



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 826 OF 2012

BEATRICE NANYAMA MURUNGA.....PLAINTIFF

VERSUS

BENJAMIN AMCHAT.....1ST DEFENDANT

JACKSON KIPSANG KOGO.....2ND DEFENDANT

JUDGMENT

The plaintiff, Beatrice Nanyama Murunga substituted Eric Kipkosgei Kogo the initial and deceased plaintiff in this case. She is the wife of Eric Kipkosgei Kogo who filed this case. The plaintiff claims to be the sole administrator of the estate of her late husband who passed on 8.8.2012. She filed a succession cause and was issued with letters of Administration. The plaintiff processed the grant and was issued with the title deed of the piece of land known as Nandi/Kiptel/1058 measuring 3.72 Ha issued on 17.2.2014.

She proceeds to state that the defendants have similarly confirmed the current status of the said land by their own search and conducted on 28th July, 2014 and that they have annexed their application dated 17th October, 2014 but was later withdrawn.

The plaintiff further states that in the said application and dated 17th October 2014, but withdrawn, at paragraph (e) of the grounds of the said application the defendants confirm the relationship of the late Eric Kipkosgei Kogo and the plaintiff as wife and husband. Similarly, at paragraph 6 of the supporting affidavit to the said application and sworn by the Advocate on record for the defendants, the same admits and confirms the relationship of the late Eric Kipkosgei Kogo and the plaintiff.

The plaintiff states that she was married to the late Erick Kipkosgei Kogo in 1992 and found when the said piece of land had long been registered in the name of the late husband in 1986.

The plaintiff states that the ownership of the piece of land had never been in dispute as when it arose in 1996 before the Land Dispute Tribunal at Kapsabet a ruling was delivered in favour of her late husband.

The plaintiff states that her late husband passed on 7th August, 2012 and she was a house wife. The late husband left behind four children thus Emanuel Kibet born in 1998, Samuel Kipkoech born in 2000, O J born in 2005 and N J born in 2011 respectively and the defendants have blocked her and the siblings from accessing, utilizing and even constructing a house on the said piece of land.

The plaintiff states that the defendants have unlawfully disposed her and her siblings from her lawful property and has trespassed and plundered her property without an authority.

The plaintiff states that her late husband was the son of the late Chelibwo Amchat who married the grandmother of her late husband, in woman to woman marriage, pursuant to the Nandi's customary laws and the defendants are similarly step brothers to the plaintiff's late husband and where her late husband came from the first house and the defendants from the second house.

The plaintiff states that the piece of land registration NANDI/LIPTTEL/255 and stated at paragraph 4 was divided into two equal portions and given to the first and second houses and from the said division, gave birth to the registration of NANDI/KAPTEL/1058 and the defendants have also equally their own portion.

It is the plaintiff's case that the defendants have without any colour of right justification or authority of the said plaintiff moved into and trespassed onto the plaintiff's parcel NANDI/KAPTEL/1058. The defendants have not filed any counter claims/suit/case in any court on challenging the possession of the suit land whatsoever.

The defendants have been profiting from the said land unlawfully at the exclusion of the plaintiff and have denied her the opportunity to develop the said suit land for the gains.

The plaintiff's prayer against the defendants jointly and severally is for an order of eviction from parcels NANDI/KAPTEL/1058 together with any other person or persons there from claiming through them and compensating for non-utilization of the said land since 1986 when the defendants unlawfully imposed themselves onto the said suit land.

The plaintiff further prays for an order of injunction against the defendants jointly and severally stopping putting up any structure, demarcating, ploughing, planting, developing, leasing, mortgaging, selling or offering for lease or in any manner whatsoever dealing with the plaintiff's parcel NANDI/KAPTEL/1058 to the detriment of the said plaintiff.

There have been previous proceedings between the plaintiff and the defendants over the same subject matter specifically, KAPSABET PMCC No. 76 of 2008 and LDT No. 21 of 1996 as well as KAPSABET CR. CASE NO. 194 OF 2012 against the defendants which have not been concluded.

The plaintiff prays for the demolition of any /and/or all structures, development, plantation, fence or anything erected without the authority of the plaintiff on parcel NANDI/KAPTEL/1058.

The officer commanding the Kapsabet Police Station to enforce the orders as issued by the Honourable Court. Costs of the suit case.

In the amended joint statement of defence, the defendants state that the plaintiff is not entitled to the orders sought. The defendants contend that the transfer and registration of land parcel No. NANDI/KAPTEL/1058 was done fraudulently. The defendants were born and grown up on the land No. NANDI/KAPTEL/255 and have always been in possession of the suit land. They claim to be the legal children of Chelwano Kabarcha and Pauline Chebungei through Woman to woman marriage as per Nandi Culture hence the legal beneficiaries of the subject land as the owners have since passed on.

According to the plaintiff, the suit does not discharge a cause of action and should be dismissed.

In the amended counter claim, the defendants aver that they are the legal beneficiaries of land No. Nandi/Kapitel/1058 same being formerly owned by the deceased parents namely Chelwano Kabarcha and Pauline Chebungei, married through Woman to woman marriage in Nandi Culture.

