



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 529 OF 2013

KIPTARUS TOO.....PLAINTIFF

VERSUS

KIBIATOR ARAP ROP.....1ST DEFENDANT

KIBEREN ARAP SAINA.....2ND DEFENDANT

JUDGMENT

Kiptarus Too (*hereinafter referred to as the plaintiff*) has come to court claiming that the 1st defendant was the registered owner of the said parcel of land No. Nandi/Kamoiywo/792 until 1968 when he decided to sell the parcel to the plaintiff. The plaintiff avers that in the year 1968, he purchased the said parcel of land No. Nandi/Kamoiywo/792 measuring approximately 10 acres at Kshs.4000/= only. The plaintiff states that he has stayed in the said land as from 1968 upto date. That in the year 2005, he requested the defendant to do the transaction of changing the name and acquire title deed as per the law but all in vain. The plaintiff decided to file the matter through the Land Dispute Tribunal and that the award was in the plaintiff's favour which was adopted at Kapsabet Principal Magistrate's Court Land Disputes Tribunal No. 5 of 2006.

The 1st defendant was given 30 days to lodge any complain in the High Court which they did not. The 2nd defendant is now interfering with the said parcel of land by grazing his cows thereon. The plaintiff therefore claims against both defendants jointly and severally for an order stopping them from entering the said parcel of land and interfering with the plaintiffs rights and that the Land Registrar Kapsabet, Nandi County to issue the title deed in the name of the Plaintiff.

The 1st and 2nd defendants filed statement of defence wherein the 1st defendant denies selling the parcel of land No. Nandi/Kamoiywo/792 to the plaintiff and avers that he could not have transferred the said land since he never entered into any agreement for the disposition of the said parcel of land with the plaintiff. The defendants further aver that decision of the Land Disputes Tribunal Committee cannot stand in this Honourable Court since the law that created the Land Disputes Tribunal has since been repealed by the Environment and Land Court Act of 2011 and the Land Registration Act of 2012. The 2nd defendant denies the contents of paragraph 10 of the plaint and avers that the parcel of land that he grazes his cattle on is legally owned by him and therefore puts the plaintiff to strict proof.

The defendants aver that no orders can be issued in vain since there was no agreement for the sale of the said and puts the plaintiff to strict proof. The defendants avers that no notice of intention to sue was issued as alleged in paragraph 12 of the plaint and that the plaint is fatally defective in law and is also a legal nullity and shall raise a preliminary objection in law at the instance seeking to have the same struck out with costs on the grounds that the action by the plaintiff was filed out of time. Section 7 of the Limitation of Actions Act Cap. 22, Laws of Kenya provides that the plaintiff ought to have brought the

matter 12 years from the date that the right of action accrued and that all dispositions of interest in land ought to be in writing and properly executed and attested to a requirement of section 3(3) of the law of Contract Act and Section 38 of the Land Act No. 6 of 2012 but the plaintiff has failed to produce a written agreement for the alleged transaction in the purported land disposition. That consent to transfer the said interest in land between the parties to this suit was not effected within 6 months hence contravening the provisions of section 8(1) of the Land Control Act Cap 302, Laws of Kenya. That the suit discloses no reasonable cause of action against the 2nd defendant as required by Order 2, Rule 15(a) of the Civil Procedure rules of 2010 hence the same is frivolous, vexatious and a waste of court's precious time. That there is no nexus between the plaintiff and the 2nd defendant since there was no privity of contract between the two parties.

PLAINTIFF'S EVIDENCE

When the matter came up for hearing, the plaintiff stated that he comes from Kapmoywo and wants his title deed. He bought land in 1968. He bought the land from Kipyator Arap Rop. They were in court in Kapsabet Land Disputes Tribunal. He needs his land. He has proceedings and wants the title deed. On **Cross examination by Mr Akello leaned counsel for the defendant he states that he does not** remember the title number but remembers that he bought the land which measures 10 acres in 1968. He did a case in Kapsabet. Land Disputes Tribunal and do not have the Minutes. The Tribunal gave him the land in 1968 but he does not know when I went to the tribunal.

