



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 98 OF 2016

(Formerly Eldoret Hccc No. 137 of 2004)

ELIJAH KIPKEO MARIKO.....PLAINTIFF

VERSUS

KIMAIYO SANG ALIAS ABRAHAM KIMAIYO SANG.....DEFENDANT

JUDGMENT

Elijah Kipkeo Mariko, hereinafter referred to as the plaintiff has come to court against ***Kimaiyo Sang alias Abraham Kimaiyo Sang*** claiming that the defendant obtained parcel of land title No.Soy/Kapsang Block 4(Ziwa)/196 approximate area on or before 11th September, 1995 fraudulently from and against the will, consent, authority or knowledge of the plaintiff. The particulars of fraud on the part of the defendant are stated as; using corrupt surveyors in obtaining the 6 acres of land from the plaintiff, Corruptly and secretly hiving 6 acres of land from the plaintiff's shares to the defendant, Forcefully taking the 6 acres to the defendant from the plaintiff, Ignoring or resisting opposition from the plaintiff during the corrupt survey or subdivision in taking the 6 acres of land from the plaintiff, Threatening the plaintiff with fighting on facing stiff opposition from the plaintiff on the ground, Colluding and interfering with the farm committee and the surveyors who ignored to listen to the plaintiff's complaint over the fraudulent taking away of 6 acres of land from the plaintiff to the defendant, ganging up with the surveyors at Eldoret against the plaintiff over the 6 acres of land, bribing surveyors both private and District Surveyors so as such surveyors could not assist the plaintiff whose private surveyor at a fee of Kshs.3000 finally refused to assist the plaintiff due to the defendant/s bribery, Causing the Kipsombe location Chief and other grassroots provincial administration to refuse to assist the plaintiff on several times in the recovery of the said 6 acres from the defendant to the plaintiff, unreasonably referring the plaintiff to deceased person from whom the defendant wanted the plaintiff to recover his 6 acres of land instead of from the defendant, Using bribery, corrupt and other dubious tactics at the Uasin Gishu District Land Disputes Tribunal to obtain favourable award/decision against the plaintiff as the defendant did in Land Disputes Tribunal Arbitration No. 80 of 2001, Causing the filing of the Land Disputes Tribunal Award/Decision and proceedings without the plaintiff in the Eldoret Cmcc Award No. 41 of 2001 on 16th January, 2003 without notice or service upon the plaintiff who came to know of the same in April, 2004 through the plaintiff's counsel in record, bribing the Land Disputes Tribunal, witnesses among others against the plaintiff in the recovery of the said 6 acres from the defendant to the plaintiff.

The plaintiff did not know of the proceedings of the Eldoret Cmcc Award No. 41 of 2002 from the date of filing until after 12th May, 2004 when the plaintiff came to know through the plaintiff's counsel on record to the effect that the Chief Magistrate's Court read and adopted the Land Disputes Tribunal Award on 16th January, 2003 before issuing the Court Decree given and issued on 6th March, 2003 against the plaintiff and that the plaintiff could not challenge the Land Disputes Tribunal Award and the Chief Magistrate's Court judgment due to time and other limitations.

The defendant has already sold part of the suit land to 3rd parties and is in the process to dispose of the remaining before the dispute is heard and finally determined. And that the plaintiff's developments such as the planted trees, fence among others have been exposed to danger of destruction or disposal by the defendant.

The plaintiff seeks to recover, inter-alia, the suit land namely Soy/Kapsang Block 4(Ziwa)/196 approximate area 6 acres from the defendant to the plaintiff by De-registering and canceling the title in the name of the defendant so as the plaintiff is registered as the proprietor.

Reasons wherefore, the plaintiff prays that the registration of the defendant as the proprietor of the suit land namely Soy/Kapsang Block 4 (Ziwa)/196 approximate area 6 acres be canceled and the plaintiff be registered as the proprietor of the said suit land and a temporary and permanent injunction against the defendant by himself, his agents, servants or whosoever from selling, disposing, entering into, using or dealing in whatever manner with the suit land namely Soy/Kapsang Block 4(Ziwa)/196. Costs to the plaintiff.

The defendant filed defence denying that the plaintiff is entitled to land No. Soy/Kapsang Block 4(Ziwa) 196 as he is the owner and a lawful registered proprietor and further denies that he fraudulently obtained the land and the alleged particulars of fraud in *toto* and invites the plaintiff to strict proof thereof.

