



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 161 OF 2014

CHESOLI YONAH WABOMBA.....PLAINTIFF

VERSUS

ALICE KHAKASA MASIBO.....1ST DEFENDANT

JOHN G. WAWERU.....2ND DEFENDANT

JUDGMENT

1. The amended plaint in this case was filed on 19/8/2015. The plaintiff claimed for the following orders against the defendants:-

(a) **The plaintiff prays for an order for cancellation of the title deeds in respect of Land Parcel No. Trans-Nzoia/Sinyerere/390, issued to the 1st defendant herein and same revert to its original status in order to preserve the deceased person's estate till full succession cause is filed thereto and distribution done in accordance with due procedure and compliance with succession laws.**

(b) **A permanent injunction be issued against restraining defendants from entering, occupying, leasing, selling, charging or in any other way dealing with that property known as Trans-Nzoia/Sinyerere/390.**

(c) **Costs be provided for.**

(d) **Any other further reliefs this Honourable Court may deem appropriate to grant.**

The plaintiff's case

2. In the amended plaint the plaintiff's case is that he is the administrator of the estate of **Wabomba Mukwana Wema**, deceased; that the 1st defendant is one of the three wives to the deceased, being the third wife; that the only known family property for the three houses which are represented by the three wives is **Title No. Trans-Nzoia/Sinyerere/390** which is currently registered in the name of the 1st defendant; that though the members of the 3 houses have established homes and lived on the suit land, uninterruptedly and peacefully, the 1st defendant has fraudulently registered the entire parcel of land in her name claiming that the deceased transferred the same to her; that on the strength of the said title, she has sold some of the land to the 2nd defendant;

It is on the basis of those facts that the above prayers are sought. **The defendants' case.**

3. The defendants have filed a joint defence in opposition to the suit. The defendants deny that the plaintiff is entitled to the suit land, aver that, the suit is mischievous and brought out of malice, and that no demand was issued and therefore the suit violates the Civil Procedure Rules 2010.

4. The defendants further filed a counterclaim alongside their defence. In the counterclaim they claim that the plaintiff has without any justification and by use of goons prevented the defendants from enjoying their right to occupy and use the suit land; that the 1st defendant is the registered owner of the suit land and that the plaintiff is intent on disposing of the suit land which he has trespassed on. The defendants seek a declaration that the 1st defendant is the absolute proprietor of the suit land and an injunction do issue to restrain the plaintiff from encroaching on the suit land, and costs of the suit.

The plaintiff's reply to the defence and counterclaim.

5. The plaintiff, in a reply to the amended defence, avers that no legal transfer by way of gift or sale was effected by the deceased, and that the defendants are fraudsters, that the registration of the suit land in the 1st defendant's name does not meet legal requirements, and that it ought to be vacated and the register restored to its previous status. He also dismisses the allegations of trespass as baseless.

Analysis of pleadings and evidence.

6. According to the plaintiff's statement filed on 10/3/2017 and his oral evidence his father died when he had three wives; there had arisen a dispute between his father and the 1st defendant over the land. The nature of the dispute was that the 1st defendant wanted to sell the land and migrate to Uganda, but the plaintiff's father refused; the deceased's title deed thereafter was transferred into the 1st defendant's name and that the 1st defendant had admitted to committing a fraud before the County Land Registrar and she had agreed to surrender the title deed but which she had up to the date of the statement failed to do. The plaintiff has therefore come to court to seek the return of the title document.

7. According to the plaintiff the 1st defendant lived with the deceased till just before his demise. He averred that when his father was selling any land, he involved family though the plaintiff was not always present. Some of the land was sold when the plaintiff was very young. It was the plaintiff's case that he and his siblings were born on the suit land.

8. The plaintiff testified that in 2005, his father called one Daniel Wafula to chair a family meeting where the deceased said the suit land should remain with the family. Further, the deceased stated that his sons would get one acre each while each of the three wives would get three points. The girls would get two points each. All members signed that resolution and the 1st defendant was left in the *boma* as others went away. The plaintiff claimed that in the year 2012/2013, the deceased claimed that his identity card and title deed and land agreements were lost and when the 1st defendant was asked she denied knowledge of their whereabouts. The incident was reported to Kapsara Police Station and an O.B. Number obtained. The police advised that an official search on the title to the suit land be done which, when conducted, showed that the 1st defendant was the registered owner. By the time of that discovery the plaintiff's father was still alive. He became sick and later healed. The plaintiff then placed a caution over the land title.

9. Later when the 1st defendant was summoned to the Land Registrar's office, the plaintiff says, she agreed to surrender the title deed and signed an undertaking to that effect. However she never returned the title deed.

10. According to the plaintiff the 2nd defendant was a lessee of about 4000 tea bushes on the suit land. The 1st defendant stated that she would not transfer the land to anyone unless she also transferred a portion to the 2nd defendant. After the demise of the deceased the 2nd defendant produced two agreements over the suit land and as at the time of the suit, he was still occupying the land and had

planted a tea crop on the land. Upon cross examination the plaintiff said that he did not know if the 2nd defendant was sold the land by his father.

11. **PW2** was Daniel Wafula. He testified that he recalled being invited to the deceased's home over a land dispute on 21/5/2009. A meeting was subsequently held with many family members in attendance. **PW2** wrote a certain document which he states, became like the deceased's will. He testified that the deceased said that he gave the title deed to the suitland to the 1st defendant. According to the **PW2**, the sale of land to the 2nd defendant was discussed at a family meeting in the presence of the 2nd defendant before the deceased died; The title deed to the suit land and other items went missing in 2013 and the 1st defendant denied knowledge of their whereabouts; Thereafter, the 1st defendant was summoned by the Registrar; While before the Land Registrar she is said to have agreed to surrender the title document but she failed to do so. **PW2** also stated that he does not know if the 2nd defendant bought land from the deceased.

12. **DW1** on the other hand averred that the deceased transferred the land to her when he was still of good health. She produced a transfer form and an application or Land Control Board Consent to transfer as well as a Consent; she testified that she did not compel the deceased to transfer the land to her. She stated that the deceased had sold land to several people and that those people live on the land. However at one time when her husband had travelled, the 1st defendant sold a portion of her entitlement in the land. She denied ever wanting to dispose of the whole of the suit land. Regarding the happenings at the Lands Office, she denied having willingly signed an agreement to surrender the title and stated that a document was written and she and her husband were coerced into signing it. On the meeting held on 6/6/2009, **DW1** testified that she attended the meeting but her husband did not.

13. **DW1** testified that while all others went away from the deceased, in his old age she remained with him. The deceased had earlier intended to subdivide the land whereby each wife and her children would get 1 ½ acres but later changed his mind and revised the subdivision such that each child among 8 children gets 1 acre and every wife and daughter one half of an acre each. The 1st defendant alleged that the deceased's children subjected her and her husband to abuse and therefore her husband transferred the land to her.

14. **DW1** testified that it was the deceased who sold a portion of the suit land to the 2nd defendant even before she got her portion. The deceased's health deteriorated in the year 2013. However, the transfer was effected in favour of the 1st defendant while the deceased was still healthy and while the other wives had detached themselves from the deceased. The **DW1** testified that the 2nd defendant had been taken to the Land Control Board on two occasions. The **DW1** stated that the reason why she never surrendered the title as demanded by other family members was that she suspected that some of them may dispossess others of their rightful portions. She said that she would, given a chance, ensure that each person got their rightful share.

15. The 2nd defendant's case is that the deceased approached him and informed him that he had some land to sell. Upon enquiring where the land was, he learnt that the deceased's land was adjacent to some land which he had bought earlier; So he entered into an agreement with the deceased for 1 ½ acres with 1500 tea plants whereupon he was to pay the consideration in four instalments. The agreed consideration was Kshs.250,000/= per acre. However each tea plant was to cost Kshs.40/=. Later on **DW2** entered into a second agreement with the deceased for sale of 1 acre.

16. The 2nd defendant testified that his agreements were made with the deceased and not with the 1st defendant, and that besides him there are more than 20 people who also bought land from the deceased. He also testified that the deceased was of good health at the time and that he took **DW2** to the Land Board. He asked the court to enable him get a title to the land.

17. **DW3** confirmed that the deceased and the 1st and 2nd defendants as well as two other persons visited his office over the transactions relating to the land. He acknowledged that he wrote "**D. Exhibit 4**", "**D.**

Exhibit 5(a)” and “5(b)”, “D. Exhibit 6” and “D. Exhibit 7” which were the agreements for sale of the suit land.

The parties’ submissions

18. The plaintiff filed his final submissions on 19/9/2017 and the defendants filed theirs on 16/10/2017. I have considered those submissions.

Issues for determination.

19. In my view the issues for determination in this suit are as follows:-

(1) Was the transfer of Title Number Trans-Nzoia/Sinyerere/390 from the deceased’s name into the 1st defendant’s name fraudulent?

(2) Who sold land to the 2nd defendant?

(3) What orders should issue?

The issues are discussed as herein below:-

(1) Was the transfer of Title Number Trans-Nzoia/Sinyerere/390 into the 1st Defendant’s name fraudulent?

20. It is not controverted that the 1st defendant stayed with the deceased until just before his death, when other family members took him away. It is also not in doubt that the deceased gave the 1st defendant the title document and other items for safekeeping. The suit land was originally registered in the deceased’s name. It was transferred to the 1st defendant on 30/7/2013. **”D. Exhibit 2(a)”** was produced in evidence. It is a transfer showing the deceased transferred the suit land to the 1st defendant. It is attested to by an advocate.

21. An application for Land Control Board Consent was produced as **“D. Exhibit 2(b)”**. It was signed by the deceased. A letter of consent was also produced as **“D. Exhibit 2(c)”**. It is signed by the Chairman of the Land Control Board, Kaplamai. This court did not find any evidence from the plaintiff to controvert these documents. In fact the plaintiff does not mention them. The plaintiff has in the amended plaint commendably listed four particulars of the 1st defendant’s fraud as follows:- (1) Secretly registering the whole family land into her names; (2) Taking advantage of the health state of their deceased father purportedly causing him to sign transfer forms in her favour well aware that there are other family members and/or houses; (c) Secretly changing and/or obtaining the title deed in her favour without the knowledge and/or consent from other family members and (d) Selling of part of that land to the 2nd defendant without authority and consent of the rest of the family members.

22. I will deal with particulars (a) (b) and (c) since particular (d) is addressed in the second issue for determination. In view of the documents marked **“D. Exhibit 2(a)”**, **“2(b)”** and **“2(c)”** mentioned herein above, there is already doubt as to whether secrecy veiled the transfer to the 1st defendant. The very fact that the plaintiff and others did not reside in the same dwelling with the deceased and the 1st defendant may have render it not easy for them to know if any transfer has taken place. If the transaction was effected willingly by the deceased, it would be a normal *inter-vivos* transfer and allegations of fraud against the 1st defendant would be hard to establish, for the deceased’s very knowledge of the transaction is proof that it was not secretly executed. It is notable that no forgery of documents is alleged. Consequently the only issue this court is compelled to inquire into is whether the 1st defendant took advantage of the health of the deceased to cause him to execute transfer forms in her favour.

23. To begin with the rule of evidence that has stood firm all through our jurisprudence is that he who

alleges proves. It therefore incumbent upon the plaintiff to establish by way of medical evidence that the deceased was unwell or that he was not in his proper mental state so as to invalidate any transfer in favour of the 1st defendant, for mere ill health may not necessarily affect a person's state of mind or free will. Not an iota of medical evidence was tabled before this court to prove the fact of illness, or illness that could have affected the state of mind or free will of the deceased at the time of execution of the transfer so as to invalidate the transfer. Without more, I find that particulars nos. (a), (b) and (c) in the particulars of fraud in **paragraph 9** of the amended plaint have not been proved and I would dismiss them for lack of evidence. I find that the defendants have been truthful in their account while the plaintiff does not appear truthful at all. I state this because I have noted that the plaintiff and his witnesses have even suppressed the evidence of sale of land to other persons by the deceased.

(2) Who sold land to the 2nd Defendant?

24. Regarding this issue, the plaintiff testified that he did not know who sold land to the 2nd defendant. This contradicts sharply with allegation (d) at **paragraph 9** of the plaint. I find the plaintiff's evidence to be inconsistent with his pleading. The same thing was said by **PW2**. The success of the plaintiff's claim should revolve around proof that the 1st defendant did sell part of the suit land to the 2nd defendant. This court has already found no fraud has been proved against the 1st defendant as no evidence of fraud was presented. Proof of sale by the 1st defendant would necessitate evidence of agreements executed by the 1st defendant. These were lacking. The only agreements produced in respect of the sale transactions complained of were laid before the court by the 2nd defendant and in those agreements, the 1st defendant did not feature therein as a seller. **DW3** identified the "**D. Exhibit 4**", "**D. Exhibit 5(a)**" and "**5(b)**", "**D. Exhibit 6**" and "**D. Exhibit 7**" as agreements he had personally written down for the parties in his own handwriting. In all of them the deceased is mentioned as the seller and the 2nd defendant as a buyer. The agreements date between 2011 and 2012. They were not effectively controverted by the plaintiff. Consequently I find that the said agreements are genuine and the land was sold to the 2nd defendant by the deceased.

(3) What orders should issue?

25. This court has found that no fraud has been proved against the 1st defendant. It has also found that the land sale was conducted between the deceased and the 2nd defendant. The question as to whether the transfer was illegal has therefore been answered in the negative. It follows therefore that the plaintiff has not proved his case on a balance of probabilities against the defendants.

26. The upshot of the above is that the plaintiff's case has no merits and should be dismissed with costs.

27. As regarding the counterclaim, this court is alive to the averments by the 1st defendant to the effect that her only aim was to ensure that each and every person got their rightful entitlement out of the suit land. I therefore find for the plaintiffs in the counterclaim but only to the extent that the 1st plaintiff in the counterclaim holds the suit land in trust and for the purpose of its distribution to persons who are entitled and recognized either as family or as having purchased land prior to this judgement, including the 2nd plaintiff in the counterclaim.

The plaintiff's suit is hereby dismissed. The costs of the main suit and of the counterclaim shall be borne by the plaintiff.

Dated, signed and delivered at Kitale on this 20th day of **December, 2017**.

MWANGI NJOROGE

JUDGE

20/12/2017

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

Mr. Majanja holding brief for Karani for plaintiff

N/A for defendants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

20/12/2017