



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 13 OF 2010

KIPKOECH KIGEN.....1ST PLAINTIFF

FRANCIS KIRUI CHEPKONGIN.....2ND PLAINTIFF

VERSUS

WINNIE S. KUMARY.....1ST DEFENDANT

MOSES SIFUNA NYONGESA.....2ND DEFENDANT

J U D G M E N T

INTRODUCTION

1. The first plaintiff was the registered owner of **LR. No. Kwanza/Namanjalala Block 4/14** which was **2.143 Hectares** (suitland). The second plaintiff bought this property from the first plaintiff on **18/4/1995**. The first defendant is a sister in-law to the second plaintiff. The second defendant is a purchaser of **half an acre** of the land from the second plaintiff.

2. The plaintiffs brought this suit against the two defendants alleging that the defendants had fraudulently subdivided the suitland which resulted in three separate titles namely **Kwanza/Namanjalala Block 4/Kapsitwet/366, 367 and 368** which were registered in the names of first defendant, first plaintiff and second defendant respectively. The plaintiffs now want the new titles cancelled and the property reverts to the original number and that the defendants be restrained from interfering with the same.

PLANTIFFS CASE

3. The plaintiffs contend that defendants are the ones who subdivided the suitland in a fraudulent way. Particulars of fraud attributed to them in the plaint are as follows:-

- (a) **Falsely presenting themselves to the first plaintiff as agents of the second plaintiff.**
- (b) **Falsely representing to the first plaintiff that the Assistant Chief of Kapsitwet Sub-location was aware of the intended subdivision.**
- (c) **Falsely inducing the first plaintiff to execute transfer of the suit property.**
- (d) **Concealing their activities from the second plaintiff.**
- (e) **Presenting fraudulently obtained documents to the Land Registrar Trans-Nzoia District.**

(f) Procuring the subdivision of the suit property in the absence of the original title.

4. **PW1 Kipkoech Kigen** who is the first plaintiff testified that on **18/4/1995**, he sold the suit land to the second plaintiff and re-located to Baringo. As at the time he sold the suitland he had not processed title for it. He was later told that some persons had entered the suit property. He was told this by the second plaintiff to whom he had sold the suitland. He told the second plaintiff that he did not know those who entered the land and that he knew the second plaintiff as the only purchaser of the suitland.

5. **PW2 Francis Kirui Chekongin** testified that he bought the suitland from the first plaintiff on **18/4/1995**. He took immediate possession. He later came to the lands office at Kitale where he discovered that the suitland had been subdivided into three portions. One portion was in the first defendant's name, there was another one in the name of the second defendant and the third portion was in the name of the first plaintiff.

6. PW2 stated that he was the one in possession of the title to the suitland and that he is the one who sold half an acre of the suitland to the second defendant. He stated that he never sold any land to the first defendant who is now occupying about **2.9 acres** of the suitland. He testified that he sued the second defendant because the second defendant processed title to his half acre without his knowledge.

DEFENDANTS CASE

7. The first defendant testified that she is a sister in-law to the second plaintiff. Her husband who has since died was a brother to the second plaintiff. Her husband used to work with National Cereals & Produce Board. The second plaintiff informed him that he had identified land in Kitale. Her husband sent money to the second plaintiff who purchased five acres. The land was supposed to be shared equally.

8. When the first defendant's husband died, he was buried on the suitland. The second plaintiff later claimed that the suitland solely belonged to him. The first defendant complained to the elders who ruled that the land belonged to both the second plaintiff and the husband of the first defendant. The first defendant later filed a claim before the Kwanza Land Disputes Tribunal which ruled that the suitland was to be shared equally. The second plaintiff later filed a Judicial Review application seeking to quash the decision of the Kwanza Land Disputes Tribunal.

9. When the first defendant had problems in raising fees for her children, she approached the first plaintiff who agreed to process title for her 2 ½ acres. Once she obtained title, she sold her two acres to the second defendant. She retained half an acre for herself. She denied that she obtained her title in a fraudulent way.

10. The second defendant testified that he bought half an acre from the second plaintiff. When the first defendant was processing her title, he asked her to also assist him in processing title for his half acre which he had bought from the second plaintiff. He signed the necessary forms which were delivered to the first plaintiff who signed them before they were taken to the lands office Kitale where titles were obtained. He later bought 1 ½ acres from the first defendant but he has not processed title.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMIANTION

11. There is no contention that the first plaintiff was the registered owner of the suitland. The plaintiffs' contention is that the defendants fraudulently subdivided the suitland into three portions. The major issue for determination in this case is whether the defendants were involved in any fraud in the subdivisions.

12. The second plaintiff does not deny that he sold half acre to the second defendant. The second defendant produced a sale agreement between him and the second plaintiff dated 6/7/2007 [defence exhibit 5]. The second defendant has since obtained title for the half acre as confirmed by a copy of certificate of title produced as defence exhibit 6. The second plaintiff himself stated that the only reason why he sued the second defendant is because the second defendant obtained title without his knowledge.

13. It was upon the plaintiffs to prove fraud attributed to the defendants. The plaintiffs did not prove even a single particular of fraud enumerated in the plaint. The title to the suitland was in the name of the first plaintiff. He was the only one who could facilitate the subdivision. The defendants state that it is the first defendant who facilitated the subdivision. During cross-examination, the second plaintiff conceded that it is the first plaintiff who signed transfer forms in favour of the first defendant.

14. The second plaintiff in cross-examination stated that he was told by the first plaintiff that he was misled into signing transfer documents by the defendants. Contrary to what the second plaintiff claimed while under cross-examination, the first plaintiff was categorical that he did not know the defendants. Though the first plaintiff denied that he did not know the two defendants, his evidence is not the whole truth. There is no way the suitland would have been transferred without his knowledge. The first plaintiff is the one who facilitated the subdivision because he was the only one capable of doing so as the land was in his name.

15. The first plaintiff struck me as a person who was not being truthful. He is a man who wanted to please both the second plaintiff and the two defendants. Secretly, he assisted the defendants to have their individual titles while openly denouncing that he did not know them so as to please the first plaintiff. To demonstrate that the first plaintiff is capable of doing anything, there is evidence that when he sold the suitland to the second plaintiff, the land had not been registered in his name. The first plaintiff sold the land to the second plaintiff on 18/4/1995. On 21/11/1995, he wrote a letter to the settlement officer [plaintiff exhibit 1] authorizing the settlement officer to remove his name from the register and in place thereof indicate the second plaintiff as the owner of the same.

16. Seven years later, the first plaintiff went ahead to process title in his name. He had already sold the land to the second plaintiff and there is no way he would have gone ahead to register the same land in his name. The first plaintiff is the one still retaining the original title to the suitland. He is the one who produced a copy of it after the court viewed the original which was returned to him.

17. The second plaintiff claimed in his evidence that the first plaintiff surrendered the original title upon purchase of the suitland. This cannot be true. A title which was obtained on 23/8/2002 could not have been surrendered in 1995 almost seven years before it was obtained. Both plaintiffs are not coming out clear on the whole transaction. There is evidence that the second plaintiff is a brother in-law of the first defendant. The husband of the first defendant died and was buried on the suitland. The first defendant had sued the second plaintiff before Kwanza Land Disputes Tribunal which ruled that the suitland be subdivided equally between the second plaintiff and the first defendant. Though the second plaintiff filed an application in the High Court challenging that decision, there is no evidence which was adduced on its outcome. As the matters stand, the decision which stands is that of the Tribunal which was subsequently adopted as judgment of the court.

18. In the contested subdivision of the suitland one of the beneficiaries of the subdivision is the first plaintiff who was registered as owner of **0.845 Hectares**. The subdivision was carried out in 2009. This shows that the first plaintiff is not a truthful person. He had sold the suitland in 1995 yet he is still hanging on to it. He assisted the defendants to have their individual titles and still has a part of the suitland in his own name yet he wants the second plaintiff to believe that he is innocent in all these schemes.

19. At least there is evidence that the suitland was for the benefit of the second plaintiff as well as the first defendant. The second plaintiff has already sold half an acre of his entitlement to the second defendant. His co-plaintiff assisted the defendants to obtain titles to their respective entitlements. The first plaintiff cannot again turn round and purport to bring a suit against the defendants. If there is any claim of land by the second plaintiff, that claim should be directed to the first plaintiff who is registered as owner of a portion which is supposed to be in the second plaintiff's name.

DECISION

20. For the reasons given hereinabove, I find that the plaintiffs have failed to prove any fraud on the part

of the defendants. Their suit against the defendants is hereby dismissed with costs to the defendants.

Dated, signed and delivered at Kitale on this 25th day of July, 2016.

E. OBAGA

JUDGE

In the presence of Mr. Weche for Mr. Barongo for 2nd defendant and Mr. Wafula for 1st defendant.

Court Assistant - Isabellah.

E. OBAGA

JUDGE

25/7/2016