The defendant further denies allegations of fraud more so on reference to corruption of surveyors threats, committee, private surveyors, chief deceased chairman land disputes tribunal, Chief Magistrate's Court, witnesses as stated in the plaint. The defendant avers that the matter was legally dealt with at all levels and it is the plaintiff who initiated all these matters and served the defendant. The defendant denies contents of paragraph 4 of the plaint as it was the plaintiff who filed the Land Disputes Tribunal's Award and served the defendant with summons to attend court for the reading of the award.

The defendant admits that he has sold his land and the purchasers are in occupation and possession and have developed the said land by constructing houses they are residing in and denies that he has developed defendant's land. The defendant further avers that there is Eldoret Cmcc No. 4 of 2002 which was filed by the plaintiff and it is over the same subject matter. The defendant prayed that the suit be dismissed with costs.

When the matter came for hearing on 12.5.2005, **PW1, Elijah Kipkeo Arap Mariko** testified that he is a farmer in Ziwa and used to live in Marigat. He knows Abraham Kimaiyo Sang who lives 3 km away from him. He had sued Sang because he has denied him use of his farm No. 9. The farm is in Block 4 Ziwa. He bought the farm from Kiptigoi Arap Legut. He knows Legut, he lives with them. The receipt was signed by Arap Legut's son who is known as Kipkering Arap Tigoi. Legut was a member of Ziwa Company. A receipt was issued by Ziwa Holdings Limited, pertaining to a share in Ziwa Holding Limited and shares of Kiptigoi Arap Melil in that company. He had paid Shs.4000 for 201 acres. He PRODUCED receipt No. 99 issued on 30.11.1968 as evidence. He never had a problem with the person who sold the farm to him who is still alive. He paid the farm in full. He has the receipts which are as follows:

Shs.300 paid on 17.3.1982 at SFT Offices No. W0534.

Shs.2,050 on 8.1.1980 – No. T221222

Shs.900 on 16.1.1980 – No. T 221239.

He also paid some money to the Surveyors, Shs.50 on 6.7.1985 No. 626.

Shs.270 on 23.5.1985 No. 609

He also paid Shs.895 to Department of Lands on 19.10.1995 – receipt No. D399843.

This settler's record on his farm of 20 acres was obtained from Ziwa Estates as he had paid all that he was required to pay. He obtained a title for 19.4 acres. The balance was used for roads and common areas. He has his title document for No. Soy Kapsang Block 4(Ziwa) 9 for 19.4 acres issued on 11.10.1995. Though the acreage in his title is 19.4, a portion of his land has been hived off by the defendant. He produced the green card for Soy Kapsang block 4 (Ziwa) 196 for 6 acres, in the defendant's name issued on 27.9.1995. He has a green card for his parcel No. 9, whose acreage is 19.4 acres whose title was issued on 11.10.1995 and wishes to produce. He is aggrieved because the defendant has grabbed his land which was first surveyed in 1994. The surveyor had come in 1985 and had surveyed his 20 acres. He was present and the defendant was not present. The defendant lives in the portion which he had lived in 1985. The surveyors came back in 1995 but they stopped work due to several problems. They came back in 1995 and surveyed his 20 acres portion.

The plaintiff alleges that the defendant took his land in 1984 when he was not present. He had then alleged that his farm was too big. His son informed him that Abraham had hived off his land. He reported the matter to the farm committee members like Arap Sisima, the farm manager, Jackson – the Vice Chairman, Kibiwott Arap Sawe and others. The manager finally visited his farm accompanied by the defendant. He learnt of the visit and when he inquired, he learnt that they had gone there with 2 surveyors on the defendant's initiative. He did not do much and he remained in his house as they undertook the survey works. He lodged a complaint with Nyong'o's Commission, when they came to Eldoret. They required him to send a second letter. He then went to the Land Disputes Tribunal. They appeared before the Tribunal and later learnt that the defendant had won that case before the Tribunal. He did not know when the decree was adopted by court. He heard the defendant boasting about the matter and he then engaged the services of a lawyer. The defendant told him to relocate back to Marakwet. He prays to have his 6 acres re-registered in his name.

