



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 302 OF 2014

NJOROGE KAGWI.....PLAINTIFF

VERSUS

CHEPKWONY ARAP RONO.....1ST DEFENDANT

PAUL KIPLANGAT ROTICH.....2ND DEFENDANT

JUDGMENT

(Suit for permanent injunction to restrain defendant from the suit property; counterclaim for the same; parties having exchanged land through agreement in 1993; exchanged land being agricultural land for which consent of the Land Control Board was required but not applied for; exchange agreement declared null and void for want of land board consent; plaintiff somehow obtaining registration as proprietor which registration was clearly fraudulent; plaintiff not entitled to permanent injunction to restrain defendant from the land; defendant entitled to claim back the land; judgment entered for the defendant)

1. This is an old case that was commenced by way of plaint on 5 June 1997. Both the original plaintiff (Njoroge Kagwi) and the original defendant (Chepkwony arap Rono) are now deceased, but the suit is being continued by their legal representatives.

2. In the plaint filed by the original plaintiff, the plaintiff pleaded that he is the registered owner of the land parcel Dundori/Mugwathi Block 2/301 (the suit property or Dundori land) which is land measuring 2.4 hectares, which he obtained from the defendant, owing to a mutual exchange of land vide an agreement dated 11 March 1993. The case of the original plaintiff was that the defendant is now threatening to invade the same and deny him his quiet enjoyment of the land. In the suit, the original plaintiff asked for a permanent injunction to restrain the defendant from interfering with the said land; a declaration that he is the owner of the said land; a declaration that the defendant is bound by the agreement of 11 March 1993 and costs of the suit.

3. The original defendant filed defence and counterclaim which was later amended. He admitted the agreement, but pleaded that the transfer of the suit property was on condition that the plaintiff also transfers his shares in a plot Ngeria/Megum Block 3 (Kimuri)/1767 (Kimuri land) and L.R No. 8451/5 Kirathimo Farm (Kirathimo land) and a plot in Kimuri center (Kimuri plot) all totaling 6 acres, to the defendant. The original defendant pleaded that the plaintiff frustrated their agreement by failing to transfer to him these parcels of land. He also pleaded that the agreement of 11 March 1993 was subject to the Land Control Board consent which was not granted and therefore the agreement is void. In the

counterclaim, the defendant asked that the plaintiff be compelled to transfer back to him the whole of the suit property and a declaration that the agreement of 11 March 1993 is void.

4. At the hearing, the plaintiff called one witness, Paul Njoroge. He is son of Njoroge Kagwi, the original deceased defendant. He produced the agreement of 11 March 1993, through which, the two parties agreed to exchange land. He testified that they gave the defendant the Kimuri land and no longer have any interest in it. In cross-examination, he testified that the suit property is now in their father's name and this is where he resides. He agreed that the title deed was issued on 21 March 1991 before the agreement of 1993. He however stated that he is not aware that the land has now reverted back to the defendant. He agreed that the suit property in Dundori and the land in Ngeria are agricultural land. He did not know if consent of the Land Control Board had been obtained. He stated that in the exchange agreement, his father was to give up proprietorship of the Kimuri and Kirathimo land, both situated in Eldoret and which measure about 6 acres, for the Dundori land, which is also about 6 acres. He stated that it is the defendant who resides in the land in Kirathimo.

5. The substituted defendant, Paul Kiplangat Rotich, testified that he is son of the original defendant, Chepkwony arap Rono. He was present when the exchange agreement of 1993 was signed and he indeed executed it as a witness. He stated that the agreement was to exchange 6 acres for 6 acres. His father was to give up his 6 acres in Dundori, so that he can get 4 acres of the Kimuri land and 2 acres of the Kirathimo land and a tiny plot. He testified that the parcels were agricultural land but they did not go to the Land Control Board. They did take over the 4 acres in Kimuri, but Njoroge Kagwi did not give them the 2 acres of the Kirathimo land. He instead sold it to another person. He testified that they never transferred the suit land to Njoroge Kagwi and he was at a loss as to how Njoroge Kagwi managed to obtain registration into his name. He reported to the police and the title was reinstated back to his father's name. He testified that Njoroge broke the agreement by selling the other 2 acres. They have since moved out of the 4 acre land in Kimuri. The land parcels in Eldoret are still in the name of Njoroge.

6. In cross-examination, he testified that they never transferred the suit land to Njoroge because they had no consent from the Land Control Board. He testified that Njoroge got registration by fraud in 1991 when they did not even know him.

7. In his submissions, counsel for the plaintiff submitted that the exchange agreement was fully complied with. He submitted in the alternative that the plaintiff's family have been in adverse occupation since the lapse of 6 months required for the land board consent which was in September 1993. In further alternative, he submitted that the plaintiff is ready to give out 2 acres of the Dundori land. Counsel for the defendant on the other hand submitted that the exchange agreement was invalid for want of consent of the Land Control Board. He also submitted that Njoroge never performed his part of the contract.

