



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 43 OF 2006

WALTER KIPCHIRCHIR KOECH.....PLAINTIFF

VERSUS

TAPNYOBII MELIL.....DEFENDANT

JUDGMENT

(Suit by plaintiff to have defendant permanently restrained from land; plaintiff stating that he purchased about 5 acres from defendant in the year 1972; title for 5 acres issued to the plaintiff in the year 1977; defendant refuting and stating that only one acre was sold and filing counterclaim; defendant stating that plaintiff acquired title by fraud; defendant having complained to the police in the year 1978; complaint found to be false and defendant charged and convicted for giving false information; no evidence of fraud tabled; in any event even if the same was fraudulent claim by defendant time barred; judgment for plaintiff; counterclaim dismissed)

This suit was commenced by way of plaint filed on **29 May 2006**. In the plaint, it is pleaded that the plaintiff purchased the **land parcel Kericho/Chemagel/1786** in 1972 from the defendant at a consideration of Kshs. 24,000/=. The land was originally comprised in the **parcel Kericho/Chemagel/604** which was subdivided into two portions **Kericho/Chemagel/1785** and **Kericho/Chemagel/1786**. In the suit, the plaintiff sought orders of permanent injunction against the defendant to stop her from any interference with the **land parcel Kericho/Chemagel/1786**.

The defendant filed defence which she later amended to include a counterclaim. She denied having sold the whole of the **land parcel Kericho/Chemagel/1786** to the plaintiff save for one acre which the plaintiff purchased for Kshs. 5,000/=. She also denied effecting transfer to the plaintiff. It was pleaded that the plaintiff obtained the subdivision and transfer of the original **land parcel Kericho/Chemagel/604** fraudulently without the authority and consent of the defendant. Inter alia it is pleaded that he concealed from the Land Registry Officials that all he had purchased was only one acre. It was pleaded that the plaintiff has used force and the police to intimidate her. In the counterclaim she sought declaratory orders that the transfer and subdivision of the **land parcel Kericho/Chemagel/604** into the **land parcels Kericho/Chemagel/1785** and **1786** are null and void. She asked for reinstatement of the **land parcel Kericho/Chemagel/604** into her name; eviction of the defendant and a permanent injunction.

The plaintiff filed a defence to counterclaim vide which he refuted the claims of the defendant. He inter alia denied any fraud and further pleaded that the case of the defendant is barred by limitation of time.

In his evidence, the plaintiff testified inter alia that the defendant sold to him the 1.8 hectares at Kshs. 20,000/=. They had a written agreement and they went to the Land Control Board. The plaintiff then became registered as proprietor of the **land parcel Kericho/Chemagel/1786** (hereinafter, the suit property). Later, the defendant complained that the plaintiff had taken over her land. This was

investigated by the police taking all the documents including the agreement and the letter of consent. The defendant's claims were found to be false and she was charged with the criminal offence of giving false information. She was charged and convicted in 1978. The court register was produced to confirm this. The plaintiff produced the Green Card to demonstrate that he is the proprietor of the land parcel. He denied having only purchased one acre from the defendant.

In cross-examination, he testified that about two years prior to 1972, he had leased about 4 acres of land from the defendant for purposes of cultivation. He stated that all documents related to the sale were taken by the Criminal Investigation Department (CID). He stated that he is in occupation and he has even charged the land. He agreed that there have been discrepancies in the documentation on the size of land that he alleges to have purchased. He denied having fraudulently transferred the suit property to himself.

PW-2 was Jotham Kipkoech Ngeno. He is the Land Registrar, Bomet. He testified that the **land Kericho/Chemagel/604** was originally registered in the name of the defendant. On **17 December 1975**, the plaintiff lodged a caution claiming a purchaser's interest. This caution was withdrawn on **22 April 1977**. On **15 September 1977**, there was subdivision of the **land parcel No. 604** which produced the **land parcels No. 1785 and 1786**. On the same day, ownership of the **parcel No. 1786** was transferred from the defendant to the plaintiff for Kshs. 20,000/=. He stated that there is a letter in their records stating that the CID took documents from the parcel file.

Upon his evidence, there was an application made by Mr. Kirui, counsel for the defendant, to have a mutation form taken to the Government examiner to investigate the thumbprint claimed to be of the defendant. But it seems as if this was never pursued.

The defendant testified that she only sold one acre to the plaintiff. She stated that before this sale, there was a time her son was arrested and she had to lease 3 acres to the plaintiff to raise money for his case. She stated that the one acre sold was in the 3 acres that she had leased. After the sale, the plaintiff however continued occupying the whole 3 acres and is on the land to date. She denied having attended the Land Control Board or subdividing the land. She denied selling 1.8 hectares to the plaintiff. She stated that they had no documentation and all their transactions were oral. She stated that it was only about 7 years ago that she became aware that the plaintiff had transferred the land to himself. She reported the matter to the elders but the plaintiff was uncooperative. She testified that she is not aware that the plaintiff has subdivided the land and all she is aware of is the original **land parcel No. 604**. She is only ready to give the plaintiff one acre. She also asked for damages.

In cross-examination, the defendant admitted not to have reported the subdivision and transfer to the police. She agreed that at some point she was locked up by the police for about one month. She denied having been charged in court on any criminal offence.

DW-2 was Reuben Kiplangat Koech. He testified that he was aware that the plaintiff had leased 3 acres for 4 years from the defendant. He testified that the defendant sold only one acre to the plaintiff at Kshs. 5,500/= and that he was a witness to the transaction. He testified that there was no further sale. In cross-examination, he stated that the agreement was oral. He testified that the defendant did not attend the Land Control Board despite the plaintiff trying to persuade her. He was aware of the arrest of the defendant in 1978 and stated that the defendant was later jailed.

DW-3 was one Kiprotich arap Chumo. He is a neighbor to the defendant. He also testified that the defendant only sold one acre to the plaintiff. He stated that this was separate from the 3 acres leased. He stated that he witnessed the sale and that there was nothing that was reduced into writing. He was not aware of the defendant attending the Land Control Board. He was of the view that the plaintiff's title is forged.

With the above evidence, the defendant closed her case.

I invited counsels to file written submissions but only Mr. Migiro for the plaintiff did. Neither did Mr. Kirui, counsel for the defendant, attend court on the date that I had set aside for any oral submissions. I

have considered these submissions in my judgment.

The case of the plaintiff is to have the defendant permanently restrained from the suit property. I have seen that the plaintiff did produce the Green Card to demonstrate ownership of the land. He did become registered as proprietor on **15 September 1977**. The defendant of course alleges that this registration was done by fraud. Save for her bare statement that this was fraudulent, the defendant never tabled any evidence of fraud. Neither did she pursue her contention, that the thumbprint in the mutation form that subdivided the land parcel No. 604, did not belong to her. I really have no tangible evidence of any fraud having been committed by the plaintiff. The contention that she sold only one acre is also unsupported by any evidence. It would appear that after the sale, she complained to the police but she was found to be giving false information. That is why she was charged and convicted in the year 1978.

Even assuming that there was such fraud as alleged by the defendant, of which as I have stated earlier I have not seen, the claim of the defendant would in my view still fail for being time barred. The defendant seems to have complained of the plaintiff's ownership of the suit property way back in the year 1978. That is how she came to be charged and convicted of the offence of giving false information. Although she testified that she came to be aware of the transfer of the property to the plaintiff only after this case was filed, this cannot be the position. She must have known, latest the year 1978, and that is why she lodged her complaint at that time. Given this position, she needed to have filed her claim within 12 years as provided for in **Section 7 of the Limitation of Actions Act, Cap 22**. She never did so. Her claim, if ever there is one, is therefore time barred.

From the above, it is clear to me that the plaintiff is properly entitled to ownership and occupation of the **land parcel Kericho/Chemagel/1786**. He is therefore entitled to have the defendant permanently restrained from this land parcel. I do not hesitate to issue the order of permanent injunction sought. The defendant and/or her agents and assigns are hereby forever barred from the **land parcel Kericho/Chemagel/1786**. I further issue an order declaring the plaintiff to be the proper owner of the said land.

The plaintiff has succeeded in his suit whereas the defendant has lost. I give the plaintiff costs of both the suit and the counterclaim.

It is so ordered.

Dated, Signed and delivered on this 8th day of April, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Mr. Joshua Mutai holding Brief for Mr. Migiro for Plaintiff.

No Appearance on part of M/s J.K. Kirui for defendant.