On cross examination by Mr. Lel, he states that his suit pertains to his land which Kimaiyo took away. It is Block 4 No. 9 in Ziwa which is registered in his name. Defendant has taken possession of his farm. His farm is a distance away. Block 4 No. 196 is a fraudulent title, it was obtained fraudulently. He reported the matter to the police. He claims to have bought his land of 20 acres from Ziwa Holdings. He obtained his title after the survey works were undertaken. His title is 19.4 acres because 0.6 acres was set aside for the common areas. He could not complain about the portion which was set aside for the common areas. The defendant took a portion of his 19.4 acres. His 19.4 acres has never been subdivided. He did not own any shares in the Holdings Company. He bought his land from a shareholder when the farm had not been subdivided. After the surveyors had completed the survey, the defendant came back with surveyors after three weeks and did further subdivisions and took his land. On the ground, his land nor 19.4 hectares since the defendant has taken 6 acres away from him. It was his father and not the defendant who had acquired shares in the Holding Company. He insists the defendant did not acquire any shares in Ziwa Holdings. It is his father who was the shareholder.

The first survey was undertaken in 1985 but they were not able to complete the works due to interferences so they came back in 1995. He admits he paid for the survey works that pertained to the value of his shares. The defendant had bought his surveyors while he was away in Marakwet. It was his son who informed him that while he was away in Marakwet, the defendant had come with two (2) surveyors and that they had subdivided his land. He cannot remember having said that the Chairman and 2 surveyors had come to his farm for purposes of subdividing. He was in Marakwet when they came to subdivide the land. Defendant was not a committee member of Ziwa Holdings. The survey works had been completed in the presence of Chairman for Block 4. The surveyor had to establish that the acreages were in line with the shareholding.

PW2 Philip Kipkoeh Kiboi testified that he comes from Ziwa, Sirikwa and knows the plaintiff Elijah Kipkeo Mariko and Kimaiyo Sang the defendant. He has a statement dated 20.4.2016 and relies on the statement fully. In the statement adopted as evidence in chief, he states that he is the person described in this statement and a witness of the plaintiff in this suit and that the plaintiff came to his parent's home at Ziwa and met his father at home to buy the latter's 20 acres of land. His father known as Kiptigoi Melil had a big parcel of land measuring about 70 acres to 76 acres in size at Ziwa Farm. That it was out of his father's share that the plaintiff bought 20 acres from his father who showed the plaintiff the 20 acres on

the ground at the corner of his father's land after the plaintiff paid his father for the land. That there were surveyors who were called by the farm committee members to measure the land locally using Nyororo/Survey chain for the farm members were still paying survey fees. That there were other people who bought land from his father after the plaintiff had bought and had been shown his 20 acres. These other purchasers of his father are still there without any problem. That surveys of Kenya later on came and did survey on the ground after the farm members had paid survey fees. The plaintiff also paid the survey fees before the plaintiff's 20 acres of land were surveyed accordingly. That the plaintiff, his father and this witness were present in their respective parcels of land during the survey work by the surveys of Kenya for the farm committee members had made a rule that it was only the land owner who could be present in his or her own land when survey work was going on. That it was later on that they heard from the plaintiff that the plaintiff's land had been hived out and given to somebody who had no share in his father's land. That was long after the surveys of Kenya had done survey work and left. That his father died before giving evidence in this case.

On cross examination, he states that he knows the plaintiff who bought the land belonging to his father in 1975. That he was present when he bought land. He was not there during the agreement. His father's land was 70 to 76 acres. He is not sure of the present of land's acreage. Elijah bought 20 acres. He does not know how much he paid. They surveyed using nyororo. They were not exact on acreage. Survey was to be done later to ascertain real acreage. Survey was later done. They came to confirm acreage. He heard later that Elijah's land was bigger by 6 acres. The surveyors came to measure the land. He heard that Abraham was given title for 6 acres.

PW3, Peter Kiprono Kipkeu states that he is the person described in the statement adopted as evidence in chief and a witness of the plaintiff for his father in this suit. He states that his father was not at home at Ziwa where he was when the defendant and other two people, Francis Yego the village elder and Asbel Rono the defendant's brother came. That he saw the three people including the defendant entering into and measuring his father's land namely Plot No. 9 before he asked them why they were doing so and got the answer from them that it was not his business to ask them so. The defendant and his team left the land for elsewhere. The defendant asked him and his father to pay Kshs.3000 to pay surveyors so as the land could not be interfered with. When his father came back from Chebiemit to Ziwa, he reported that the defendant and his team came and measured the land in the absence of his father who was unhappy that the defendant and his team could come land measure the land in his absence. That his father later sought for the defendant before he went home and told them that the defendant told him that ***“you are a Marakwet and must go back to Marakwet.”***

DW1, Abraham Kimaiyo Sang testified that he recalls well in the 1970 or thereabouts, he bought a parcel of land known as Soy/Kapsang Block 4 Ziwa Holdings vide a deliberation of the area Lands Committee measuring 30 acres. That subsequently, the surveyors from the District Lands Office came to survey the said parcel of land to ascertain demarcations and various entitlements to various individuals and or shareholders. His shares pursuant to the said entitlement was less by 6 acres and owing to the area Lands adjustments. That he was allocated 6 acres from the plaintiff's land as his share was in excess of the initial entitlement and he fenced and developed the said parcel of land.

That after the survey, the plaintiff herein was not satisfied with the adjustment as per the surveyors and launched a complaint with the Land Disputes Tribunal where the matter was ventilated upon and finalized to his favour. That the Tribunal's award was later adopted by the Eldoret Chief Magistrate's Court to fortify the fact that he is the real beneficial owner and or legal proprietor of the 6 acres of land allocated to him after a legal subdivision process.

That he therefore humbly prays that the honorable court adopts the Decree dated 16.1.2003 of the Chief Magistrate's Court and declare that he is the registered owner of the said parcel of land and that the plaintiff be ordered to stop interfering , encroaching onto, developing, disposing and or wasting the same or dealing with the parcel of land in any manner.

DW2, Daniel Kibiwott Arap Sawe testified that he was the Chairman of Block 4 Ziwa Lands Committee in the year 1968 or thereabouts and he witnessed the purchasing of about 30 acres of land from Ziwa

Holdings by one Mr. Abraham Sang. That later on, the District Land Surveyors came to survey the aforementioned land and that is when adjustments were done to allocate the shareholders with their rightful shares. That Mr. Abraham Sang's acreage was less by 6 acres and the same was hived off from the plaintiff's piece of land as his entitlement was in excess as per the District Lands Survey Report. That the said survey conducted in the year 1994 established the land demarcations and boundaries and the plaintiff became dissatisfied with the said subdivision. He went ahead and launched a complaint at the Land District's Land Tribunal where he, the defendant was awarded an order to his favour. That he subsequently appealed at the High court where the matter is to date.

DW3, Jackson Kiptoo Metto testified that he is the Chairman of Ziwa Lands Committee and he is aware that the defendant purchased 30 acres of land from Ziwa Holdings and started occupying the same from the year 1970 or thereabouts. That the defendant herein has had peaceful occupation and use of the said land since then and was even issued with a valid title deed to the same confirming his proprietorship. That in the year 1995, the District Land Surveyors came to the farm and surveyed the same to demarcate the boundaries and the various entitlements to the various shareholders.

The above mentioned survey report established the various acreage as they appeared on the Lands map and on the ground respectively. However, the plaintiff herein was dissatisfied with the initial survey report and he went ahead and called a different surveyor to ascertain the same. They sent the District Lands Survey Coordinator on the 3rd occasion and it was decided that the defendant was less of his entitlement by 6 acres. The said 6 acres was hived off from the plaintiff's land. That is when the plaintiff went ahead and started complaining that they had fraudulently taken his land.

I have considered the pleadings evidence on record and rival submissions of parties and do find that there are two main issues for determination ***firstly, whether the plaintiff has established that there was fraudulent transaction between the defendant's and the surveyors.*** The plaintiff's witnesses appear not to have known what transaction their father Kiptigoi Melil did with the plaintiff as they were not witnesses. It is trite law that fraudulent conduct must be distinctly alleged and proved. It is not enough to allege and leave it to be inferred from the facts. plaintiff has not demonstrated that there was fraud on the part of the defendant.

Secondly, ***whether the decree in Eldoret CMCC Award no 41 of 2001 and subsequent decree is binding.*** This court finds that the Chief Magistrate's Court read and adopted the Land Disputes Tribunal Award on 16th January, 2003 before issuing the Court Decree given and issued on 6th March, 2003 against the plaintiff. The court finds that there is a valid decree of the court which has not been set aside either on appeal or judicial review and therefore is subsisting and binding. The award of the Land Disputes Tribunal could be irregular, or even a nullity. However, it can only be challenged through the existing legal regime. The plaintiff followed the wrong procedure by filing the plaint before this court, to challenge the decision of the Land Disputes Tribunal and its adoption as a judgment of the lower court. The plaintiff should have followed the right legal machinery.

The upshot of the above is that the suit is dismissed with costs to the defendant.

DATED AND DELIVERED AT ELDORET ON 2ND DAY OF DECEMBER, 2016.

ANTONY OMBWAYO

JUDGE