



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 82”B” OF 2012

[Formerly Eldoret Hccc No. 168 of 2001]

JONATHAN K. MUTAI.....1ST PLAINTIFF

KAPTICH KESSIO.....2ND PLAINTIFF

VERSUS

CHERUIYOT RANDICH.....DEFENDANT

JUDGMENT

Jonathan K. Mutai and Kaptich Kessio (hereinafter referred to as the plaintiffs) have come to court against **Cheruiyot Randich** claiming that at all material times, to this suit, the 2nd plaintiff was the registered joint proprietor alongside one Sarah Jemaiyo Kogo of that parcel of land known as Nandi/Kamoiywo/863. It is claimed that under the authority of the 2nd plaintiff, the 1st plaintiff did enter into an agreement with one Philip Kipkoech Cheruiyot on 28.7.1993 under which agreement Philip Kipkoech Cheruiyot purchased 0.5 acres out of the 2nd plaintiff's share of the suit land for a consideration of Kshs.18,000.

It is claimed that the defendant without any colour of right and with fraudulent interest to deprive the plaintiffs of their land took proceedings before the Kapsabet Division Land Disputes Tribunal and obtained an award for 0.6 acres out of the said land which award was subsequently adopted by the Principal Magistrate's Court at Kapsabet.

The particulars of fraud are falsely representing to the Land Dispute Tribunal that he was a party to the agreement of sale with the 1st plaintiff and participating as an elder in the proceedings and thereby being a Judge in his own case. Typing or permitting to be typed fictitious proceedings wholly unrepresentative of what transpired at the Tribunal's proceedings. Preventing the 1st plaintiff from participating in the Tribunal's proceedings. Hiding or causing to be hidden, the proceedings of the Tribunal thus preventing the plaintiffs from challenging the validity of the proceedings. Obtaining an award from the Tribunal which had no jurisdiction to interact the claim in view of the fact that there is a valid title deed over the same.

As a direct consequence of the aforesaid fraudulent acts and the subsequent adoption of the award by the court, the defendant is now laying claim over the suit land to the plaintiff's prejudice.

The plaintiffs therefore pray for a declaration of this court that the purported award of the Kapsabet Division Land Disputes Tribunal was invalid ab initio in the circumstances and that the defendant is not entitled to any claim over the suit land.

The plaintiffs further pray for permanent injunction against the defendant to bar him from trespassing upon, fencing off, excising or in any way interfering with the suit land in pursuance of the said Dispute Tribunal's award. The plaintiff prays for costs and interest.

The defendant filed defence and counterclaim stating that he bought the suit land legitimately but decided to make his son Philip Kipkoech Cheruiyot process the transaction on his behalf. The award by the Kapsabet Divisional Land Tribunal was reached after the panel of elders had heard the same land dispute and deliberate on the issues and reached decision in favour of the defendant after which it was adopted at Kapsabet Principal Magistrate as the court's judgment. The orders the plaintiff is applying for in the Plaint will be prejudicial to the defendant because the defendant bought the disputed land genuinely.

The defendant states that the plaintiffs' suit is incompetent, bad in law and it is otherwise an abuse of the due process of the court and shall at the hearing raise preliminary objection. The defendant denies ever being served with demand notice of intention to sue and puts the plaintiff to strict proof thereof. The jurisdiction of this honourable court is not denied.

In the counterclaim, the defendant states that he honestly bought the disputed land from the plaintiff after his church elders persuaded him under urgency need by the plaintiff to pay a fine due to an assault case as he could not raise the money and as such, the disputed land should be declared to be defendant's.

He states that though he acted as a witness in the purchase of the suit land he was the one who paid the price on behalf of his son Philip Kipkoech Cheruiyot, the purchaser in the sale agreement so he requests this court give an order that the land be given to him.

He states that this case is an old case of 2001 and the plaintiffs have neglected to prosecute the same several times and it has been the defendant who took the hearing dates only to be stood over generally for lack of attendance by the plaintiff therefore he asks this court to dismiss this case for want of prosecution.