DEFENCE EVIDENCE

The defendant testified that he comes from Jua Kali, Kamagut. And knows the plaintiff Kiptarus Too who has sued him because of land No. 792. According to the defendant, he is the owner of the land and has never sold it to the plaintiff. He sold the land to Nelson Busienei in 1968. He has never received money from Kiptarus Too. He acknowledges having received money from Nelson Busienei who bought 10 acres. He sold the five acres to Kiberen Arap Saina. He has no objection in giving Busienei his land measuring 5 acres. The whole parcel of land is in the hands of his brothers. The land belongs to Busienei and Kiberen Arap Saina. He produced the title. **On Cross examination by Too, he states that he** never sold the land to the plaintiff but sold the same to Arap Busienei and that the plaintiff never gave him money as alleged. Kiptarus Too occupies the 10 acres. Busienei gave the plaintiff 5 acres. The land is 10 acres. Kiptarus occupies 5 acres. Arap Too is in occupation of the whole parcel of land. The plaintiff has been in occupation for sometime. He was not invited in the proceedings before the tribunal. He believes that Mr Too should have agreed to give him the land. He gave the land to Busienei and Busienei gave the land to Too. He wants Mr. Busienei and Mr. Kiberen to share the land. Arap Busienei knows what Too should get. Busienei gave Too the 5 acres. The other 5 acres were given by Kiberen Arap Saina who sold the land to Busienei who gave him money and Too did not give money. On **Re-examination by Akello he states that he** sold land to two people. Busienei and Kiberen. Busienei and Too are related. Too married the daughter of Busienei's uncle.

DW2 was Kiberen Arap Saina from Kapmoywo who states that he does not know Kiptarus Arap Too. In 1977 The 1st defendant sold him five acres the land in Kamoywo 792. and gave him the title deed. He produced the certificate of Search. and the receipt. He went to work on the land and was chased and has never gone back since he chased him away. They have never had a dispute. On Cross examination by Too he states that he has once gone to the land when it was being ploughed. There are houses on the parcel of land and that Arap Too has cattle on the land. He fears going on the land where the plaintiff lives. He has never sued the plaintiff because the land is in the name of Kipyator.

PLAINTIFF'S SUBMISSIONS

The plaintiff submits that he is the bonafide owner of the suit land and that there is not in dispute that the plaintiff herein purchased the suit land for sum of Ksh.4000/= from the 1st defendant which amount was paid in full. The plaintiff made an application for consent to the Kapsabet Land Control Board on through the Resident Magistrate Court, Kapsabet since the defendants refused to sign the relevant transfer documents. It is the plaintiff submission that the 1st defendant was aware that he had sold the suit land to

the plaintiff and that the plaintiff was the bonafide owner. The defendants action colluding to transfer part of the suit land from the 1st defendant to the 2nd defendant is fraud and plaintiff urges this Honourable court to take action against the defendants' fraudulent actions which have become rampant nowadays.

The plaintiff commenced proceedings against the 1st defendant before Tribunal and the Elders Tribunal on 8.11.2005 made an Award in favour of the Plaintiff which Award was adopted through Kapsabet LDT NO. 5 of 2006 by Honourable J. M. Njoroge, Senior Resident Magistrate on 25th April, 2006. The 1st defendant had a right under the adopted decree to lodge objection within 30 days which right the 1st defendant never exercised. The repealed LDT Act law was very clear that when a party felt aggrieved by the Award of the elders, the only recourse was to appeal to the relevant body or an application for review to the High court under Order 53 of the Civil Procedure Rules which was never exercised by the plaintiff which in his submission was a concession by the 1st defendant that indeed the suit land herein was legally his.

The plaintiff submits that the Award of the Tribunal was regularly entered and adopted in 2006 and there was no objection that was lodged by the defendants against the said decision of the Tribunal. The enactment of the environment and Land Court Act In 2011 does not render the decision of the Tribunal in any way improper.

In response to the defendants' submissions that this suit is time barred, it is the plaintiff submission that the suit land is founded on fraud and that under Section 26, the Limitations of Actions Act, time starts to run only when the fraud is discovered which in this case fraud was concealed until 2003 when fraud was discovered by the plaintiff. Regarding obtaining of Consent within 6 months required from Land Control Board, it is the plaintiff's submission that this was made impossible by the 1st defendant for ulterior motives of colluding with 2nd defendant and later on transferring part of suit land to the 2nd defendant illegally.

Lastly, on the issue of privity of contract between the plaintiff and 2nd defendant, it is his submission that the 2nd defendant was enjoined into this matter for having trespassed unto his land and colluding with the 1st defendant to have the suit land registered illegally in the names of the 2nd defendant.

DEFENDANTS SUBMISSIONS

The *gravamen* of the defendants submissions is that the plaintiff never proved during trial that he was the legal owner of the suit land as he did not produce a title deed or an agreement to prove his allegations. The plaintiff did not even call any witness to prove that he even purchased the aforesaid parcel of land. He claimed that he purchased the parcel of land from the 1st defendant but the 1st defendant denied ever entering into a contract for the sale of land with the plaintiff. Instead, the 1st defendant testified that he had sold the land to one Arap Busienei who gave the land to the plaintiff herein. The 1st defendant also explained that Arap Busienei did not pay all the price money for 10 acres and for that reason he sold 5 out of the 10 acres to the 2nd defendant.

The allegation by the plaintiff that he purchased 10 acres for a sum of Kshs.4000/=-, which was paid in full and that he made an application for consent to the Kapsabet Land Control Board or through the Magistrate Court at Kapsabet since the defendants refused to sign the relevant transfer documents is just but an allegation which is not sustained by evidence and should therefore be disregarded by the court absolutely.

The defendants further submit that the plaintiff never led any evidence during trial to prove this allegation that the 1st defendant fraudulently transferred the suit land to the 2nd defendant. This is an allegation that is merely coming up in his submissions. The court should take note that no criminal proceedings have ever been preferred against the defendants by the plaintiff if his allegations were genuine. According to the defendants, no evidence was availed to court to prove the plaintiff's allegation that this matter was sufficiently resolved before the Land Disputes Tribunal. The record is clear that the plaintiff never produced any document and he also never called any witness to prove any of his allegations herein. The

proceedings at the alleged Land Disputes Tribunal were also not produced. In a nutshell, this is yet another of the plaintiff's wild allegations with no basis and should not be entertained by the Honourable court.

They further submit that even if it were true as alleged that the matter was resolved by the Land Disputes Tribunal, the decision of the Tribunal cannot stand because it was a nullity *ab initio*. This is because the Land Disputes Tribunal lacked jurisdiction to determine issues concerning cancellation of a title deed or any other document of title.

It is not in dispute that the defendants have been the registered proprietors of the land since 1977 and can be seen from the search and the land certificate produced by the defendant's court. Clearly, the allegation by the plaintiff that the matter was resolved by the Land Disputes Tribunal is not true and if it is true, that this Honourable being a superior court with supervisory jurisdiction over the Lower Court should not uphold the findings of the said tribunal.

In response to the plaintiff submission that the Land Dispute Tribunal made an Award in the plaintiffs' favour which was regularly entered and adopted in 2006, the defendants jointly submit that no evidence was availed in court to prove this allegation, and this Honourable Court should not entertain the same. On the issue raised by the plaintiff that the suit land is found on fraud and that the fraud was concealed until 2003, the defendants submit that this is a mischievous allegation which is not supported by evidence and it also never came up during trial. There is no evidence linking the defendants herein with any fraud. Based on the foregoing, it is their humble submission that the plaintiff has not sufficiently discharged his onus of proof on a balance of probabilities and the court should therefore dismiss this suit with costs to the defendants.

FINDINGS AND HOLDING

On the issue as to who is the bonafide owner of the suit parcel of land, this court finds that though the said parcel of land is still registered in the names of the defendants, the Land Disputes Tribunal awarded the land to the plaintiff. The Award was adopted as the judgment of the court. No appeal has been preferred and no judicial review has been preferred and therefore, the decision of the Tribunal and Magistrate's Court prevails unless it is challenged in court. There being a judgment that has not been challenged, this court finds that the suit herein is superfluous as it is intended to adopt the decision of the Tribunal and the judgment of the Magistrate's Court. There is no such provision known in law that gives the court the authority to adopt the decision of the Magistrate's court. The plaintiff has a judgment hence should proceed to execution of the same.

In the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2015] eKLR the supreme court (Coram: Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang & Njoki, SCJJ.)held

“that [41] In his plaint before the High Court, the deceased (now represented by the applicant) had sought: a permanent injunction against the respondents, to restrain them from dealing in the various parcels of land; that they be evicted; that the District Land Registrar, Nyamira do cancel the said titles; and that a declaration be granted, that the decision of the Lands Disputes Tribunal was null and void. The plaintiff’s contention was that he was the sole registered owner of the land, and that as far as he was concerned, the award by the Tribunal was a nullity in so far as it interfered with his title to the suit land. The 1st respondent claimed that he was entitled to the land allocated to him, as he had contributed to its acquisition, and it is the applicant who had wrongly registered herself as a sole owner. The 2nd and 3rd respondents based their claim upon the fact that they were bona fide purchasers without notice.

