



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.198 OF 2018

JAMES NJOROGE GITAU.....PLAINTIFF

VERSUS

LUCY CHEPKURUI KIMUTAI.....DEFENDANT

JUDGMENT

(Suit in which both plaintiff and defendant claim title to the same land; land originally being under a land buying company; both plaintiff and defendant claiming to have purchased shares from the original shareholders and thus entitled to the land; company director not recognising the defendant's share; evidence of the company paramount; judgment entered for the plaintiff; earlier decree in favour of plaintiff from the Land Disputes Tribunal however declared invalid).

PART A: INTRODUCTION AND PLEADINGS

1. This suit was commenced through a plaint which was filed on 13 June 2008 claiming ownership of the land parcel Dundori/Muguathi Block 2/7 (Koelel) (the suit land) as against the defendant, who is sued in her own capacity and as the administrator of the estate of Kimutai Rotich (deceased). In his plaint, the plaintiff has pleaded that in the year 1986, he bought 75 shares of Kalenjin Enterprises Limited (a land buying company) from one Micah Kipchumba Chumo and he thus became a member of the said company. Arising from his shareholding, he avers that he was allocated the suit land, but when he went to collect the title deed, he was surprised to learn that title had already been issued to Kimutai Rotich. He filed a case before the Land Disputes Tribunal which gave and award in his favour. The title of Kimutai was later transferred to the defendant through transmission. It is his case that Kimutai Rotich got registered as owner fraudulently, and the following particulars of fraud are pleaded :-

- (a) Causing himself to be registered for a land he had not paid .*
- (b) Obtaining title for a land without being cleared by probe committee and/or the company directors subsequently.*
- (c) Causing himself to be issued with a title document whereas he knew his name was not in the register of members.*
- (d) Obtaining land without any consideration having been made fully aware that he cannot occupy it legally in 1989.*
- (e) Obtaining title to a land he knew that it belonged to the plaintiff.*

2. It is further pleaded that the defendant registered herself as owner of the land fraudulently and the following particulars of fraud are pleaded :-

- (a) Causing herself to be registered while she knew the plaintiff was a lawful claimant of the suit land.*
- (b) Causing herself to be registered even when it was declared that her deceased husband was not a lawful owner.*
- (c) Failing to disclose in the Succession Cause that the plaintiff was a creditor to the estate.*

3. The defendant filed a defence which she later amended to include a counterclaim. She contended that the registration of Kimutai Rotich was a first registration within the meaning of Section 143 of the Registered Land Act and the same cannot be impeached even upon proof of fraud. She pleaded that the suit land was properly owned by Kimutai Rotich. She averred that the plaintiff purported to lay claim over the land and presented it to the Land Disputes Tribunal, being Tribunal Case No. 25 of 2005, which heard the dispute and made a finding that Kimutai Rotich had acquired the land illegally and directed that his title be cancelled. It is pleaded that Rotich died on 11 August 2002, and

that he was already deceased when the plaintiff lodged his claim at the Tribunal. She lodged the suit Nakuru High Court Judicial Review No. 208 of 2008, but the court did not stay proceedings at the Magistrates Court and the award of the Tribunal was adopted. She has averred that she obtained letters of administration for the estate of the deceased and subdivided the land into 13 portions, and that she now holds titles to 3 of these portions. It is her position that the Tribunal did not have jurisdiction to hear the case and she has asked that the title of the defendant be cancelled.

4. The plaintiff later amended his plaint. Inter alia, he pleaded that the case Nakuru High Court Judicial Review No. 208 of 2008 was dismissed for want of prosecution and following the decree of the Magistrate's Court, he proceeded to execute it and has obtained a title deed to the suit land.

PART B: EVIDENCE OF THE PARTIES

5. The plaintiff testified that he is a retired teacher. He testified that he purchased the shares of Micah Kipchumba in Kalenjin Enterprises Limited, which Micah had purchased from one Ketienya Morogochi. They had a written agreement with Micah, dated 30 September 1986, which he produced as an exhibit. He purchased 75 shares and Micah gave him a copy of Mr. Ketienya's Share Certificate, and the transfer of shares certificates. He also got a receipt for survey fees in the name of Ketienya. He went with these documents to the company, and the company entered him in the company register and assigned him membership No. 1011. He stated that as a result of his membership, he was entitled to land measuring 4.5 acres as each 25 shares were equivalent to 1.5 acres of land. When he bought the shares, the land had not yet been identified, but he was later shown the suit land in the year 2005. When he went to it, he found Kimutai Rotich. He reported to the company which told him that Kimutai is not their member. He later learnt that Kimutai had died. He took the matter to the Land Disputes Tribunal (LDT) and he claimed that the defendant appeared before the LDT did apply for substitution of the deceased Kimutai. The LDT held that Kimutai should buy shares in the company or his title be cancelled. He stated that the defendant registered the award for adoption before the Magistrate's Court as LDT Case No. 106 of 2007 and the award was adopted. The defendant later approached the High Court to quash the award but this case was dismissed in the year 2012 for want of prosecution. He then filed the award at the Lands Office but he was informed that Kimutai no longer held the land as it had been transferred to the defendant. He got the Executive Officer to execute the requisite transfer documents in execution of the award and he thus got himself registered as proprietor. All he now wants is an order for eviction against the defendant.

6. Cross-examined, he stated that when the transfer of shares was done, they did not seek consent of the Land Control Board. He said that he paid stamp duty for the transfer although he did not have the receipt. He stated that at the time he bought the shares, the company still held the whole of the land and had not subdivided it. He acknowledged that the first entry is dated 19 July 1985 in the name of the Government of Kenya, and the second entry in the register is that of Kimutai Rotich, showing that he became registered as proprietor on 14 August 1997. He affirmed that he was shown the land in the year 2005 and he then filed the case before the Tribunal against Kimutai Rotich as he did not know that he is already deceased. In the course of hearing the case, a letter from M/s Gekong'a & Company Advocates dated 9 August 2006, was written to the Tribunal informing the Tribunal that Kimutai is dead and that the defendant had applied for letters of administration. He did not have anything to show that it is the defendant who filed the award before court for adoption. He affirmed that he obtained title following the decision of the Tribunal and decree of the Magistrates Court.

7. Re-examined, he testified that the defendant was already administrator of the estate of the deceased when the award was made by the Tribunal.

8. PW-2 was one Elijah Kiplagat Kipkemei Chelaite. He is a director of Kalenjin Enterprises Limited. He testified that he has been a director since the year 2001 and in the year 2008, he was elected Chairman of the Board of Directors. He affirmed that Kalenjin Enterprises is a land buying company and stated that the land in question was subdivided to members in the year 1985. He testified that the plaintiff is a shareholder of the company and was cleared in the year 1985. He testified that the company undertook a clearing exercise, as in that year 1985, there were some fraudulent dealings where some persons got themselves into the farm register yet they were not members. A complaint was made to the Government which formed a team of 15 District Officers and 45 elders to investigate. The team visited the land in question and found Kimutai Rotich, but he had no ownership documents. These persons were given notice to vacate on 31 March 1989. The company did not recognize these persons and they re-allocated these properties, the land in dispute being allocated to the plaintiff, as he had genuinely purchased shares that were originally of Ketienya Morogochi. He had the company register which showed the plaintiff as member No. 7. He asserted that Kimutai Rotich was not a member. He testified that the person who made fraudulent entries, was one Henry Chepkoigat, who was employed as a Clerk/Secretary and he took his fraudulent list to the Lands office for issuance of titles. He testified that he made more than 6000 certificates whereas the company only had 4000 members and that he gave out blank certificates to the directors who innocently signed the same. According to him, the genuine members are those in the register. He stated that Henry was charged with a criminal offence and later died.

9. Cross-examined, he testified that there are about 5 different registers in the Lands Office. He stated that the register he produced in evidence was prepared by him and it came from earlier registers and that it is this which has the genuine shareholders. He was shown the register which produced title to Kimutai Rotich but he categorized it as the fraudulent list.

10. With the above evidence, the plaintiff closed his case.

The defendant testified as DW-1. She testified that her late husband, Kimutai Rotich, was a member of Koelel Farm of Kalenjin Enterprises Ltd. She presented a list showing that her husband was in the register. She testified that they built a house on the suit land even before formal survey had been done. She stated that this land was pointed out to them by a Committee. The land was shown to them in the year 1976 and it is this year that they built their land. She testified that her husband died in the year 2002 and she obtained letters of administration of his estate. The grant was confirmed and she transferred the suit land to herself. She then subdivided the land into 13 plots. She kept one portion which is where she has buried her husband and son. This is now the land parcel Dundori/Mugwathi Block 2/1620 (Koelel). She stated that of the 13 subdivisions, she has 3 other title deeds, but the rest have not yet been prepared. About the dispute before the LDT, she stated that the plaintiff filed this case after her husband had died, and despite being informed of his death, the LDT still proceeded to hear the case.

11. Cross-examined, she did state that she did not participate at the LDT. She denied having held letters of administration when the award

was made. She stated that the Tribunal called for her husband's receipts but she did not have them as they got burnt. She stated that they settled on the suit land before it was formally surveyed and that her husband's father owned the land parcel No. 6 but he later sold his shares. She asserted that her husband's name is in the register of Kalenjin Enterprises. She conceded that she subdivided her land in the year 2010, while this case, and her judicial review motion was still ongoing. She mentioned that she has transferred two of the subdivisions to other persons and one is in her name.

12. DW-2 was Richard Kibet Kemei. He testified that he was a member of Kalenjin Enterprises and identified his name in the register availed by the defendant. He testified that Kimutai Rotich was also a member of Kalenjin Enterprises and that they settled on the periphery of the land purchased by the company before it was subdivided. When surveyors came to demarcate the land, they did not disturb the place that they had settled and they were allocated land where they had settled. He stated that when titles were issued, one would return the receipts and share certificates, for the title deed.

13. Cross-examined, he testified that he sold his land in Koelel Farm and moved to Njoro after the 2007-2008 post-election violence. He did not carry any copies of his share certificates or duplicate of his title. He stated that it is a Mr. Komen, a director, who issued them with titles. He said that he got his title in the year 1990/1991 and that titles were being issued in the early 1980s. His view was that if Kimutai got title in the year 1997, this was just due to delay. He confirmed that Mr. Chepkoigat came and fraudulently put in some new persons but Mr. Kimutai was not one of them.

14. With the above evidence, the defendant closed her case.

PART C: SUBMISSIONS OF COUNSEL

15. I invited counsel to file written submissions which they did and I have taken note of these in arriving at my decision.

16. In his submissions, Mr. L.M. Karanja, learned counsel for the plaintiff, submitted inter alia that the interest of the plaintiff is recognized in the records held by Kalenjin Enterprises and that his purchase is traceable to the original owner Mr. Ketiinya Morogochi. He submitted that the Land Registrar could only properly process a title against a validly issued clearance certificate by Kalenjin Enterprises. He submitted that the name of Kimutai was entered into the register fraudulently and he was not a bona fide member. He submitted that there was no evidence to controvert the register produced by Mr. Chelaite. On the proceedings before the tribunal, he submitted that unless quashed, the award and decree do stand. He referred me to various authorities to support his client's position.

17. Mr. Githui, learned counsel for the defendant, inter alia submitted that no consent of the Land Control Board was ever sought by the plaintiff at the time of purchase of the company shares and thus no interest could pass in the suit land. He referred me to Section 6 of the Land Control Act. He also submitted that Kimutai Rotich held a first registration under Section 143 of the Registered Land Act (repealed), and his title is thus indefeasible even if fraud is proved. He attacked the award of the LDT as having been made out of jurisdiction and that the proceedings were conducted against a deceased person, thus incompetent. He concluded that the plaintiff's case cannot succeed on account of transfer of shares for no Land Control Board consent was issued, and cannot also succeed on account of the award of the Tribunal, for the same is incompetent. Neither can he succeed on account of fraud given the provisions of Section 143 of the RLA. He also relied on various authorities all of which I have considered.

PART D: ANALYSIS AND DECISION

18. It is clear that both parties claim ownership of the suit property. The plaintiff's claim is based on two grounds, firstly, his purchase of shares in Kalenjin Enterprises from the original holder, and the award of the Land Disputes Tribunal. I will start with the latter.