When the matter came for hearing, the ***PW1 1st plaintiff, Jonathan K. Mutai*** testified that he lives at Kapsabet, Nandi County, Kamoiywo Location. He knows Nandi/Kamoiywo/863 which belongs to his mother who sold a portion of land of 0.5 acres at the cost of Kshs. 17,800 to Philip Kipkoech Cheruiyot ID. No. [.....]. The title is in the names of the 1st plaintiff's mother Sarah Chemaiyo Kogo his grandmother and Kaptich Kessio his mother. The share of Kaptich Kessio is 2.8Ha and Sarah's share is 8.4 Ha.

The agreement's consideration was paid in cash by Philip Kipkoech Cheruiyot who later brought in a person who is not a surveyor to do demarcation but he refused. He added 0.1 to be 0.6 and he was paid all the money in cash thus Kshs. 4,000. Philip Kipkoech Cheruiyot was to pay Kshs. 3,800, and the plaintiff was to pay Kshs. 6,775. They were told to wait for the Land Control Board but Philip changed his mind and told him that the terms were high and suggested that he does give him back the money. They sat and after sometimes, he saw a letter from Cheruiyot Randich. Cheruiyot Randich claimed that the land was his as the money was his. He produced the agreement between Philip Kipkoech Cheruiyot and his mother.

When doing the agreement, Cheruiyot Randich was a witness and not a party. He was the father of Philip Kipkoech Cheruiyot. When the plaintiff saw the letter and the documents of the Tribunal, he was wondering why he was being sued.

He complained on the composition of the Tribunal as Cheruiyot Randich was a member. The elders insisted to proceed with the case. The land belonged to his mother and not him. He had not sold land to the defendant. The Tribunal decided that he gives the defendant 0.6 acres despite the fact that he was not called for the ruling. He was ready to give back Philip Kipkoech Cheruiyot the money. The suit land is in the name of his mother and grandmother.

On cross examination by Cheruiyot Randich, he states that Land No. Nandi/Kamoiywo/863 belongs to his mother. He states that his mother sold the land to compensate someone the plaintiff had injured. They sat and agreed and Philip paid the money for the land.

He remembers when Philip Kipkoech Cheruiyot called the surveyor, he refused because he came with his father and yet he wanted a surveyor to do the job.

On re-examination by Adhiambo learned counsel for the plaintiff, he states that there is no agreement between Cheruiyot Randich and his mother. The only agreement was between Philip Kipkoech Randich and his mother. The defendant is not in the agreement.

PW2, Kaptich Kesio, the 2nd plaintiff and an elderly lady testified that she lives at Kapson, Kamoiywo. she has land at Kamoiywo. Her mother Elizabeth Chepkaina gave her the land. She knows Sarah Jemaiyo Kogo. Her mother married Sarah Chemaiyo Kogo. When her mother died, she was given land with Sarah Kogo. She produced a certified copy of Search dated 31.1.2001. She did not sell the land but gave his son Jonathan Kiplagat Mutai part of the land. Jonathan Kiplagat Mutai sold the suit land to Philip Koech. When the land was sold to Philip, he was present and signed the documents. Her husband also signed the documents.

They went to Tribunal with Sarah Kogo and Cheruiyot Randich the father to Philip Kipkoech Randich. He has never sold land to Cheruiyot Randich. Cheruiyot Randich went to the Tribunal which gave the suit-land to Philip Kipkoech Cheruiyot. He produces certified copies of proceedings and Award and the Decree as PEx.4(a) and 4(b).

On Cross examination by Randich, she states that she sold the land. She went to the Randichs to request them to buy the land. She sold the land because there was a problem between her son and one Tirop. She wanted to bring peace.

On re-examination by M/s Adhiambo, she states that when she signed the agreement, she was selling the land to Philip. Jonathan and Randich were witnesses. They were all present. Cheruiyot Randich did not object, only at the Tribunal. He did not sell land to Cheruiyot Randich but Philip Kipkoech Randich.

PW3 Joel Metto testified that he lives in Kapuson village in Nandi Location. He is the chief of the area. There is an agreement between Philip Cheruiyot and Kaptich Kessio. The land was sold by Kaptich Kessio, the mother to Jonathan Mutai. Kaptich Kesio talked to Jonathan Mutai before selling the suit land. Jonathan Mutai asked the mother to allow him sell the land and therefore they sold the land. They sold half an acre to Philip Cheruiyot. The original agreement is with Philip Cheruiyot. He drafted the agreement. The land was sold for Kshs.17,500. There were Cyprus trees planted. Mr. Randich was a witness for Philip Cheruiyot the purchaser. Philip never entered the land. Jonathan Mutahi lives on the land. Randich went to the Tribunal and was one of the elders of the Tribunal. He was an elder for a period of time. In 1998, he was a chief. Mr. Randich was a member of the Tribunal.

On cross examination by Randich, he states that he is the chief of Kamaina. He wrote the agreement for parcel no 1022. The land No. 1022 belongs to Kiprotich Yebai. Land No. 863 belongs to Kaptich Kessio and Sarah Chemaiyo Kogo. According to official Search, Kaptich Kessio owned Nandi/Kamoiywo/863. Before any agreement, he has to establish that the certificate of official search is available.

On re-examination by Adhiambo, he states that the seller identified his parcel of land as 1022. He wanted to sell half an acre to Philip Cheruiyot. They agreed to transact. It was Nandi/Kamoiywo/863 which was surveyed. The numbers have not been affected. No person complained that the land was not for Kaptich Kessio.

PW4 Francis Murei testified that he lives at Kamoiywo Location, Sania sub-location, Nandi County. He is a retired Agricultural Officer, Technical Assistant. He remembers the land in question but has forgotten the number. He went to the chief as a witness when the agreement was done. He was a witness for Philip Kipkoech Cheruiyot. Jonathan Kiplangat Mutai sold the land. His mother gave him a share to sell half an acre. The land was being sold to Philip Kipkoech Cheruiyot. Randich was a witness. The land was not being sold to Randich the father to Philip. The money was paid by Philip Kshs. 17,500. He also paid Shs.500 for trees. He has never heard that Randich was buying the land. He was in the Tribunal and gave evidence. Jonathan and his mother were in the Tribunal. The claim was filed by Randich. The buyer was Philip Kipkoech Cheruiyot. He saw proceedings on the date of hearing. He did not testify in the proceedings that the land belonged to Randich. There were five elders. There was Zachayo, Joshua Tanui and Randich. Randich was an elder. Randich after initiating the claim also sat in the Tribunal as an elder.

On cross examination by Randich, he states that he does not know who called the other for the agreement.

The defendant Cheruiyot Randich on his part testified that the land is his having bought it from the plaintiff's mother and given the same to his son Philip Kipkoech Randich. However, when his son went to take possession the 1st plaintiff prevented him from entering the piece of land. They went to the village elder and to the Assistant chief and later to the Tribunal.

On cross examination by Adhiambo learned counsel for the plaintiff, He states that he was a member of the Kapsabet Divisional Land Disputes Tribunal but he left the Tribunal. Their work was to hear and determine land disputes. The land in dispute was registered in the name of Kaptich Kessio. The Tribunal as it then was entertained all cases including ownership. He referred the matter to the Tribunal. He knows the elders in the Kapsabet land disputes Tribunal. They used to work together. The defendant told the Tribunal that he bought the land and gave his son Philip who later told him that they had denied him the land. The defendant went to the Tribunal because the land was his. The land was given back to him by the Tribunal.

DW2 Philip Kipkoech Cheruiyo, t testified that he is a farmer who hails from Kamoiywo location, Nandi County. According to DW2, Jonathan Mutahi made a mistake of assaulting a person and the said person obtained a P3 form. Mutahi was sought for by the police. His mother intervened and sought for people to buy her land to enable her get money to pay the person who was assaulted. Mutai's mother went to his father, the defendant herein requesting him to buy the land to enable her pay the fine. His father had refused but he agreed later. He wrote a letter that Mutai should not be arrested. His father looked for money by selling a cow. He got money and called the chief and other people. After they came, his father said that the land should be registered in DW2's name. They wrote the agreement. He gave money. After all this, Mutai told them to do survey locally. They did a local survey. They prepared the fence but later, Mutai removed the fence, trees and put them aside. He chased them from the land. Later, he told his father that the money he bought land could be refunded. They went to the village elder who gave the land to his father. The assistant chief also gave the land his father. Tribunal gave the land to his father. Kapsabet Court gave the land to his father.

On cross examination by Adhiambo, he states that he is a son of Philip Randich. His father bought the land but the land was his. The agreement shows that he was the buyer. His father went to the Tribunal because he bought the land. His father went to the Tribunal because he gave the money. He was with his father when it all happened. They did not write anywhere that the land was bought by his father. The agreement is silent on the role of his father as a buyer. The money purchasing the land was from his father. His father used to work for the Tribunal but that was the only Tribunal in the division. They did not go to court. They went to the Tribunal. They did not do any fraud. In the Tribunal, he was a witness. His father appeared before the Tribunal.