The defendants further aver that the subject land is as a result of malicious and or subdivision of land No. Nandi/Kapitel/255 obtained by way of misrepresentation of facts.

The particulars of fraud are posing to be grandson to One Chelibwon Amchat who was the registered owner of disputed land. Taking undue and unfair advantage of the advanced age and senility of the Late Chelwano Kabarcha the registered owner of the subject land to subdivide and transfer part of land parcel No. NANDI/KAPTEL/255 to himself. Disinheriting the defendants of part of their inheritance namely land No. NANDI/KAPTEL/1058. Grabbing land No. NANDI/KAPTEL/1058 from the registered owner. Taking unfair advantage of the defendants and registering Land No. NANDI/KAPTEL/1058 in the year 1986 when defendants were still minors.

Procuring the registration of parcel No. NANDI/KAPTEL/1058 in his names through underhand means.

The defendants reiterate that they were born and brought up on the suit land and have been in peaceful and interrupted possession of the parcel of land No. NANDI/KAPTEL/1058 to the exclusion of the plaintiff and they pray that the land reverts to them. They pray that the subdivision of the NANDI/KAPTEL/255 to be declared null and void. Title No. N/K/1058 to be nullified and cancelled and the same to revert to the defendants. In alternative, there be a declaration that subdivision and transfer resulting to parcel No. Nandi/Kapitel/1058 is null and void.

In defence to counter claim, the plaintiff admits that the defendants were born on the suit land but denies that being born on the suit land confirms upon their ownership of the suit land being Nandi/Kapitel/1058.

The plaintiff admits that the defendant were sons of the late Chelibwob Amchat in accordance with Nandi Customary Law that allows Woman to Woman marriage but adds that equally the said Chelibwob Amchat married the mother of her late husband and subdivided the land into two and caused Nandi/Kapitel/1058 to be registered in the plaintiff's husband's name.

The plaintiff states that during the lifetime of the father of his late husband (Chelibwob Amchat) the defendants had sued the plaintiff's husband in District Tribunal Court No. 2 of 1996 and the ruling was delivered. The decision was made there is no appeal under the Land Dispute Tribunal Act, Cap 303 Laws of Kenya.

It is alleged that the ownership of the suit has changed from the late husband of the plaintiff to the plaintiff through Succession and that the same has not been challenged.

In reply to the statement of defence to Counter Claim, the defendants join issues and states that the title to the suit land was fraudulently obtained and in collusion with the Land Registrar notwithstanding the restriction placed thereon

When the matter came up for hearing the plaintiff's statement was adopted as evidence in chief. She testified that she is the widow of Eric Kipkogei Kogo who died on 7.8.2012. Before death he had sued the defendant for trespassing on his land he was to register the portion and had a title deed. Though the plaintiff was registered proprietor the defendants lived on the land. Upon her husband's demise, she filed a

succession cause and was issued with a grant and the suit property was transferred to the plaintiff upon confirmation of the grant. She produced the letter of administration. She was given certificate of confirmation of grant on 31.1.2014. She took the order to the Land Registrar and was issued with the title deed on 17.2.2014. She produced the title deed. The certification has never been challenged. She has never lived with her husband on the land. The 1st defendant was arrested and charged for creating disturbance and jailed. She produced proceedings. She prays that they be evicted from the land and be moved to their land no. 1057. Land No. W/K.255 was subdivided to create 1057 and 1058. Land No. 1057 is in the defendant's mother's name while 1058 in the names of the plaintiff. On cross examination by Mr Birech learned counsel for the defendant, the plaintiff states that when she got married the title deed was in her husband's name. The plaintiff's husband was brought up by her grandmother. The plaintiff's husband's mother's name is Janet Jerono. She is still alive at Kipkuto. The plaintiff was married in 1992 and when she was married, she found Benjamin Amchat living in 1057 and Jackson living in 1058. The plaintiff's husband never ploughed the land until his death in 2012. The plaintiff's husband's grandmother lived with all her children including the plaintiff's husband but the plaintiff's husband could not continue living with them due to violence.

DW1 Benjamin Rotich Kogo on his part states that he is also known as Benjamin Amchat and that Amchat is the family name. He knows the plaintiff who stays at Kipkuto with the family of John Keino who married Janet Keino who is the mother of the plaintiffs deceased husband, Erick Kipkosgei Kogo. He states that Chelwano Kabarcha did not have children and therefore married their mother Pauline who got five children. He was born on the land in 1954. The plaintiff's husband was buried on land belonging to John Keino and that is where the plaintiff lives.

DW2 was Kipyego Arap Kogo who lives at Kipkito in Kaptel Nandi County. He has known the defendants for over 30 years. He states that the mother of the defendants was called ***Pauline Chebungei*** and was married to ***Chalwano Kabarcha***. The marriage was under Nandi Customary law. Pauline Chebungei had five children namely; Benjamin, Kipsang and Cheruben. He could not remember the rest. Pauline lived at Chelwano Kabarcha's home. He states that Erick Kipkosgei Kogo was another child of another woman that was married by Chelwano Kabarcha. The mother of Erick Kipkosgei Kogo was Janet Jerono she got another husband and left with Erick and never returned. The defendants currently occupy the land.