[42] The High Court had thus framed the issues for determination:

- i. whether the Borabu Land Disputes Tribunal award should be declared null and void;***
- ii. pursuant to the foregoing, whether the defendants should be evicted, and injunction to***

issue;

iii. *whether the land register should be rectified back to the original Osoge/Kineni/Block 1/70, in the name of the plaintiff;*

iv. *damages/mense profits, if at all;*

v. *costs.*

[43] The High Court held that it indeed had jurisdiction to nullify an award of a tribunal, if such an award was made outside the tribunal's jurisdiction. It set out the mandate of the tribunal thus: to deal with disputes of a civil nature, concerning the division of land, or the determination of boundaries to land, including land held in common; a claim to occupy or utilize land; or trespass to land. However, the Court held that its jurisdiction is only exercisable where such decision of the tribunal has not transmuted into a judicial determination, through adoption as a Judgment of the Court.

[44] Consequently, the High Court declined to grant the Orders sought, stating that the award of the Borabu Land Disputes Tribunal having been adopted by the Senior Resident Magistrate's Court at Keroka, ceased to exist on its own, and thus, could not be the subject of a declaration. The High Court further observed that even if the declaration was to issue with regard to the Tribunal's award, it would have no effect as the decree that emanated from the lower Court's Judgment had not been challenged by the plaintiff. The learned Judge further held that, upon an award becoming a Judgment of a Court of competent jurisdiction, it can only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in appropriate proceedings.

[45] Elaborating its finding, the High Court observed that the Senior Resident Magistrate's Court at Keroka, at which the award for adoption was filed, had no jurisdiction to question its regularity or otherwise, as its role was merely that of adoption and issuance of a decree. The learned Judge observed that the award should have been appealed to the Lands Appeals Committee constituted for the Province, in accordance with Section 8(1) of the Lands Disputes Tribunals Act (which was not done). Alternatively, the plaintiff could have commenced judicial review proceedings in the nature of certiorari, to quash the award— but this was also not done.

[46] Consequently, the High Court (Makhandia, J) dismissed the applicant's suit with costs to the respondents, on 29th October, 2010.

[47] Aggrieved by that decision, the applicant moved the Court of Appeal at Kisumu, with Civil Appeal No, 184 of 2011. The appeal was premised on grounds that the High Court had failed to find that the Land Disputes Tribunal lacked jurisdiction to deal with title to land, and so its decision was null and void.

[48] The Court of Appeal, in a decision rendered on 19th September 2014, dismissed the appeal, upholding the High Court's position. The Appellate Court observed:

“The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The appellant instead chose to file the suit for declaratory orders and compensation...”

[49] It is clear from the foregoing account that, at no time were the substantive issues now framed in the application before this Court, ever considered, or determined by the superior Courts. The issues now being associated with “matters of general public importance”, have clearly not evolved through the judicial hierarchy, in the mode contemplated by this Court in the Peter Oduor Ngoge case. Suffice it to say that if this Court were to admit and determine such

issues, the Court would be determining them in the first instance—which would be contrary to established principle, and to the design of the judicial system.

[50] As observed by the Appellate Court in its decision denying certification, the issue whether or not the tribunals established under the repealed Lands Disputes Tribunal Act had jurisdiction to determine claims of land ownership, is by no means a “matter of general public importance,” as is clear from the terms of Section 3 of that Act. Moreover, the applicant has not demonstrated that the High Court or Court of Appeal, in this matter, held a view inconsistent with the recognized jurisprudence on this issue.

[51] Consequently, this motion must fail. The issues that the applicant intends to canvass before this Court in her appeal, are not issues that came up before the superior Courts. The applicant, in presenting her intended appeal as one involving matters of general public importance, intends to bring up entirely new matters for litigation before this Court. It is not permissible, as is clear from a good number of precedents laid by this Court.”

I have quoted the supreme court's decision at length as it is very relevant in this matter where the plaintiff intends to canvass matters that have ***been heard*** in the Lands Disputes Tribunal and the Magistrates Court in their original jurisdiction and have ***been determined and that there is a judgment and decree***, but have not been brought to this Court in the manner prescribed by law. This court can only be invited to review the decisions made by invoking its powers under the section ***9 of the law reform Act*** or a ***constitutional petition under Articles 22 and 23*** of the Constitution of Kenya or section ***8 (1) of the Land Disputes Tribunal Act no 18 of 1992 repealed*** which provides for an appeal.

The issue of fraud does not arise as the same is not pleaded as required by law and has not been proved.

In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis mine)

The standard of proof in cases based on fraud are slightly higher than balance of probabilities. In *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

Ultimately, the court finds that the suit is misconceived as there is an existing judgment of the Principal Magistrate's Court, Kapsabet which has not been set aside and that will expire 12 years from the date it was made. The suit is dismissed with costs for being superfluous.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE