



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 376 OF 2014

ROSE CHEPKOECH ROTICH.....PLAINTIFF

VERSUS

ELIAS KIPLAGAT BUSIENEI.....DEFENDANT

JUDGMENT

Rose Chepkoech Rotich (*hereinafter referred to as the plaintiff*) has come to this court against **Elias Kiplagat Busienei** (*hereinafter referred to as defendant*) claiming that she is the legal administrator to the estate of Johan Malakwen Rotich (*hereinafter referred to as deceased*) who died on 16.6.2009 intestate having bought bought 24 acres at Kaptuktuk farm at Kshs.8,000/= in 1972. Before his demise, the deceased was an employee of Kenya Railways. That he later bought another two acres for the defendant. She further avers that the defendant in abuse of trust did subdivide the said plot into 2 portions of Tembeleo/Elgeyo Border Block 10 (Kaptuktuk)316 and Tembeleo/Elgeyo Border Block 10 (Kaptuktuk)329 of 12 acres and 9 acres respectively.

That to aggravate the malicious act further, he consolidated 3 acres from the plaintiff's husband's land and the 2 acres and sold the same as 5 acres to Christopher Karoney (deceased) and that he is in occupation of the said Tembeleo/Elgeyo/Border Block 10 (Kaptuktuk) No. 329. That the defendant fraudulently after sub-division did register himself as the absolute owner of the said Tembeleo/Elgeyo Border Block 10 (Kaptuktuk)329 without the knowledge or consent of the owner.

She prays to this honourable court to deregister the defendant and issue eviction together with perpetual injunction. She further prays for a declaration that the registration of the defendant as the absolute owner of Tembeleo/Elgeyo Border Block 10(Kaptuktuk) 329 was fraudulent thus he be divested, and vest in the plaintiff's name and an injunction restraining the defendant from encroaching on the same. Last but not least she prays for costs of the case.

The defendant filed a statement of defence stating that the land was initially bought by the late Johana Malakwen Rotich through a land buying company. Contrary to what is asserted by the plaintiff, the plaintiff's late husband bought the land in shares of Kshs.5,000 and Kshs.3,000/= and transferred the suit land to the defendant by surrendering the receipt of Kshs.3,000/= which translated to 11 acres of the land. The defendant further avers that he entered into a further agreement with the plaintiff's husband dated the 4th of May 1998 where he curved out a portion of 2 acres of his 11 acres and gave it to the plaintiff's husband. The defendant admits that the plaintiff's husband Johana Malakwen Rotich is now deceased. However, he states that the plaintiff is not the legal administrator of the estate of the deceased having no grant in support of her allegation as such shall at the earliest opportunity crave that the suit be struck out with costs having been brought by an incompetent party.

The defendant denies that the plaintiff is in peaceable occupation of Tembeleo/Elgeyo Border Block 10 (Kaptuktuk) No. 329 and further avers that it is the plaintiff and her late husband who in protest to the court ruling forcefully encroached onto the land and have since refused to move despite numerous civil attempts to have them grant the defendant peaceable occupation of the land and avers that the plaintiff's occupation of a section of the suit land is nothing short of trespass and calculated to deny the defendant his peaceable occupation and use of the suit land. The defendant in reply to paragraph 10 of the plaint avers that the subdivision and final registration of the land was within the law and any allegations of fraud shall be put to the proof thereof.

The defendant pleads the matter as *res judicata* having been heard and determined as between the defendant and the late Johana Malakwen Rotich and concluded vide the ruling of Msc. 33 of 2002 and shall at the earliest opportunity seek to have the suit struck out. The defendant avers that the plaintiff lacks the necessary authority to file the suit bearing that no grant in respect of the estate of the deceased and shall at the earliest opportunity raise a preliminary objection and a declaration that the suit is highly incompetent and notice hereby do issue. In the circumstances, the defendant prays that the plaintiff is not entitled to the or any reliefs sought in the plaint. He prays that the suit be dismissed with costs.

The plaintiff testified under oath that she is the wife of Johana Malakwen Rotich (deceased). She was married in 1998 and that her husband bought land in 1972 in which she has stayed in the land for 30 years. In the year 2000, the the sour relationship began with the defendant disturbing them with suits. She states that the defendant then was not living in the suit land but in the adjacent land which her late husband had bought for him. It was the defendant who advised her as a wife to late Malakwen that the land in question was bought by her husband way back in 1972. When her husband realized that the defendant had registered himself as the absolute owner of 329 the matter was referred to the elders whom she understands resolved that the land belonged to Malakwen her late husband. She understands the matter went to court where some people came with askaris and took away 2 graded cows. The issue rested there until the demise of her late husband. Sometimes in December, 2014, she was issued with court summons stating that she should vacate the land. She then came and to seek legal advice when she was advised to file a substantive suit, hence the filing of this cause. She prays that the defendant be deleted as the sole owner and the same do vest in her name with court costs.

PW1, Simon Kipkering Kipkorir stated that he is the Assistant chief of Kaptuktuk sub-location. He signed his handwritten statement on 13.4.2015. He states that he has worked as assistant chief for Kaptuktuk sublocation for 17 years and that the late Malakwen Rotich, husband to Rose Rotich came to their office to complain of land registered illegally by the defendant Elias Busienei. They convened a meeting of elders on 24.3.1999 and since the matter was weighty and touches on an issued title deed he moved the case to higher authorities. The said Malakwen (deceased) moved to Chief's office to address same complaint and on 30.7.1999. Another meeting was held where elders and shareholders deliberated and observed that Elias be given 4 acres since he contributed nothing toward purchasing as he was only caretaker of the farm. Later, Elias refused to hand over copy of title deed as demanded by surveyors and hence long protracted legal cases ensued until 21.8.2009 after the death of Malakwen Rotich. Clan elders, relatives, neighbours and his office decided to hold another meeting where a decision was made by all 89 persons present that Elias Busienei was to take 4 acres and the rest of the land revert to owner Mr. Malakwen Rotich (deceased) as it was registered without his consent. He oversaw the subdivision later and beacons planted. Elias Busienei himself signed and subdivided the land with family according to elders' verdict. He has now reneged on the promise and commitment hence this suit brought before court.

PW2, Abraham Kipchirchir Serem stated that he comes from Kaptuktuk in Koitoror location in Moiben division. He states that he was the secretary of Kaptuktuk farm whose membership was 103, its main purposes of the group was to purchase the farm from the farmer European owner. The members were to be given acreage according to amount of money paid. When a member paid money, he was issued with a receipt. The husband to the plaintiff paid and issued with receipt as hereunder:

PAYEE'S NAME	DATE	AMOUNT	RECEIPT NO.	CORRESPONDING ACREAGE
Johana Malakwen Rotich	10.9.1973	5,000	3815	

Johana Malakwen Rotich	23.9.1974	3,000	-	
Total		8,000		24 acres

After the completion of the payment, surveyors were called in 1992 to subdivide the farm and issued with title deeds. The defendant was given 2 acres which the plaintiff's husband had bought for him. Since the defendant had been tilling on the land, they knew him as a brother in law to plaintiff's husband. They later on learnt that the defendant had subdivided the land which was originally No. 316 of 24 acres into 316 with 12 acres in the name of the plaintiff's husband and the 9 acres in the name of the defendant which was fraudulent. At no time did the defendant become a member of the company. The land in dispute belongs to the plaintiff according to PW2.

PW3, Barnaba Tarus Rono, the Chief of Koitoror location, in Uasin Gishu County, Eldoret East, Moiben Division stated that he adopts the statement dated 13.4.2015. He knows all parties. On 13.7.1999, he attended a meeting where Elias Busienei and Johana Malakwen was buying land from Kaptuktuk Co. Ltd. He knew Elias Busienei in the land planting and staying on the land as Johana Malakwen was busy in his duties in Mombasa. He was working with Kenya Railways. Malakwen (deceased) retired in 1999 and came back to his land. Elias Busienei became indifferent. Mr. Malakwen went to their office and complained that Mr. Busienei had registered himself as the owner of part of the land. He showed them receipts as evidence that he paid for the land. The parcels were receipted in his name. They sat down and found that Elias Busienei was the brother in law to Malakwen. Elias' sister is married to Johana Malakwen. The plaintiff is the younger wife to Johana Malakwen.

It was agreed that Mr. Johana Malakwen gives Mr. Elias Busienei 2 more acres therefore making it 4 acres in total. Mr. Busienei complained that he did not get 4 acres. Mr. Busienei was to surrender the titles but he has not. He said he was not conversant on the situation on the ground.

The defendant testified under oath that he stays at Kaptuktuk sublocation, Koitoror location, Moiben Division, Uasin Gishu County. He is a farmer by profession and knows Rose Jepkoech Rotich. She was the 3rd wife of Johana Malakwen Rotich. Johana Malakwen Rotich was his brother in law because he married his sister.

He knows the parcel of land known as Tembeleo/Elgeyo Border Block 10 (Kaptuktuk/329 where he lived since 1975. That in 1975, Malakwen was in Nairobi working with Kenya Railways. One day he went for vacation in Kiminini where the defendant was working. He told him to take care of his parcel of land in dispute. The land had not been subdivided. The defendant left his job and went to take care of the parcel of land. He told him to take care of the land and that one day he would give him the same. He agreed and took charge until in 1990 when directors agreed that the land had to be surveyed. On that day, Malakwen was in Mombasa on transfer. The committee met to agree on the survey.

He called one witness DW1, Birgen Maiyo a village elder who testified that he lives in Kaptuktuk and knows the plaintiff as Malakwen's widow. In 1982, he went to the Kaptuktuk land and found Elias Kiplagat Busienei staying in the land of Malakwen Rotich. In 1991, he became a committee member of the Land Committee. He was with David Kiprotich Kitum, father of Rose Jepkoech Rotich. The survey was done in 1992. As a committee, he called for the receipts from all members to ascertain the acreage. They received 2 receipts from Johana Malakwen. One was for Kshs.5000/= and the other was for Kshs.3000/=. The receipt for Kshs.3000 had 9 acres. The Kshs.5000/= was 15 acres all adding to 24 acres. Johana Malakwen bought 2 acres from Silvester Choge. The total acreage became 26 acres. Johana Malakwen gave Elias Kiplagat Busienei 11 acres and remained with 15 acres and that was all for him. They received 2 receipts from Elias Busienei. Mr. Johana Malakwen agreed that he had given the receipts to Elias to claim the land. Elias got title for 9 acres. Malakwen remained with 6 acres. They did

not receive any complaint.

According to this witness there was no bad blood between the committee and Elias. Rose married Malakwen in 1999 and was not there when the committee was formed. Abraham Chirchir was a committee member. They have never been summoned. He does not know how many parcels of land Malakwen has.

I have considered the evidence of the plaintiff and do find that the plaintiff is in occupation of the disputed land by virtue of having been married to Johan Malakwen Rotich who died intestate on 16.6.2009. The plaintiff has not produced any grant of letters of administration to give her capacity to sue. On this point alone, the plaintiff suit must fail as she has not demonstrated that she is the legal representative of the estate of the deceased.

Moreover, the plaintiff has not demonstrated that her husband was the proprietor of the disputed parcel before it was acquired by the defendant. The plaintiff evidence amount to hearsay because she states in her statement that it was the defendant who advised her as a widow to the late Malakwen that the land in question was bought by her husband way back in 1972. It is noted that she got married 26 years after the transactions and therefore, not privy to the transactions.

PW2, Abraham Kipchirchir, Serem did not produce the agreement between Johana and Elias and moreover, did not produce the receipts mentioned in his statement.

PW3, Barnaba Tarus Rono, the Area chief was 14 years during the transaction and could only rely on records and therefore, in absence of such record, his evidence is merely hearsay. He did not produce the receipts or any agreement.

The suit herein is premised on breach of trust and fraud. I do find that the plaintiff has not established any breach of trust by the defendant. Particulars of fraud were neither pleaded nor proved.

Section 24 of the Registered Law Act provides that;

"24. (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 the lease."

Section 25 provides that;

"25. (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 provides that;

“26.(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 import of the above sections is that a person registered as absolute proprietor of land has rights that cannot be defeated except on ground of fraud or misrepresentation to which the person is proved to be party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996, the Court of Appeal in considering the standard of proof required where fraud is alleged had this to say-

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.”

The plaintiff has not demonstrated that the above title was procured through fraud or misrepresentation or through a corrupt scheme.

The defendant on the other hand has demonstrated that he has title to the property as absolute proprietor. The upshot of the above is that the suit is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JANUARY, 2016.

ANTONY OMBWAYO

JUDGE