On cross examination by Mr. Ochieng he states that Erick Kipkosgei Kogo has been in the same family of the 1st and 2nd Defendants but left Chelwano Kabarcha with his mother when he was of tender age.

I have considered the pleadings and evidence on record and the rival submissions by court on record and do find the first issue ripe for determination is ***whether there existed woman to woman marriage between Chelwano Kabarcha and Pauline Chebungei***. And between Chelwano Kabarcha and Janet Jerono. The court has to determine whether the plaintiff's husband was married to the late CHELWANO KABARCHA and also whether the defendants' mother was married to the same lady under woman to Woman marriage under the Nandi Customary law.

The plaintiff merely mentions that there was a woman to woman marriage between the plaintiff's husband's mother and the lady known as Chelwano Kabarcha. She does not state when the marriage occurred, time it occurred and when dowry was paid.

The same applied to the 1st Defendant who merely mentions that there was a resolve to have marriage under the Nandi Customary law between their mother and one Chelwano Kabarcha. There is no evidence of the date the marriage was celebrated. No evidence of Dowry paid. DW2 also merely states that there was a marriage and does not give the details.

Eugene Cotran, a renowned author on customs of various tribes of Kenya. In his book, the law of marriage and Divorce, London Maxwell and Sweet 1968 at page 117 says (among Nandi/Kipsigis) a woman past the age of child bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband but is usually after his death. Marriage consideration is paid as in regular marriage and a man from the woman's clan has sexual intercourse with the girl in respect of woman marriage consolidation has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration.

In the case before me there is no evidence that there was a marriage ceremony between the plaintiff's husband mother and Chelwano Kabarcha likewise there is no evidence of a ceremony of marriage between Pauline Chebungei and Chelwano Kabarcha. No evidence of **consideration** paid and no evidence of sexual intercourse with a clan member. I do find that both parties have not demonstrated the existence of woman to woman marriage under the Kalenjin customary law.

The second issue is on the ownership of the two suit parcels of land. This court finds that the available evidence demonstrates that Parcel No. Nandi/Kaptel/255 measuring approximately 7.4 Ha existed in Registry Index Map Sheet No. 15. This land was registered in the names of Chelwano Kabarcha. The parcel of land was subdivided into two parcels of land thus Nandi/Kaptel/1057 and Nandi/Kaptel/1058. The exercise of subdivision was allowed by Chelwano Kabarcha the proprietor. She executed the mutation forms and it appears consent to subdivide was obtained. She ensured that 1057 was registered in the names of the defendants' mother and 1058 was registered in the names of the plaintiff's husband. Save that the application for consent of the land control board to transfer was not signed by both parties however this omission cannot be relied upon by the defendants to fault the transaction as they were not party to the said transaction. The plaintiff produced the title deed demonstrating that the parcel of land was registered in the plaintiff's name.

It was incumbent upon the defendants to prove fraud. The defendants merely made allegations of fraud but did not prove the same. They did not demonstrate that the plaintiff obtained the title fraudulently. Section 24 of the Land Registration Act provides that subject thereto: —

- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

Section 25 of the Land Registration Act states as follows: -

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject: —

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

Section 26 states as follows; -

“(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”.

The plaintiff is the registered owner of land parcel No. NANDI/KAPTEL/1058. Going by Sections 24, 25 and 26 cited above, in order for the defendant to successfully challenge the title of the plaintiff he must on appropriate standard prove that the title to land parcel No. NANDI/KAPTEL/1058. was obtained, procured and/or transferred to the plaintiff by fraud; and that the plaintiff was a party to the fraud.

Section 107 of the Evidence Act Cap 80 of the laws of Kenya states that; -

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

It is, therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.

It goes without saying that a party is bound by their own pleadings and the evidence they adduce in court. The purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination.

The allegations of fraud in particular called for detailed evidence to reach the threshold of proof.

I am well alive to the case of **Koinange and 13 others – Vs - Koinange [1986] KLR 23** where the court restated the cardinal precept of the law of evidence that he who alleges must prove it. In the cases of **Ratilal Gordhanbhai Patel V. Lalji Makanji [1957] EA 314 and Ulmila Mahindra Shah v. Barclays Bank International and Anor [1979] KLR**, the courts have stated that Fraud has everything to do with one’s state of mind and intentions, and not the outcome of actions and that the standard of proof for fraud is very high beyond the usual standard of balance of probabilities in civil cases approaching but below proof beyond reasonable doubt.

The court finds that there is no scintilla of evidence on fraud to enable this court nullify the title issued to the plaintiff.

The upshot of the above is that I do grant an order that the defendants jointly and severally be evicted from parcels NANDI/KAPTEL/1058 together with any other person or persons there from claiming through them. The defendant to be given 45 days’ notice before any eviction is done. The counter claim is dismissed. Costs of the suit to the plaintiff.

Dated and delivered at Eldoret this 21st day of December, 2018.

A. OMBWAYO

JUDGE