 in respect of L.R. KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/18. He said that he was issued with the said title deed in his capacity as a member

of Kebeneti Limited. Furthermore, he produced the membership list for the Kebeneti Limited to confirm that he was a registered member. He also produced several receipts showing the amount he paid as membership and survey fees.

17. Even though he stated that he had intended to sell his share to the defendant, it is not in dispute that the defendant only paid the sum of Kshs. 1800 out of Kshs. 2800 after which he failed to pay the balance. The plaintiff explained that the defendant was given vacant possession of the suit property because of his close association with the chief at the time who was his brother.

18. On the other hand, the defendant claims that the plaintiff obtained the title fraudulently. He testified that he took possession of suit property in 1981 and he has carried out various developments including 6 houses where his sons stay with their families as well as a tea plantation among other developments.

19. It is noteworthy that 7 years after he obtained the title deed, the plaintiff filed suit against the defendant for vacant possession and rectification of the register. It is surprising that the defendant who was in possession and claims to have bought the suit property from the company after buying the plaintiff's shares, never deemed it fit to stake his claim by filing suit against the plaintiff until the plaintiff sued him. By his own admission, the defendant did not pay the full amount for the shares and according to him, there was an outstanding amount of Kshs. 200. He was not able to demonstrate that he became a member of the company as his name was never included in the list of shareholders. He was also unable to explain how the title deed was issued to the plaintiff if the company recognized him as a shareholder/member.

20. The plaintiff evidence was that the defendant took possession of the suit property with the assistance of the chief and the secretary of the company, both of whom were his relatives. The defendant was at pains to explain why he was not given cows like other shareholders and even went as far as claiming that the cows were grabbed by the plaintiff. My assessment of the evidence is that the plaintiff was a truthful witness whereas the defendant tried to sugar-coat his story yet it was full of falsehoods and inconsistencies. His own witness DW3 contradicted the defendant's evidence by alleging that the defendant was given 3 cows and the plaintiff was given an equal number of cows by the company yet all the other witnesses said each member was given 3 cows and the defendant was never given any cow.

21. The defendant was unable to prove the allegations of fraud attributed to the plaintiff in the counterclaim. It is trite law that fraud must be pleaded and proved. The court of appeal in the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** in considering the issue of fraud observed as follows:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

see Insurance Company of East Africa vs. The Attorney General &3 Others Hccc135/1998.

Whether there was fraud is, however, a matter of evidence.”

22. Even though the defendant pleaded and particularized the alleged fraud, he did not lead sufficient evidence to prove fraud.

Under section 26(1) of the Land Registration Act the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

23. In the absence of proof that the title was acquired fraudulently, it is my finding that the plaintiff is the lawful proprietor of L.R. KERICHOKIPCHORIAN/LELU BLOCK 5(KEBENETI)/18 measuring 26 acres.

24. I will now move on to the second issue which touches on the ownership of L.R. KERICHOKIPCHORIAN/LELU BLOCK 5(KEBENETI)/154. This title is registered in the name of the defendant. The plaintiff challenged the defendant's title on the grounds that it was acquired fraudulently. He said that the defendant used the chief to trespass into the said piece of land after which he fraudulently had it transferred to his name. He thereafter resisted the plaintiff's attempts to remove him from the land by chasing him away with a panga.

25. It is common ground that the defendant has been in occupation of the said parcel of land since 1981. What is in dispute is whether the defendant is the rightful owner of L.R. KERICHOKIPCHORIAN/LELU BLOCK 5(KEBENETI)/154. The defendant was unable to explain how he was registered as the owner of the said land measuring 8 acres as he was neither a member of Kebeneti Limited nor did he produce any document to show that he bought the said parcel of land from the plaintiff.

Hon Justice Munyao Sila in the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another(2013) eKLR while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows: -

-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

26. From the evidence on record, it emerges that the registration of the defendant as the owner of the 8 acres was unlawful as it must have done through a corrupt scheme with the assistance of some officials of Kebeneti Limited who were friends or relatives of the defendant.

Arising from my above mentioned findings, the defendant is not entitled to the reliefs sought in the counterclaim. The said counterclaim is therefore dismissed with costs to the plaintiff.

27. On the other hand, the plaintiff has proved his case on a balance of probabilities. Accordingly, I enter judgment for the plaintiff and make the following final orders:

a) A declaration is hereby issued that the 2 parcels of land known as L.R. KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/18 and L.R. KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/154 belong to the Plaintiff.

b) A declaration is hereby issued that the defendant is a trespasser on L.R. KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/18 and 154

c) The defendant shall vacate the suit properties to wit ,L.R. KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/18 and 154 within 60 days from the date hereof, failing which an eviction order shall issue upon application.

d) A permanent injunction is hereby issued restraining the defendant by himself, his agents, representatives or assigns from trespassing onto L.R. KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/18 and 154.

e) The title issued to the Daniel Kiprof Kenduiywo(the Defendant) is hereby cancelled and a new title shall be issued in the name of Kitur Arap Tesot(the Plaintiff) within 60 days.

f) The register in respect of land parcels number L.R. KERICHO/KIPCHORIAN/LELU BLOCK 5(KEBENETI)/154 be rectified by the Land Registrar, Kericho to reflect the plaintiff's name within 60 days.

g) The Plaintiff is awarded Kshs. 400,000 General damages for trespass.

h) The costs of this suit and the Counterclaim shall be borne by the defendant

Dated, Signed and Delivered at Kericho this 8th day of November, 2019.

J.M ONYANGO

JUDGE