



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

ELC CASE NO. 35 OF 2015

ROP ALBERT (suing as the representative of the estate of FRANCIS

KIPROP SANGA (DECEASED).....1ST PLAINTIFF

FRANK KIPKOK CHERUIYOT (suing as the personal representative

of the estate of KIPKURUI ARAP SANGA (DECEASED)...2ND PLAINTIFF

-VERSUS-

GLADYS KOSKEY.....1ST DEFENDANT

DENIS KIPROTICH LANGAT.....2ND DEFENDANT

DAVID ROTICH BIG FIVE.....3RD DEFENDANT

SAMWEL KIPNGENO TANUI.....4TH DEFENDANT

JUDGMENT

Introduction

1. The 1st plaintiffs instituted suit against the defendants in their capacity as the personal representatives of the estate of FRANCIS KIPROP SANGA (Deceased) and the estate of KIPKURUI ARAP SANGA (Deceased) having obtained grant of Letters of administration Ad litem in respect of the estate of the said deceased in Kericho H.C Ad Litem No. 64 of 2016 – estate of the late FRANCIS KIPROP SANGA (Deceased) while the 2nd plaintiff did the same in in respect of the estate of KIPKURUI ARAP SANGA in Kericho H.C Ad Litem No. 63 of 2016.

2. In the said plaint dated 31st July 2015, the plaintiffs are seeking the following reliefs;-

i. A declaration that title number KERICHO/CHEMAGEL/508 was illegally and fraudulently transferred to the 1st defendant and subsequently sub-divided and the new parcels KERICHO/CHEMAGEL/4620, KERICHO/CHEMAGEL/4621, KERICHO/CHEMAGEL/4622, KERICHO/CHEMAGEL/4623

and KERICHO/CHEMAGEL/4624 transferred to the defendants.

ii. The registers in respect of Title Numbers KERICHO/CHEMAGEL/4620, KERICHO/CHEMAGEL/4621, KERICHO/CHEMAGEL/4622, KERICHO/CHEMAGEL/4623 and KERICHO/CHEMAGEL/4624 be cancelled and the original register in respect of KERICHO/CHEMAGEL/508 be restored and registered in the names of FRANCIS KIPROP SANGA (DECEASED) and KIPKURUI ARAP SANGA (DECEASED).

iii. A perpetual injunction restraining the defendants by themselves, their workers, servants, employees, agent, assigns and/or those claiming through them from entering into, fencing, grazing, transferring, leasing, alienating, charging and/or in any way or manner whatsoever from dealing with the suit lands KERICHO/CHEMAGEL/4620, KERICHO/CHEMAGEL/4621, KERICHO/CHEMAGEL/4622, KERICHO/CHEMAGEL/4623 and KERICHO/CHEMAGEL/4624 and/or from evicting or interfering with the plaintiffs' use and/or occupation of the same.

iv. Costs of the suit.

v. Any other or further relief the Honourable court may deem fit.

3. The deceased persons who were brothers, were jointly registered as the proprietors of the title Number KERICHO/CHEMAGEL/508, and were also respectively the fathers of the 1st and 2nd plaintiffs respectively.

4. The said FRANCIS KIPROP SANGA (Deceased) whose estate is represented by the 1st plaintiff, passed away on 16th February 2006, while the deceased, KIPKURUI ARAP SANGA, whose estate is represented by the 2nd defendant passed away on 4th August 1997.

5. It is the plaintiffs' contention that by the time both deceased persons died, the suit land was still registered in their names. They further contend that by 17th July 2015 when the plaintiffs carried out a search in respect of the said land, they discovered that the same had been transferred to the 1st defendant on 26th September 2014 after which the 1st defendant subdivided the same into five portions and subsequently registered the same as follows:-

i. KERICHO/CHEMAGEL/4620 – In her name, the 1st defendant

ii. KERICHO/CHEMAGEL/4621 – In the name of the 2nd defendant

iii. KERICHO/CHEMAGEL/4622 – In the name of the 3rd defendant

iv. KERICHO/CHEMAGEL/4623 – In the name of the 4th defendant

v. KERICHO/CHEMAGEL/4624 – In the name of the 5th defendant

6. It is the plaintiffs' contention that the said transactions were done before succession proceedings were taken out in respect of the estates of the said deceased's persons and the same were therefore unlawful and fraudulent.

7. The defendants filed a joint statement of defence dated 14th September in which they deny that the suit land was fraudulently transferred to them. They contend that on 14th February 1989 the deceased charged the suit land to Kenya Commercial bank to secure a loan of Kshs. 100,000 but were unable to repay the loan and in order to prevent their property from being auctioned by the bank, they offered to sell it to the 1st Defendant and her late husband in 1992. After buying the suit property, the 1st defendant sub-divided the same and sold portions thereof to the 2nd, 3rd and 4th defendants.

8. The case was set down for hearing and the 1st plaintiff testified on his own behalf and on behalf of the 2nd plaintiff. The plaintiffs also called one witness, the District Land Registrar, Bomet.

Plaintiffs' case

9. Pw1 Rop Albert produced grants of letters of administration ad litem to justify their capacity to institute the suit. He produced the death certificates of his father and the 2nd plaintiff's father which were marked as Plaintiff's exhibits 1 and 2. He produced both the plaintiffs' grants of letters of administration ad litem which were marked exhibit 3 and 4.

10. PW1 testified that the original title number KERICHO/CHEMAGEL/508 was registered in the names of the plaintiffs' fathers who were brothers, and the said title was in their fathers' names even after they had both died.

11. He stated that sometimes during the year 2015 some of the defendants brought some building material to the land claiming that they had purchased the same. This prompted the plaintiffs to carry out a search when they found out that the land had without their knowledge or consent been registered in the name of the 1st defendant who in turn subdivided the same into five portions and transferred the portions to the defendants including herself. PW1 produced five searches in respect of the said subdivisions and transfers as exhibits 5, 6, 7, 8, 9 and 10.

12. According to PW1's evidence, the plaintiffs and beneficiaries of the deceased persons were not aware and were not party to the said transfers, and further letters of Administration had not been taken out in respect of the estates of FRANCIS KIPROP SANGA (DECEASED) and KIPKURUI ARAP SANGA (DECEASED)

13. In view of the foregoing, it is the plaintiffs' contention that the registration of the deceased brothers' land in the name of the 1st defendant and subsequent subdivision of the same and transfer of each partition to each of the defendants including the 1st defendant were unlawful and fraudulent hence null and void.

14. PW2 J. K. Ngeno, the Land Registrar, Bomet County produced the following documents:-

i. The Green Card in respect of KERICHO/CHEMAGEL/508 showing the said deceased's persons as proprietors of the same – exhibits 11

ii. The Green Card in respect of KERICHO/CHEMAGEL/508 exhibit 12 showing in entry No. 7 that the same was now registered in the name of the 1st defendant as at 26th September 2014, and also showing that the same title was on the same day closed and partitioned into 5 subdivisions 4620 to 4624.

iii. The Transfer Form – Exhibit 13 in favour of the 1st defendant but the same was not signed or registered.

iv. An unsigned application for consent to transfer the suit to the 1st defendant

15. In cross examination, PW2 admitted that there was no consent of the Land Control Board to all the transfers emanating from the said original Title Number KERICHO/CHEMAGEL/508. There was also no mutation form in respect of the said subdivisions. He stated that the certificates of confirmation of Grant in respect of the deceased estates were not in the file.

16. The Land Registrar, PW2 first stated that the transfer to the 1st defendant and subsequent subdivisions to the defendants were done un procedurally, though he later clarified that he had seen the relevant transfer documents in the file and the transfers were therefore valid.

Defendants' case

17. The defendants testified but did not call any witnesses.

18. The 1st defendant stated that on 19th December ,1992, she and her husband, the late Elijah Koskei bought a portion of land parcel number KERICHO/CHEMAGEL/508 measuring 1 acre from the deceased who were the fathers of the plaintiffs.

19. She produced a sale agreement which was however not signed by FRANCIS KIPROP SANGA(DECEASED). She testified that later, on 24th April, 1993 the 1st defendant and her said husband acquired the rest of the land being one (1) an acre through an agreement signed by KIPKURUI ARAP SANGA- The same was produced as Exhibit 4.

20. In cross-examination, DW1 admitted that the suit land measures approximately 2.2 Ha as indicated in the Green card and/or abstract and when converted into acreage is approximately 5.5acres.

21. She further stated in cross examination that one of the proprietors did not sign the two agreements as he was not at home. She stated that the consent of the appropriate Land Control Board was obtained. The gist of the evidence of DW2, DW3 and DW4 were that they each bought their respective portions of the suit land from DW1. They also admitted that they knew the land was registered in the names of the said deceased persons and that no Succession proceedings had been taken out in respect of the deceased's estates but DW1 nevertheless managed to have the said portions transferred to them.

Issues for determination

22. The following issues arise for determination:

i. Did the parents of the plaintiffs sell the suit property to the 1st defendant during their lifetime?

ii. Was it necessary to obtain a confirmation of grant before transferring the suit property from the plaintiffs' fathers to the 1st defendant?

iii. Did the 1st defendant obtain the consent of the Land Control Board to transfer land parcel number KERICHO/CHEMAGEL/508?

iv. Were there valid sale agreements at the time the said subdivisions were transferred to the 2nd, 3rd and 4th defendants?

v. Did the 1st defendant collude with the District Land Registrar Bomet to fraudulently transfer the suit property to the 1st defendant?

vi. Were the 2nd, 3rd and 4th defendants purchasers for value without notice?

vii. Are the plaintiffs entitled to the reliefs sought?

Analysis and Determination

23. With regard to the first and second issues, it is the plaintiffs' contention that the suit property was transferred to the 1st defendant unlawfully long after the death of the registered proprietors without first obtaining a grant of letters of administration in respect of their estates.

24. This claim has been refuted by the 1st defendant who claims to have purchased the suit property with her late husband way back in 1992, before the death of the registered proprietors. She produced the sale agreement dated 19.12.92. She further testified that the suit property had been charged to KCB to secure a loan of Kshs. 100,000 which the proprietors were unable to pay and that she and her late husband came to their rescue by buying a portion of the suit property. She produced a letter from KCB dated 19.01.92 (Defence Exhibit 1) indicating that the outstanding loan had been cleared by Elijah. K. Koskey. This evidence was not controverted by the plaintiffs. What they harped on was the length of time it took to transfer the suit property to the name of the 1st defendant and the apparent failure to obtain consent of the Land Control Board.

25. The green card which was produced as Defence exhibit 8 shows that indeed in 1989 the suit property which was still registered in the names of the plaintiffs' fathers was charged to KCB as alleged and was only discharged on 27.3. 2008. The next entry is a transfer to the 1st defendant on 26.9.2014 after which the title was closed upon sub-division on 24.2.2015. The 1st defendant produced a sale agreement between the original proprietors and the 1st defendant's late husband which the plaintiffs contested on the ground that it was not signed by one of the proprietors. In her testimony, the 1st defendant explained that one of the proprietors did not sign the sale agreement as he had run away from home as he feared that the bank would auction their land. She however testified that the wife of the said proprietor was present during the signing of the agreement and she duly signed the same.

26. The 1st defendant has also explained the reason it took long to transfer the suit property to her name as she and her husband had relocated to the United States of America for a number of years after staying on the suit land for 3 ½ years. She also stated that some of her documents disappeared while she was away. I must say that the 1st defendant struck me as an honest witness and I have no reason to doubt what she said. In any event, most of her evidence was never controverted by the plaintiffs. It is therefore my finding that the suit property did not form part of the estates of the plaintiffs as the title deed was held by KCB and was only discharged upon payment of the outstanding loan by the 1st defendant. Even if the plaintiffs had taken out letters of administration soon after their fathers died, the suit property would not have formed part of the estate of the deceased that was available for distribution. Instead, it would have been listed among the liabilities of the two estates, and assuming that the 1st defendant and her late husband had not bought the same, it would have been auctioned by the bank.

27. I now move to the third issue which is whether consent of the Land Control Board was obtained within six months in accordance with section 6(1) of the Land Control Act, Cap 302 of the Laws of Kenya. The District Land Registrar, Bomet who testified as PW3 was rather wishy washy in his testimony. First he stated that the transfer was done unprocedurally since there was no consent of the Land Control Board then in cross-examination, he stated that he had found the application for Land Control Board forms in his file and that the transfer was not unlawful. As an expert witness whose evidence is supposed to assist the court to reach a just decision, PW3's evidence was unhelpful.

28. I have scrutinized the defendants' exhibits and there is no consent form in respect of the transfer in respect of land parcel number KERICHO/CHEMAGEL/508 from the plaintiffs' fathers to the 1st defendant or indeed form KCB to the 1st defendant and it is not at all clear how this was achieved. According to the 1st defendant, the copies of the consent and transfer form disappeared from her house while she was away in the United States of America. This may well be true but what about the copies in the file at the Lands Office? PW3 who effected the transfer could not account for these critical documents from his file. The inference is that the said documents also disappeared from the file at the Lands office otherwise the transfer would not have been effected.

29. I take judicial notice that it is not uncommon for such documents to disappear from files at the Lands office, where parties have vested interests. I say so because I have no doubt in my mind that the suit property was only discharged after the 1st defendant paid off the outstanding loan and the only reasons that the plaintiffs are advancing to claim the suit property is that the 1st defendant did not obtain the consent of the Land Control Board before the expiry of six months and therefore the sale was null and void. I find their allegations of fraud against the District Land Registrar, Bomet unconvincing especially since they deliberately failed to enjoin the Land Registrar as a defendant and even called him as their witness. However, I shall deal with the aspect of fraud separately.

30. Absence of Land Control Board consent in a land transaction involving agricultural land is a vexed issue that has been litigated time and again for a period spanning almost five decades. The position that the Courts have consistently taken is found in the case of **David Sironga ole Tukai versus Francis Arap Muge & 2 others, Nairobi Civil Appeal number 76 of 2014** where the judges of Court of Appeal relied on the case of **Hirani Ngaite Githire versus Wanjiku Munge (1979)KLR 50**, stated that;

“the position is simple and clear. Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The Court cannot do that; for it is not for us to legislate but to interpret what Parliament has legislated. So in this case that agreement between the parties having been entered in June 1969 became void for all purposes(including the purpose of specific performance) at the expiration of three months from the date of making it; and, since no consent had been obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary to obtain Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land in a control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes”

31. However, in **Willy Kimutai Kitilit V Michael Kibet Civil Appeal No. 51 of 2015 (Eldoret)** the Court of appeal differently constituted held as follows:

“However, whether the Court will apply the equitable doctrines of constructive trust and estoppel to a contract rendered void by lack of consent of the Land Control Board will depend on the particular circumstances of the case. The Court further held as follows:

There is a stronger reason for applying the doctrines of constructive trust and estoppel to the Land Control Act. By Article 10 (2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis added) which binds the courts in interpreting any law (article 10 (1) (b). Further by article 159 (2) (e) the Courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, section 7 of the Transitional and Consequential Provisions in the sixth Schedule to the Constitution, the Land Control Act should be construed with alterations, adaptations and exceptions necessary to bring it in conformity with the Constitution.... Since the Constitution has elevated equity as a principle of justice to a Constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.”

32. In the **Willy Kimutai Kitilit** case (supra) cited above the court was of the view that a vendor who has put a purchaser in possession of the land cannot later renege on the agreement and claim that the sale was invalid for failure to obtain the consent of the Land Control Board as this would be going against the principle of equity which has now been entrenched in the Constitution of Kenya, 2010. The Court therefore held that in such circumstances, a constructive trust could be inferred.

33. Guided by the above case of **Willy Kimutai Kitilit** (supra) which is binding on this Court, and applying the Court of Appeal's reasoning to the instant case, the plaintiffs' fathers having put the 1st defendant in possession of the suit property after her late husband paid off the outstanding loan and saved the suit property from being auctioned by the bank are estopped from relying on section 6(1) of the Land Control Act to invalidate the sale.

34. This leads me to the question as to whether fraud was proved against the defendants.

35. The plaintiffs have elaborately pleaded fraud against the defendants and set out the particulars of fraud at paragraph 18 of their Plaint as follows:

“PARTICULARS OF FRAUD

- a) That the first defendant and the land Registrar, Bomet colluded to deprive the estates of the said deceased persons of their land*
 - b) That the land Registrar in collusion with the 1st defendant transferred to the 1st defendant, land which she was not entitled to*
 - c) That the 1st defendant in collusion with and/or assistance of the Land Registrar, Bomet sub-divided the said land and transferred portions of the same to the 2nd, 3rd and 4th defendants without following the law*
 - d) That the 1st, 2nd and 3rd defendants colluded with the Land Registrar Bomet to carry out the sub-divisions and transfers without following the law and in particular without obtaining the requisite consent of the Land Control Board.*
 - e) That the 1st, 2nd, 3rd and 4th defendants caused to be transferred land which they were not entitled to.*
 - f) That the Land Registrar Bomet attempted to cover up the said fraud by issuing a fake certificate of search dated 20th July 2015.*
 - g) That the estates of the deceased persons were deprived of their property without consideration and in contravention of the law*
- 19. Without prejudice to the foregoing, the plaintiffs further contend that the 2nd, 3rd and 4th defendants were not bona fide purchasers for value without notice.”*

PARTICULARS

- a) Failing to carry out due diligence*
- b) Obtaining land without the consent of the appropriate Land Control Board*
- c) Attempting to conceal their fraud by failing to take possession of their respective portions so as not to alert the estates of the deceased persons”*

36. It is not lost to me that almost every aspect of fraud imputed upon the defendants involves the Land Registrar, Bomet yet for some strange and inexplicable reason the plaintiffs did not deem it fit to sue them as defendants in this matter. What is even more intriguing is that the plaintiffs called the Land Registrar, Bomet as their witness. I have already commented on his evidence and I need not re-emphasize the impression I formed of him. Suffice is to say that his evidence was inconsistent and wanting.

37. Fraud is a serious allegation that must be pleaded, particularized and proved to a standard higher than on a balance of probabilities.

38. The courts have repeatedly held that allegations of fraud must be strictly proved. In the case of **Koinange & 13 Others V. Charles Karuga Koinange 1986 KLR** at page 23 Justice Amin citing the case of **Ratilal Patel Makanji (1957) EA 314** observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof....Allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”

39. Furthermore in the case of **Vijay Morjaria .v. Nansingh Madhusingh Darbar& another [2000]eKLR (Civil Appeal No. 106 of 2000)** 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 the facts.”

40. This decision was upheld by the Court of Appeal in Nairobi in the case of *Kinyanjui Kamau .v. George Kamau Njoroge [2015] eKLR (Civil Appeal No 132 of 2005)* where it was stated that:

“ to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding. In the present appeal, there is no such evidence, and the courts below rightly came to the conclusion that the appellant had not made out a case for the grant of the orders he sought.”

41. In the instant case the Plaintiffs failed to prove fraud against the defendants. The plaintiff’s evidence that the sale was fraudulent is misplaced and is not borne out by the facts and the motive behind the sale. Their failure to enjoin the Land Registrar Bomet who was supposed to be at the centre of every act of fraud, as per the particulars of fraud set out above, is telling.

42. Granted that there may have been lapses and delays in the transfer of the suit property to the 1st defendant, which she has explained in detail in her testimony, this in my view does not disclose any element fraud on her part or on the part of her late husband. It is common ground that the plaintiffs’ fathers were unable to service the loan to KCB and their property was in danger of being sold by the bank in exercise of its statutory power of sale. They then approached the 1st defendant’s husband to help them salvage the suit property by paying off the outstanding loan, which he did, as confirmed by the letter from KCB. At what point did this transaction which was initiated by the plaintiffs’ fathers’ turn into a fraudulent one?

43. Having said that, I must point out that I have noted some gaps and delays in the manner in which the suit property was transferred to the 1st defendant and subsequently to the 2nd, 3rd and 4th defendants. The procedures for conveying the property from the bank to the 1st defendant was considerably delayed. What ought to have happened after the 1st defendant’s husband paid the outstanding loan is that the bank ought to have immediately discharged the property to the surviving proprietor who in turn ought to have obtained a consent to subdivide and transfer the portion purchased by the 1st defendant and her husband to them. This prolonged delay is what gave rise to the feeling by the plaintiffs that there was fraud. However, from the 1st defendant’s testimony it is clear that the delay was occasioned by their relocation to the United States, rather than fraud. She stated that the requisite consent was obtained and even if it was not, this is a case where the equitable maxim that equity deems as done that which ought to have been done ought to be applied to meet the ends of justice.

She then had the capacity to sell portions of her share to the 2nd, 3rd and 4th defendants after which they took possession of their respective portions.

44. The last question I have to address is whether the 2nd, 3rd and 4th defendants are bona fide purchasers for value without notice. The plaintiffs have argued that by the time the 2nd, 3rd and 4th defendants purchased the suit property, it was still registered in their late fathers’ names. That may well be so, but as I have explained above, the delay had nothing to do with fraud as alleged by the plaintiffs. If anything, the plaintiffs seem to be suggesting that they should benefit from the delay in transferring the property to the 1st defendant, merely because it remained in the names of their fathers even though they had disposed of it during their lifetime. This would amount to unjust enrichment. I agree with the submissions of defendant’s counsel that the defendants ought to have regarded the 2.25 acres of the suit property sold to the 1st defendant and her late husband as a liability to the estates of the plaintiffs instead of purporting to include it as an asset that was available for distribution.

45. From the foregoing, I find and hold that the plaintiffs have failed to prove their case against the defendants on a balance of probabilities and I dismiss it with costs to the defendants.

Dated signed and delivered at Kericho this 17th day of July 2018

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Koske for the Plaintiffs
2. Mr. Adama for Mr. J.K.Rono for the Defendants
3. Court Assistant - Rotich