



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 54 of 2010

MARY ATEMO GACHIRIGAPLAINTIFF

VERSUS

JEPHTHER O. OPANDEDEFENDANT

JUDGEMENT

INTRODUCTION

1. The Plaintiff is the registered owner of **LR No Waitaluk/Kapkoi Sisal Block 1/Kibormos/177** (suitland). The Plaintiff filed this suit against the Defendant seeking an order of eviction. The Defendant filed a defence and raised a counter-claim in which he sought a declaration that the title held by the Plaintiff was obtained fraudulently and that the caution registered by the Defendant on 16/6/2005 is valid and the same should remain in force.

PLAINTIFF'S CASE

2. The Plaintiff testified that on 8/8/2005, she entered into a sale agreement with one **Saidi Kipkalum Mohamed** who agreed to sell to her **three acres** out of **LR No. Waitaluk/Kapkoi Sisal Block 1/Kibormos/171** at a consideration of **Kshs 780,000/-**. It was agreed that she was to take possession after the maize which was on the land was harvested.
3. When she went to take possession of the three acres, the Defendant who was in possession refused to move out claiming that he had bought the same land from the same vendor who had sold the land to her. The Plaintiff stated that she had bought her **three acres** from **Block 171** whereas the Defendant claims that he ought his **5 ½ acres** from **Block 20**.

DEFENDANT'S CASE

4. The Defendant testified that on 12/3/2003 he entered into a sale agreement with **Saidi Kipkalum Mohamed** in which he bought **5.5 acres** at a consideration of **kshs 890,000/=**. His wife had early on bought 6 acres from the same vendor. He bought the **5.5 acres** from **LR No. Waitaluk/Kapkoi Sisal Block 1/20**. That upon sub division, his **5.5 acres** fell on **LR No Waitaluk/Kapkoi/Block 1/Kibormos/90**. There were subsequent sub divisions which finally resulted into the suitland.

5. He later heard that **Saidi Kipkalum Mohamed** wanted to sell the land to a third party. He went and registered a caution on **LR No Waitaluk/Kapko Block 1/Kibormos/90**. He however later on learnt that the caution he had lodged had been removed and the land had been sub divided and titles issued. He complained to the Chief Land Registrar who engaged the officers from the Lands office at Kitale in correspondence on why the caution which he had lodged was removed. He contends that the title held by the Plaintiff was fraudulently obtained and that the caution he had lodged was removed unprocedurally.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

6. There is no dispute that the Plaintiff is the registered owner of the suitland. A title deed issued on 29/11/2005 was produced as **exhibit 2**. Prior to the title being issued, the Plaintiff had entered into a sale agreement with **Saidi Kipkalum Mohamed**. The agreement was produced as **Exhibit 1**.
7. The vendor of the suitland was called as a witness of the Plaintiff. He testified on how he sold the suitland to the Plaintiff. The witness also testified that the Defendant wanted to buy land from him. The Defendant drafted a sale agreement in Nairobi which he sent to him for signature. He testified that this agreement was the subject of **Kitale HCCC No 26 of 2005** in which he had sued the Defendant. The fate of this case is however not known and as per the Defendant's evidence, the court file disappeared.
8. The main issue for determination in this case is whether the Plaintiff acquired her title in a fraudulent manner and who between Plaintiff and Defendant is entitled to the suitland. The history of the suitland can be traced from a larger Parcel of land which was known as **Waitaluk/Kapko Block 1/Kibormos/20** owned by **Saidi Kipkalum Mohamed**. This parcel was subdivided and title closed on subdivision on 25/1/2002. It yielded three new numbers namely **Waitaluk/kapko block 1/kibormos/90, 91 and 92**. This is confirmed by an extract from the register produced as defence exhibit 5(b).
9. Parcel No. **Waitaluk/Kapko Block 1/Kibormos/90** was sub divided and title closed on 6/11/2003. The subdivision yielded **LR No Waitaluk/Kapko Block 1/Kibormos/171, 172 and 173**. This is confirmed by an extract from the register which was produced as defence **exhibit 5(a)**.
10. Parcel No **Waitaluk/Kapko Block 1/Kibormos/171** was subdivided and it yielded numbers **Waitaluk/Kapko Block 1/Kibormos/174, 175, 176 and 177**. This is confirmed by letter dated 26/4/2006 written by the District Land Registrar Kitale addressed to the Chief Land Registrar in Nairobi. This letter was produced as defence **exhibit 2**.
11. A look at the agreement between the Defendant and **Sadi Kipkalum Mohamed** shows that the Defendant was buying **5.5 acres** from Parcel No **Waitaluk/Kapko Block 1/ Kibormos/20**. The agreement which was produced as defence **exhibit 1** was made on 12/3/2003. It is important to note that as at this time, parcel No. **Waitaluk/Kapko Block 1/Kibormos/20** was not in existence as the title had been closed on subdivision on 25/1/2002.
12. The Defendant caused a caution to be registered against title **No Waitaluk/Kapko Block 1/ Kibormos/90**. This caution was registered on 16/6/2005. However a look at the extract from the register shows that this parcel had been closed on subdivision on 6/11/2003. It is not known how the caution was accepted for registration on a non existent title. There are various correspondence between the office of the Chief Land Registrar and the District Land Registrar Kitale. These correspondence were produced as defence **exhibit No. 2, 7, 8, 10, 11 and 12**. All these correspondence were triggered by the complaint made by the Defendant who was not happy with the manner in which the caution he had lodged was removed. They also raise questions on how the sub divisions were carried out and registered.