19. In as much as the award and decree of the Tribunal have not been formally set aside, I am not persuaded that the said award was competent. Firstly, this was a dispute over ownership of land, and the Tribunal could not purport to have jurisdiction. Secondly, the case was presented against a person who is dead, and it is trite law that you cannot sue a dead person. I do not for one moment believe that the plaintiff was not aware of the death of Kimutai, when he filed the case before the Tribunal. He claimed that he went to the land in the year 2005, and found some person on the land. He must have inquired about who is in possession, and it would have clearly emerged that Kimutai had died some years back. Even assuming that I am wrong on this, and that he did not know of the demise of Kimutai, when he lodged the dispute before the Tribunal, I do not understand how he, and the Tribunal, could proceed to hear the case, even after being alerted that Kimutai is dead through the letter written by M/s Gekong'a & Company Advocates. I have seen that the defendant did obtain letters of administration on 9 August 2006, but I have not been shown any formal application for substitution having been made before the Tribunal, not that it would matter, because it is apparent that the proceedings were a non-starter in the first place, having been filed against a person who is deceased. I am unable to bring myself to allow the award and the decree issued pursuant to the decision of the Tribunal to stand.

20. Mr. Karanja in his submissions referred me to the decision of the Court of Appeal in the case of *Florence Nyaboke Machani vs Mogere Amosi Ombui (2014) eKLR*. In the said case, the Court of Appeal held that there was no challenge to a decision of the Land Disputes Tribunal following the proper laid down procedure, either an appeal or a judicial review motion. The appeal was thus dismissed.

21. That may be the position, but can I really close my eyes and ears to the fact that proceedings were commenced against a person who is dead, and an award was made against a person who is dead, without his representative being a party to the case? I think there are special circumstances in this case which completely militate against giving a semblance of integrity to the award of the Tribunal. Article 159 of the Constitution demands that justice be done without undue regard to technicalities and I think I will be failing in my duties if I am to allow such an award to be enforced. I am guided in this respect by the Court of Appeal decision in the case of *Stephen Kibowen vs The Chief*

Magistrate's Court Nakuru & 2 Others, Court of Appeal at Nakuru, Civil Appeal No. 211 of 2013 (unreported). In this case, a challenge was made to the award of the Land Disputes Tribunal outside the 6 month period ordinarily allowed for filing Judicial Review proceedings, and the matter was dismissed on this basis by the High Court. On further appeal to the Court of Appeal, the Court of Appeal quashed the award despite the suit having been filed outside the 6 month period. The Court of Appeal reasoned that a nullity amounts to nothingness and incapable of commencing a reckoning of time. By parity of reasoning, in our instance, the award of the Tribunal is a "nullity and nothingness" and cannot be the foundation of any vesting right to the plaintiff.

22. For the above reasons, I am unable to allow the case of the plaintiff based on the award of the Tribunal. In essence, it means that I will have to start all over again to find out who between the plaintiff and defendant is properly entitled to the suit property. That is indeed the second limb of the plaintiff's case.

23. The plaintiff states that he purchased the shares that were originally owned by one Ketienya Morogochi. The share certificate of Ketienya was produced as an exhibit. Morogochi sold his shares to Micah Chumo who in turn sold his shares to the plaintiff. There is evidence of the transfer of these shares. I have also seen a receipt dated 14 October 1986 for survey fees, paid on account of Ketienya Morogochi. The issue of transfer of the shares of Ketienya Morogochi to the plaintiff is not really disputed. What the defendant has raised is that this transfer is null and void as there was no consent of the Land Control Board. In my view, one cannot insist on the Land Control Board consent in this instance. First, there is no challenge by the sellers towards the transfer of their shares to the purchaser. If there was a challenge, maybe the court would have needed to look into whether that transfer of shares needed the consent of the Land Control Board. The defendant cannot purport to wish to enter into the transaction between the plaintiff and Mr. Chumo, for he lacks the privity to do so. Secondly, the company itself has already registered the plaintiff as a member of the company. He is now a member standing in his own right and can assert rights over his own shareholding. I thus decline to be moved by the claim of the defendant that the transfer of the shares did not have the consent of the Land Control Board.

24. What is before me is a straight contest over who between the plaintiff and the defendant ought to own the land. For either litigant to succeed, they need to demonstrate to me, the root of their title, and the root of their title must originate from the shares held at Kalenjin Enterprises. I have already outlined that the plaintiff purchased shares from Mr. Chumo who had in turn purchased shares from Mr. Morogochi. This is affirmed by the company through its director, Mr. Chelaite who testified as PW-2. Mr. Chelaite produced a register of the company, and I have absolutely no reason to doubt that register. The register shows the name of the plaintiff and assigns him the plot No. 7. This evidence is coming from the company itself, and cannot be taken lightly. It is the company which knows its members and which knows what land it has assigned to the members. If the company refutes that one is a member, then that person needs to rebut this, through cogent evidence. I am afraid that the defendant had not delivered any evidence to me that Kimutai held any shares at Kalenjin Enterprises. She has not delivered any share certificate, nor any receipt for payment for survey so as to be assigned the suit land. All that the plaintiff had was a document, titled "Rift Valley Enterprises (Koelel Farm) List of Allottees" as proof that the suit land was assigned to the deceased.

25. Now, I do not know the origin of this list for it does not bear a stamp of authenticity from Kalenjin Enterprises. It does appear to me to have been prepared by the Land Registrar, but I have no idea and from what verifying documents, the Land Registrar, made this list. PW-2 categorically denounced this list as a fraudulent one, and I cannot take that lightly. Having been so demonized, it behoved upon the defendant to give a semblance of authenticity to that list, which I am afraid the defendant did not do. Other than merely producing it, the defendant did not try to show that this list is genuine and authentic. I am afraid that given the fact that a director of the company has denounced this list, and there being no evidence to back up its authenticity, I am unable to give that list priority over the register that PW-2 produced. I am thus not persuaded that Kimutai Rotich was ever assigned to own the suit land by Kalenjin Enterprises. He ought never to have been registered as proprietor of the suit property at all. My finding therefore is that his registration as proprietor must have been procured by way of fraud, misrepresentation or mistake.

26. Mr. Githui, rightfully submitted that the applicable law in the instance of this case is the Registered Land Act (repealed). The acts complained of and the suit herein were filed before the regime of the Land Registration Act, which came into force in the year 2012. Mr. Githui referred me to Section 143 of the Registered Land Act, and argued that even if it is found that the title of the defendant was procured through fraud, the same cannot be impeached for it is a first registration. I am afraid that this is not the position. The first registered proprietor according to the register was the Government of Kenya. Mr. Kimutai Rotich was the 2nd registered proprietor and not the first. We also need to understand that the concept of indefeasibility of a first registered proprietor, in Section 143 of the Registered Land Act, is in respect of land that has derived title through the process of Land Adjudication and not through sale or allotment by Government.

27. Given the above, I am persuaded that it is the plaintiff who is the rightful proprietor of the suit property. I am further persuaded that the defendant and her predecessor in title could not have obtained the title to the suit land without having engaged in some sort of fraud, or misrepresentation. Her title is therefore fit for cancellation pursuant to the provisions of Section 143 (2) of the Registered Land Act which provides as follows :-

143. (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

28. I am persuaded that the registration of the defendant's predecessor was by fraud and capable of being nullified. My holding is that as between the plaintiff and defendant, it is the plaintiff who holds the better title to the suit land. The plaintiff is thus entitled to both ownership and use of the suit property and the defendant will need to give vacant possession. I appreciate that the defendant may have been in occupation for a long time and may need to organize herself to relocate. I give her 6 months to give vacant possession after which she will be permanently barred from being in possession of the suit property.

29. I have seen the register of the suit land. It does show that the current proprietor is the plaintiff. However, that proprietorship is out of the decision of the Land Disputes Tribunal. The register will need to be amended to show that the plaintiff is proprietor not because of the decision of the Land Disputes Tribunal but because of the decision of this court.

30. I now make the following final orders :-

- i. That as between the plaintiff and defendant, it is the plaintiff who is the rightful proprietor of the land parcel Dundori/Muguathi Block 2/7 (Koelel).
- ii. That any title to the land parcel Dundori/Muguathi Block 2/7 (Koelel) or any subsequent title derived from this title held by the defendant is/are hereby nullified.
- iii. That it is hereby ordered that the plaintiff be registered as proprietor of the land parcel Dundori/Muguathi Block 2/7 (Koelel) not through the decision of the Land Disputes Tribunal but through the judgment of this court.
- iv. That the defendant is hereby given 6 months from the date of this judgment to vacate the suit property and if she does not do so within this period she be evicted therefrom.
- v. That upon expiry of the 6 months period, or vacating the suit property, whichever comes earlier, the defendant is permanently restrained from entering, being upon, or in any other way interfering with the possession of the land parcel Dundori/Muguathi Block 2/7 (Koelel).
- vi. The defendant shall bear the costs of this suit.

31. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 14th day of November 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Kahigah for the plaintiff

Mr. Aim holding brief for Mr. Githui for the defendant .

Court Assistants :Carlton Toroitich

Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU