



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT ELDORET

ELC NO. 165 OF 2015

THOMAS BIWOTT.....1ST PLAINTIFF

JOSEPH BIWOTT.....2ND PLAINTIFF

VERSUS

WILLY K. CHEROGONY (sued as the Administrator of the

Estate of CHEPKWONY KIBIWOTT CHEROGONY).....1ST DEFENDANT

LAND REGISTRAR, BARINGO COUNTY.....2ND DEFENDANT

JUDGMENT

By a plaint dated 21st May 2015 the plaintiffs herein sued the defendants seeking for the following orders:

- a) A declaration that the title deed issued to the 1st defendant on 19th March 2013 is illegal and fraudulent.
- b) An order for cancellation of the title deed issued to the 1st defendant on 19th March 2013 and rectification of the register and registration of the plaintiffs as the sole registered owners by transmission of the whole of that parcel of land known as Baringo/Kapropita/1517 measuring 4 acres and 6.7 acres respectively.
- c) Costs of this suit.

The defendants were served with summons to enter appearance and a copy of the plaint whereby they entered appearance and failed to file a defence within the stipulated period. The matter therefore proceeded by way of formal proof.

It was PW1's evidence that the plaintiffs and 1st defendant are the sons of the late Chepkwony Kibiwott Cherogony, the 1st Defendant being the administrator of the estate of their deceased father. That upon the demise of their father, succession proceedings were lodged vide Eldoret High Court P & A No. 4 of 2005 and a certificate of confirmation of grant was issued on 10th December 2010 in which the estate was distributed as follows:-

a) Willy K. Cherogony	B/ Kapropita/994	1 acre
b) Kimuge Cherogony	B/ Kapropita/ 994	3 acres
c) Joseph L. Biwott	B / Kapropita/ 994	6.7 acres
d) Thomas C. Biwott	B/ Kapropita/994	4 acres
e) Reuben K. Cherogony	B/ Kapropita/ 877	0.6 acres
f) Willy K. Cherogony	B / Kapropita/ 307	0. cres

PW1 stated that the subdivision was done to reflect the portions as per the grant but on the ground the same has not been implemented. It was

also his evidence that the 1st defendant was supposed to transfer the portions to the beneficiaries but he has been subdividing and selling in blatant abuse of his powers as the administrator of the estate of the deceased.

PW1 stated that the 1st defendant has failed to effect the distribution of the estate by way of transmission and has instead registered himself as the sole proprietor of the Plaintiffs' land parcels namely Baringo/Kapropita/994 and sub-divided it to create a new parcel reference No. Baringo/Kapropita/ 1517 measuring 5.08 hectares and disinherited the Plaintiffs who are lawful beneficiaries of the said land parcel.

It was PW1's testimony that the 1st defendant has sold part of the land to one James Nicholas Kiptoo in disregard of the beneficiaries' interest in the parcel of lands which came into his possession as an administrator of the estate of their deceased father. The plaintiff produced a copy of certificate of confirmation of grant and copies of extracts of green cards in respect of the suit parcel of land as exhibits before the court. He therefore urged the court to enter judgment against the defendants as prayed in the plaint.

Plaintiffs' Submissions.

Counsel for the plaintiffs filed written submissions and restated the plaintiffs' evidence. He submitted that the 1st Defendant is obligated to distribute the estate to the beneficiaries as per the certificate of confirmation of grant and therefore he cannot abdicate that responsibility as he would be breaching his powers and duties as provided for under section 83 of the Law of Succession Act which provides for the duties of an administrator of an estate to include:

"to distribute or retain on trust (as may be) all assets remaining after payment of expenses and debts, according to the respective beneficial interests therein under the will or intestacy, as the case may be".

Mr. Yego Counsel for the plaintiffs submitted that by the 1st defendant registering himself as the sole registered owner of Baringo/Kapropita/ 1517 and failing to transfer the property by transmission in favour of the beneficiaries as per the certificate of confirmation of grant, the 1st Defendant grossly abused his powers under section 83 of the Law of Succession Act.

Counsel further submitted that the 1st defendant's fraudulent and illegal actions aforesaid cannot stand and ought to be declared null and void and he be ordered to transfer the property by transmission in favour of the Plaintiffs according to their respective beneficial interests under the certificate of confirmation of grant. Counsel therefore prayed that judgment be entered in favour of the plaintiffs as prayed in the plaint as the plaintiffs have proved their case on a balance of probabilities.

Analysis and determination

This is a case where the 1st defendant was entrusted with the administration of the estate of a deceased father on behalf of all the beneficiaries but has failed to do so. The issues for determination are as to whether the plaintiffs are entitled to the suit land as per the confirmed grant of letters of administration and whether the defendant has acted in contravention of his duties as an administrator to transfer the suit parcels of land vide transmission to the named beneficiaries.

On the first issue it is clear that the suit land belonged to the late Chepkwony Kibiwott Cherogony who was the father of the plaintiffs and the 1st defendant. It is also on record that the estate was distributed vide Eldoret High Court P & A No. 4 of 2005 where a grant of letters of administration was confirmed and each beneficiary was given his portion of the suit land.

The 1st defendant as an administrator was under a duty to transfer the portions to each beneficiary vide transmission but in contravention of his duty refused or neglected to do so. It was the plaintiff's evidence that the 1st defendant has subdivided the land and sold to other parties.

There is no evidence that the confirmed grant of letters of administration has been revoked therefore the distribution as per the grant stands and should be adhered to. The court cannot allow an administrator to abuse the powers bestowed on him on behalf of the beneficiaries by the law. Any action outside the distribution of the estate and transfer of the portions as mentioned in the grant is null and void. If the 1st defendant sold any land to one James Nicholas Kiptoo then he must have sold his portion which measures 0.28acres and if the portion sold is more than that then the same has to be cancelled to enable the beneficiaries get their share as per the grant.

The action by the 1st defendant of registering all the parcels in his name after subdivision is tainted with illegality and further the action of refusing to transfer the parcels to the respective beneficiaries and selling a portion is questionable.

I find that the plaintiffs have proved their case on a balance of probabilities against the defendants and I therefore enter judgment in the following terms:

a) A declaration is hereby issued that the title deed issued to the 1st defendant on 19th March 2013 is illegal and fraudulent.

a) A order compelling the 1st Defendant to execute transfer forms by transmission in favour of the Plaintiffs in respect of Baringo/Kapropita/ 1517 arising from a sub-division of land parcel No. Baringo/Kapropita/994 as per their respective beneficial interests therein as duly ascertained in the certificate of confirmation of grant issued on 10th December 2010 failure of which the Deputy Registrar of this court to execute the forms on his behalf.

b) An order is hereby issued directed at the 2nd defendant for cancellation of the title deed issued to the 1st defendant on 19th March 2013 and rectification of the register and registration of the plaintiffs as registered owners by transmission of the whole of that

parcel of land known as Baringo/Kapropita/1517 measuring 4 acres and 6.7 acres respectively.

c) Costs to be paid by the 1st defendant.

DATED and DELIVERED at ELDORET this 17TH DAY of DECEMBER, 2018

M.A ODENY

JUDGE

Judgment read in open court in the presence of Miss Kibichy holding brief for Mr. Yego for Plaintiff, Miss Wamalwa for 1st defendant and Mr. Wabwire for 2nd defendant.

Mr. Koech: Court Assistant.