13. Of interest is the letter by the Chief Registrar dated 27/12/2006 [**defence exhibit 12**] addressed to the District Land Registrar Kitale. This letter raised a number of issues which the Chief Land Registrar wanted addressed. The District Land Registrar was given 21 days within which to respond, failing which all the subdivisions including the sub-subdivision resulting in registration of the Plaintiff as owner of the suitland were to stand nullified. This letter seems to be the basis of the Defendant's counter-claim. The issues raised in the said letter are the ones forming the particulars of fraud on the part of the Plaintiff in the counter-claim and this is what he gave in his evidence in support of the court-claim.
14. There was no evidence adduced by the Defendant to show that the District Land Registrar never supplied what he was asked to do. The Chief Land Registrar wanted evidence of payment of statutory fees such as stamp duty. He also wanted Registry index maps, evidence that consent of the Land Control Board was obtained and evidence on how the caution lodged by the Defendant was removed. It is the Defendant who alleged in his pleadings that the Plaintiff did not obtain her title in a genuine way. It was incumbent upon him to prove the allegations. The Defendant should have called the officials from the District Land Registry Kitale to confirm whether all the documents complained of were available or not. He cannot rely on a letter which called for the documents and gave a deadline for the submission of those documents. There is no evidence that the District Land Registrar never supplied the documents sought by the Chief Land Registrar. I cannot therefore assume that those documents were not availed and that the subdivisions resulting from **Plot No 90** stood nullified as the chief Land Registrar had indicated in his letter.
15. Even if there was evidence that the title was obtained fraudulently which is not the case herein, there is no evidence showing that the Plaintiff was part of that scheme. The Chief Land Registrar raised some concerns which he asked the District Land Registrar to address. If the officials from the Kitale District Land Registry did not do their job as required, their misdeed if any cannot be visited upon the Plaintiff. The Plaintiff had bought her three acres and she proceeded to have her title. What the Plaintiff needed to prove is that she is the registered owner of the suit land and that she bought the suitland after which she processed title. She has done this. She was not expected to show receipts for payment of stamp duty or any other statutory fees. It is the Defendant who is alleging that the title was obtained fraudulently who was expected to adduce evidence that the Plaintiff did not do all these. It is the Defendant who is calling for nullification of title who should have proved that the title was not obtained in a lawful way.
16. **Section 26 (1) (a) and (b)** of the Land Registration Act is very clear on when a certificate of title can be challenged. The certificate can be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. There is no evidence which has been adduced that there was any fraud involving the Plaintiff. There is also no evidence adduced to show that the title deed was acquired illegally, unprocedurally or through a corrupt scheme.
17. The caution was lodged against a title which was not in existence as the same had been closed on sub division. I do not understand the basis of the Defendant's argument that there was backdating of documents. It is clear that sub division of parcel No 90 was done on 6/11/2003. The Defendant lodged his caution on 16/6/2005. I have looked at all the documents which were produced by the Defendant. I cannot see any letter which says that the caution was removed on 6/11/2003 before the same was registered. The only letter which mentions removal of caution is the one dated 4/9/2006 [**defence exhibit 1**] which states that the letter removing the caution was dated 27/7/2005 and addressed to the Defendant. Though the District Land Registrar mentioned in his letter that he had attached a copy of that letter, the said attachment was not produced in evidence. I therefore do not know its contents and whether it was saying that the caution was removed on 6/11/2003.

DECISION

18. I find that the Plaintiff has proved her case to the required standards. On the other hand, I find

that the Defendant has failed to prove his counter-claim. I proceed to dismiss the Defendant's counter-claim with costs to the Plaintiff. An order of eviction is hereby given against the Defendant from **LR No. Waitaluk/Kapkoï Sisal Block 1/Kibormos/177**. The Plaintiff shall have costs of the suit.

18. Dated, signed and delivered at Kitale on this 16th day of May 2016.

E. OBAGA

JUDGE

In the presence of Mr Ingosi for Plaintiff

Court Assistant – Isabellah

E. OBAGA

JUDGE

16/5/16