The plaintiff submits that the 2nd plaintiff sold 0.5 acres to the defendant's son Philip Kipkoech Cheruiyot and parties executed the agreement. However, the defendant went to the Land Disputes Tribunal and increased the said portion of land to 0.6 acres. According to the plaintiff, the award was irregular as the Tribunal did not have jurisdiction to deal with registered land. Moreover, that the facts were misrepresented to the Tribunal. Moreover, that the defendant was an elder in the Tribunal and had worked with the Tribunal for many years and therefore, orders of national justice were not met. According to the plaintiff, the award was void, ab-initio for lack of jurisdiction and that the decision of the Tribunal was in breach of rules of national justice. The defendant in his submissions supports the decision of the Land Disputes Tribunal.

I have considered the pleadings, evidence on record and submissions of parties and do find that it is not in dispute that on 28.7.1993, Mr. Kaptich Kessio of ID. No. 3447014/66 of Kabison village sold 0.5 acres of land No. Nandi/Kamoiywo/1022 to Philip Kipkoech Cheruiyot at Kshs.17,500 plus one incomplete semi-permanent house plus 92 planted trees totaling to Kshs.800. The total purchase price was Kshs. 18,000. The parties to the agreement did not obtain the consent of the land control board and therefore the agreement was void at the expiry of 6 months for failure to obtain consent of the land control board. The defendant was not party to the agreement and therefore cannot claim under the same as he is not privy to the agreement. From the foregoing, the counterclaim has no basis and is dismissed with costs.

However, Mr. Cheruiyot Randich later sued Mrs. Kaptich Kessio and Jonathan K. Mutai in Kapsabet Land Disputes Tribunal in Case No. 60 of 2000. He claimed that a son of Kaptich Kessio had beaten someone and was fined Kshs.30,000. The defendant paid the fine in exchange for land. He paid a total of Kshs.25,000.

The 1st plaintiff herein who was the 2nd defendant before the Tribunal claimed that the defendant bought 0.5 acres and paid Kshs.12,000 which was used to pay the fine. The Tribunal heard the parties and made a decision according to defendant 0.5 acres.

It is clear from the above proceedings that 0.6 acres was awarded by the Tribunal, the award was read to the parties in open court and adopted as the decision of the court. I have considered the pleadings and the submissions of all counsels and do find that the main issue is whether the suit is properly before court by way of plaint seeking for orders of declaration that the decision of Soy Land Disputes Tribunal to be a nullity.

Section 3(1) of the Land Disputes Tribunal Act, 1990 (repealed) limited the jurisdiction of the Land Disputes Tribunal to a claim to occupy and work on land, division or determination of boundaries, and trespass to land

Section 8(1) provided for any party to the dispute dissatisfied by the decision of the tribunal to appeal to the appeals committee within 30 days of the decision. Any party dissatisfied with the decision of the appeals' committee had the right to appeal to the High Court within 60 days of the decision made on a point of law.

It is clear from the foregoing that after adoption by the Magistrate's court, the award of the Tribunal becomes a judgment of the court that can only be challenged by way of an appeal to the Appeals' Committee and subsequent appeal to the High Court or by Judicial Review. The plaintiff in this case did not challenge the decision of the Tribunal and its adoption in accordance with the Land Disputes Tribunal Act or by way of Judicial Review. That is the only known procedure for challenging the said decision.

A party dissatisfied with the decision of the High Court should appeal to the Court of Appeal. The other available option is to file a judicial review application under the Law Reforms Act, Cap. 26, Laws of Kenya.

It is not available for the plaintiff to file a declaratory suit to challenge the decision of the Land Disputes Tribunal where the decision of the tribunal was adopted and became a judgment of court and a decree extracted. The suit herein is strange and based on a challenge of a decree of the court that can only be challenged by appeal and or judicial review. This court will not belabor to determine the other issues as there is a valid judgment of the Magistrate's court. The suit is dismissed with costs.

Dated and delivered at Eldoret this 17TH day of December, 2018.

A. OMBWAYO

JUDGE