8. I have considered the pleadings, evidence and submissions of counsel.

9. The genesis of the dispute is the 1993 agreement between Njoroge, the original plaintiff, and Chepkwony, the original defendant. I have seen the agreement which was produced as an exhibit. It is dated 11 March 1993. Chepkwony was the owner of the Dundori land, described in the agreement as Plot No. 301 Kalenjin Enterprises Limited, which measured 6 acres. On the other hand, Njoroge owned the Kimuri land (measuring about 4 acres) and 2 acres of the Kirathimo land and a small plot in Kimuri centre. The parties agreed to exchange their respective plots without any additional consideration. Possession was to be given immediately. DW-1 was among the persons who witnessed the agreement. There is no evidence that the consent of the Land Control Board was ever sought and no evidence that any was obtained. The parties however agree that the properties were agricultural land and therefore subject to the provisions of the Land Control Act, which requires consent of the Land Control Board before for any dealings over agricultural land. This is clearly spelt out in Section 6 of the Land Control Act which where relevant states as follows :-

6. (1) *Each of the following transactions -*

(a) *the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with*

any agricultural land which is situated within a land control area; (emphasis added) ... is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

10. There is a long chain of authorities which buttress the point made by Section 6 of the Land Control Act, including the recent case of ***David Sironga Ole Tukai vs Francis arap Muge & 2 Others (2014) eKLR***, cited by counsel for the defendant. Consent was necessary for the exchange transaction herein, and since none was applied for, or granted, the exchange transaction is void.

11. It is not clear how, but somehow, Njoroge did manage to become the registered proprietor of the suit property. A title deed bearing an issue date of 21 March 1991 was issued to him. DW-1 testified that they did report to the police about this apparently fraudulent title, and on 11 December 1997, Chepkwony was reinstated as proprietor of the suit property. This is shown by an extract of the register of the title which was produced by DW-1 in evidence. It is not clear to me how this was done, for at that time, this suit was already ongoing.

12. It will be observed that in this suit, the plaintiff wants the defendant barred from interfering with possession of the suit property, on the basis that the property belongs to him. My view is that if ever the property belonged to the plaintiff, then the plaintiff procured registration of it by way of fraud. The exchange transaction was subject to the consent of the Land Control Board but none was given. The property could therefore not have been properly transferred to the plaintiff, assuming that Chepkwony did execute a transfer instrument, which is denied. But most glaringly, Njoroge could not have obtained registration on 21 March 1991, even before Chepkwony knew him, and more than two years prior to the exchange agreement.

13. There is clear evidence that the registration of Njoroge as proprietor of the suit property was fraudulent. I do not see how the plaintiff can succeed in his case, given this dubious registration. His registration as proprietor was procured by fraud and this court cannot protect such title. If the title was still in the name of Njoroge, I would have made an order to cancel his registration, but his title has already been cancelled and the name of Chepkwony reinstated. It is not therefore necessary for me to issue an order of rectification of the register, but I do issue a declaration that Njoroge Kagwi did obtain registration of the suit property by way of fraud, and the register should maintain the name of Chepkwony arap Rono as proprietor. I am not persuaded by the argument of counsel for the plaintiff that there has been adverse occupation of the suit property by the plaintiff. First, this is not a suit for adverse possession, but even if it were, it will be noted that the defendant at the outset did contest the registration and occupation of the land by the defendant. Neither I am moved by the submission that in the alternative, the defendant be granted 2 acres of land. There is absolutely no basis for this. The plaintiff's case must fail in totality.

14. I have not forgotten that the defendant has raised a counterclaim. He wants back his Dundori land and is ready to give up, indeed he stated that he has already given up, the Eldoret properties. I do not see how I can deny him these orders. I have already held that the exchange agreement is void for want of consent of the Land Control Board. It cannot be enforced. The defendant is entitled to be put back to the position that he was in prior to the exchange agreement. His suit has merit and I allow it.

15. I think I have dealt with all issues in this suit and I now make the following final orders :-

(i) The plaintiff's suit seeking that the defendant be permanently restrained from the land parcel Dundori/ Muguathi Block 2/ 301 is hereby dismissed with costs.

(ii) The exchange agreement of 11 March 1993 is hereby declared null and void for want of consent of the Land Control Board.

(iii) It is hereby declared that Njoroge Kagwi did obtain registration as proprietor of the land parcel Dundori/Muguathi Block 2/301 by way of fraud.

(iv) There is hereby issued an order compelling the plaintiff and/or his representatives, agents, assigns, or any other person claiming under him, to forthwith vacate the land parcel Dundori/Muguathi Block 2/301 and forthwith give possession of the said land to the defendant and/or his representative/s. In default, the defendant is at liberty to apply for an eviction order.

(v) The defendant shall have the costs of this suit and the costs of the counterclaim.

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 7th day of October 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Ms. Kerubo present or plaintiff

Mr Waiganjo Mwangi present for defendant

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU