



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 3 OF 2000

THOMAS K. A. LELEI PLAINTIFF

VERSUS

JOSEPH K. LELEI DEFENDANT

JUDGEMENT

1. The Plaintiff and the defendant are sons of the late Japheth Chemei Cheptoo alias Lelei. The late Japheth Chemei Cheptoo had three wives. The Plaintiff is son from first wife whereas the defendant is son from the third wife. The plaintiff filed a suit against the defendant on 6/1/2000 in which he claimed general and exemplary damages for trespass to his property known as Trans- Nzoia/Suwerwa/485 as well as Kshs.50,000/= which he had used to erect a fence which the defendant allegedly destroyed. He also sought an order of eviction against the defendant from the said property.

2. The defendant filed a defence to the plaintiff's suit and raised a counter-claim in which he seeks a declaration that the plaintiff is holding the suit land in trust for himself and other family members and that the title in the name of the plaintiff should be rectified by deleting the plaintiff's name and substituting it with that of the defendant. The defendant also sought an order of permanent injunction restraining the plaintiff from interfering with the suit property.

PLAINTIFF'S EVIDENCE

3. The Plaintiff testified that the suit land was a subdivision of LR NO Trans-Nzoia/Suwerwa/202 which belonged to their father. On 28/4/1991 their father sub-divided the land into two equal portions of 11 acres each. The plaintiff was given one portion and the defendant given the other portion. Their father then went before the Land Control Board where he applied for sub-division of his land into two equal portions. The consent was granted. This was in 1993.

4. The plaintiff then went ahead to process a title in his name. He obtained a title to the suit land on 23/1/1997. The acreage was 4.75 hectares. The plaintiff further testified that the defendant was supposed to process his title. In 1997 the defendant pulled down a fence separating the plaintiff's plot and that of the defendant. The defendant then put up a house there. The plaintiff was by then residing at Kibomet where he has land. This is what prompted the plaintiff to file a suit against the defendant. The plaintiff denied the defendant's allegations that he obtained title to the suit land in a fraudulent manner.

DEFENDANT'S EVIDENCE

5. The defendant testified that in 1990 he asked his father to show him where he was to put up a house. His father told him to put up a house at the suit property because that is where his mother was residing. In 2002 he was asked to move out of the suit land on the ground that the status of the suit property had

changed. He denied any knowledge of change of status of the property which was in the name of his father. He contended that LR NO Trans-Nzoia/Suwerwa/486 which is alleged to be his is actually in the name of his deceased father.

6. The Defendant testified that upon the demise of his father, the family filed a Succession cause in which the original LR NO. Trans-Nzoia Suwerwa/202 is listed as one of the properties of their deceased father. He testified that original land should be divided into three portions so that it can be occupied by the three wives of the deceased in accordance with Marakwet traditions. The defendant contends that the sub-division was done fraudulently and that his father was sick at the time and should have not taken part in the sub-division.

ANALYSIS OF EVIDENCE

7. There is no contention that the suit land is a sub-division of LR NO Trans-Nzoia/Suwerwa/202 which was registered in the name of Japheth Chemei Cheptoo. The said Japheth Chemei Cheptoo (deceased) died in 2005. before the deceased died he had sub- divided his land into two equal portions and given his two sons the plaintiff and the defendant a portion each. The sub-division plan was reduced into writing and the same was signed by both the plaintiff and defendant among others. The agreement was produced by the plaintiff as exhibit 2. The defendant did not deny that the signature appearing on exhibit 3 was his.

8. The plaintiff called PW2 Mathew Charles Kipkeu who testified on how the deceased called him to come and be involved in the subdivision of his land. This witness was uncle to both the plaintiff and the defendant. Though the defendant and his mother DW3 Tula Lelei denied knowing PW2, DW4 Jenniffer Shokwei Lelei who is a co- wife of DW3, while under cross – examination by the plaintiff's counsel admitted that she knew PW2 as a dishonest person who at one time tried to alter the documents relating to her husband's properties.

9. The plaintiff produced minutes of the Land control board exhibit 3 which shows that the deceased applied for consent to subdivide his land into two equal portions. There was nothing to show that the consent to subdivide was fraudulently obtained or that the sub-division of the land as per exhibit 2 was fraudulent.

10. The plaintiff called PW2 Christian Kapsiliot a surveyor. This witness testified on how he went to the ground to determine the boundary between LR NO Trans-Nzoia/Suwerwa/485 and 486. He went to the land pursuant to a court order which resulted from a consent entered into by the advocates of the parties. It is therefore ironical that the defendant can turn round and claim that he is not aware of any sub-division of the deceased's property known as LR No. Trans- Nzoia/Suwerwa/202.

11. The Defendant had alleged fraud on the part of the plaintiff. He did not prove any of the allegations of fraud against the plaintiff. He did not demonstrate that the agreement which was produced as exhibit 2 was never signed by him or that it never existed. The defendant did not show that the deceased was not involved in obtaining the consent to sub-divide his land and given it to his sons. There was no evidence adduced to show that the plaintiff had himself registered as owner of the suit land in a fraudulent manner. The suit land had been given to him by his father during his lifetime. There was an allegation that LR NO Trans-Nzoia/Suwerwa/202 is listed as one of the properties of the deceased. If this is the case, then this is wrong, because the property was not available for distribution the same having been shared out by the deceased during his life time and the plaintiff has already obtained title to his portion. The title was obtained by the plaintiff long before the deceased died. It is the defendant who failed to process his own title. This explains why the other portion that is LR NO Trans/Suwerwa/486 is still in the name of the deceased.

ISSUES FOR DETERMINATION

12. The Advocate for the parties had agreed on the following issues for determination.

- (a) Whether the plaintiff is the registered owner of plot No. Trans-Nzoia/Suwerwa/485.**
- (b) Whether the defendant is the registered owner of plot No. Trans- Nzoia/Suwerwa/486.**
- (c) Which parcel of land is the defendant in occupation and for how long has been in possession and is the possession lawful or not.**
- (d) Was the defendant given possession by the original owner.**
- (e) Whether Plot No. Trans-Nzoia/Suwerwa/485 and Plot No. Trans-Nzoia/Suwerwa/486 originated from land parcel No. Trans-Nzoia/Suwerwa/2002.**
- (f) Whether Plot No. Trans-Nzoia/Suwerwa/202 was officially surveyed and divided to reflect the new titles.**
- (g) Whether the plaintiff secretly and fraudulently caused title No. Trans-Nzoia/Suwerwa/485 to be transferred to and registered in his name.**
- (h) Whether or not the plaintiff is holding title No. Trans-Nzoia/Suwerwa/485 in trust for the defendant and other family members.**
- (i) Whether or not the register of Parcel No. Trans-Nzoia/Suwerwa/485 should be rectified by deleting the names of the plaintiff and substituting therein the names of the defendant.**
- (j) Whether the plaintiff is entitled to the orders sought.**
- (k) Whether the defendant is entitled to the orders sought.**
- (l) Who ought to pay costs of the suit.**

13. There is no contention that the plaintiff is the registered owner of LR Trans-Nzoia/Suwerwa/485. He produced a title deed in his name. Issue No (a) is therefore answered in the affirmative. As regards issue (b) the answer is in the negative. The defendant is not the registered owner of LR NO Trans – Nzoia/Suwerwa/486. The property is registered in the name of the deceased. This is because the defendant did not go for transfer into his name. His deceased father having designated this portion to be his transfer to the defendant's name should not have been a problem.

14. Issue No (c) and (d) can be addressed together. There is no doubt that the defendant was allowed by his deceased father to stay on the land. When the father subdivided the land, he clearly indicated on which side each of the two sons were to occupy. This was drawn down on paper and each of the two signed. If for any reason, the houses for defendant fell on the portion to be occupied by the plaintiff, then the defendant is entitled to have him moved from there. There is evidence from the plaintiff's side that the sub-division was carried out in a way that the defendant was given the portion where his mother had been staying. If the land had been divided amongst wives of the deceased, then Marakwet traditions would have been followed but this was not the case and there was no evidence adduced to show that in a case where a father gives land to his sons, they should take positions as dictated by tradition.

15. On issue No (e), there is no doubt that LR NO Trans- Nzoia/Suwerwa/485 and 486 are subdivisions of LR NO Trans- Nzoia/Suwerwa/202. The question is therefore answered in the affirmative. On the issue as to whether Plot No Trans-Nzoia/Suwerwa/202 was officially sub-divided, my finding on this is that it was officially sub-divided otherwise there was no way two titles would have come out without the requisite documents being prepared during the survey. There was no evidence that there were no mutation forms and such other documents.

16. On issues No (g) and (h), I have already made a finding that the defendant has failed to demonstrate that the plaintiff obtained the title fraudulently. It therefore follows that he is not holding the same in

trust for the defendant or his other family members. There can be no order for rectification of title as no fraud has been shown to have been perpetrated by the plaintiff. What the plaintiff has done in his submissions is to make assumptions based on no evidence.

17. The plaintiff has failed to prove his claim of Kshs.50,000/= being expenses incurred in putting up a fence which was allegedly destroyed by the defendant. This claim is therefore disallowed. The plaintiff has however proved on a balance of probabilities that the defendant is residing on his portion. He should not be allowed to remain there. He should be evicted from the suit land. The plaintiff's evidence is that he has never resided on the suit land. He is staying on his plot which is at Kibomet. There was no proper basis laid for an award of either general, or exemplary damages. The claim for general and exemplary damages is therefore disallowed.

18. The defendant has failed to prove his counter-claim. The same is hereby dismissed with costs to the plaintiff. The plaintiff shall also have costs of the suit.

Dated, signed and delivered at Kitale on this 22nd day of September, 2014.

E. OBAGA

JUDGE

In the presence of M/S Munialo for Mr Yano for defendant and Mr Onyantha for Mr Tigogo for Plaintiff. Court Clerk –Kassachoon.

E. OBAGA

JUDGE

22/9/2014