



**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L APPEAL NO. 18 OF 2013**

*Formerly HCA 198 OF 2010*

**MARY CHEPSONGOK ROGO.....PLAINTIFF**

**VS**

**TABITHA KIPYABA.....DEFENDANT**

**JUDGMENT ON APPEAL**

***(Being an appeal against the decision of Honorable J.M. Njoroge, Principal Magistrate, arising out of Kapsabet PMCC No. 320 of 2006, delivered on 30 September 2010).***

1. The appellant, Mary Chepsongok Kogo, commenced a suit against the respondent via plaint in the Kapsabet Principal Magistrate's Court on 20 June 2006. In the plaint, she inter alia pleaded that she is the registered owner of the land parcel Nandi/Kamobo/4384. She pleaded that she had been away in Nairobi for sometimes and when she came back she discovered that the defendant (respondent in this appeal), had moved into her land. She pleaded that the defendant had her own land registered as Nandi/Kamobo/107 and averred that she should be evicted from the land parcel Nandi/Kamobo/4384 (the suit land). She asked for prayers that the defendant vacate the suit land or she be evicted.
2. The respondent as defendant, filed Defence which she later amended. In her Amended Defence, she pleaded inter alia that on 21 March 2006, the plaintiff fraudulently obtained title to the suit land by fraudulently and secretly conducting succession proceedings, which gave her title, to the land parcel Nandi/Kamobo/108. It is this title No. 108 which was sub-divided to bring forth the parcel Nandi/Kamobo/4384. The other was parcel Nandi/Kamobo/4383. The succession proceedings were in respect of the Estate of Moindi arap Ngetich (deceased) and the respondent pleaded that she ought to have been involved as creditor of the said estate. The respondent counterclaimed for an order to have the suit land transferred to her.
3. A Reply to Defence and Defence to Counterclaim was filed. It was inter alia pleaded that the Succession Proceedings, Kapsabet Principal Magistrate's Court Succession Cause No. 53 of 2001, were conducted transparently. It was also pleaded that the appellant was the sole beneficiary of the Estate of Maindi arap Ngetich, and further, that the Grant of Letters of Administration has never been annulled. The appellant pleaded that the respondent could only succeed if the Grant was annulled or revoked. It was also pleaded that it is only the High Court which had jurisdiction to order transfer of the suit land to the respondent after hearing an application to revoke or annul the grant.
4. Pleadings closed and after a full hearing, the Honorable trial Magistrate dismissed the plaintiff's case. He held that there was evidence tendered that the respondent had purchased 1/2 acre of land from the deceased in the year 1971. The deceased however died before they could go to the Land Control Board.

The learned trial Magistrate held as follows :-

*It is my view that the plaintiff should therefore proceed to transfer the 1/2 acre of land to the defendant as she is the bona fide purchaser. On the other hand the court cannot grant the orders sought by the petitioner (probably meant plaintiff) as that would defeat the purchase rights by the defendant who has resided on the parcel since 1971. I have further considered the submissions on record and found that the plaintiff has failed to prove her case on a balance of probability. I shall order the plaintiff's case dismissed with costs.*

5. It is this judgment which is the subject of this appeal. The appellant has laid down 13 grounds in her Amended Memorandum of Appeal. But I can summarise them into six as follows :-

*(i) That the decision was not in tandem with the facts and the law.*

*(ii) That the parcel Nandi/Kamobo/4382 could only be cancelled by the High Court and the Magistrate was wrong to hold that the appellant was guilty of non-disclosure.*

*(iii) That the trial Magistrate erred in ordering transfer of 1/2 acre in disregard of the provisions of Section 7 of the Limitation of Actions Act, CAP 22, Laws of Kenya, the right having allegedly accrued 35 years prior to the date of filing suit.*

*(iv) The judgment went against the provisions of the Land Control Act, CAP 302.*

*(v) That the trial Magistrate erred in failing to note that the appellant was the 1st registered owner of Nandi/Kamobo/4384 and is protected by Section 28 of the Registered Land Act, and the judgment is unenforceable by dint of Section 143 of the Registered Land Act, CAP 300, Laws of Kenya.*

*(vi) That the defendant's counterclaim could only be determined by the High Court under Order 37 Rule 3.*

This being a first appellate court, it is my duty to re-evaluate the evidence and determine whether the trial court arrived at a correct finding.

6. I have already laid out the pleadings of the parties. The plaintiff's case was simple, that the defendant has no right over the suit land, and should be evicted. The defendant on the other hand made a counterclaim that the suit land should be transferred to her. She based her claim on the pleadings that the plaintiff conducted succession proceedings fraudulently.

7. The plaintiff testified that she is sister to arap Maindi (the deceased) and that she got title after succession proceedings. No objection was made in the succession proceedings. She thus got title by way of transmission to the land parcel Nandi/Kamobo/108. She then sub-divided this land to bring forth the land parcels Nandi/Kamobo/4383 and 4384 ( the suit land). She sold the parcel No. 4383 to a third party. In cross-examination, she admitted that the defendant had been on the suit land for many years and had built a home on it. She however denied that the defendant had purchased the land. PW-2 was Carolyne Munuango, an Executive Assistant at Kapsabet Law Courts. Her role was to produce the file of the Succession proceedings in issue. A few anomalies were noted, such as not paying for fees for confirmation and early gazettelement, but there were however no objections raised to the issuance of the Grant to the appellant. PW-3 was one John Kipketer arap Kirorei, a neighbor. He testified that he knew the appellant as sister to the deceased. However the appellant did not live on the suit land. He said that the respondent had built a house but that it was no longer on the suit land.

8. With that evidence the plaintiff closed her case.

9. The defendant testified that in 1971 she purchased 1/2 acre from Maindi Ngetich (the deceased) and had settled on the land since. But Ngetich died before they could go to the Land Control Board. She produced the agreement of 1971 as an exhibit. She testified that she was not involved in the succession

proceedings. She testified that she only needed the 1/2 acre and not the rest. The evidence of the defence witnesses was to the effect that the deceased sold land to the respondent and that there was a house built on it by the respondent.

10. Only counsel for the appellant filed submissions in respect of this appeal. Neither did counsel for the respondent appear at the hearing of the appeal to make any oral submissions. In his submissions, Mr. C.F. Otieno for the appellant, submitted that the sale agreement did not identify the land being sold nor was there evidence of payment of Stamp Duty. He also submitted that there was no consent of the Land Control Board. He submitted that 35 years had lapsed from the time of alleged sale in the year 1971 to the time title was issued to the appellant in the year 2006. He submitted that under Section 7 of the Limitation of Actions Act, an action to recover land had to be brought within 12 years, and therefore this claim was time barred. He further submitted that the appellant's title was a first registration which could not be defeated by dint of Section 143 of the Registered Land Act. It was his view that the respondent's claim if any ought to have been directed at the Estate of the late Ngetich.

11. I have considered the pleadings, the judgment and the submissions of counsel.

12. It will be noted from the judgment, that the trial court was of the view that the respondent had proved her claim for entitlement to 1/2 acre of the suit land. This, according to the learned trial Magistrate, was based on the reasoning that the respondent had proved that she had purchased 1/2 acre of the suit land from the deceased. With respect, I think the trial court delved into a matter which was not before the court in the form of pleadings. I have again gone through the defence and counterclaim, and nowhere is there any pleading, that the respondent was entitled to 1/2 acre of the suit land by way of purchase. Indeed, there is no pleading at all, that the respondent purchased 1/2 acre of the suit land from the deceased in the year 1971. What was pleaded in the defence and counterclaim, is that the appellant obtained title by fraudulently conducting succession proceedings. Parties are bound by their pleadings and the trial court ought to have decided the matter based on the pleadings of the parties. This was a clear error on the part of the trial magistrate.

13. The only issue covered in the judgment, in so far as the succession proceedings are concerned, was a statement that the appellant ought to have included the respondent in the succession proceedings in good faith. The trial Magistrate never held that there was any fraud in the succession proceedings. The court could not even hold so, for it could not have had the requisite jurisdiction. The remedy of declaring that the succession proceedings were fraudulent could only be available by invoking the provisions of Section 76 of the Law of Succession Act, CAP 160, Laws of Kenya and not by filing a separate suit through plaint. The respondent ought to have filed an application, either in Kapsabet Succession Cause No. 53 of 2001, or through an appropriate application in the High Court, to revoke and/or annul the Grant for having been obtained irregularly or through fraud.

14. But let us assume for a moment that there was a proper pleading for a claim to the 1/2 acre of the suit land, by way of purchase in the year 1971, and let us assume that there was a valid sale agreement. Could the trial court enforce the agreement of 1971 against the appellant? I think not. It emerged in evidence that the sale agreement was never approved by the Land Control Board. Section 6 of the Land Control Act requires that dispositions touching on agricultural land, including sales of agricultural land, be sanctioned through a consent of the Land Control Board. If consent is not granted, such transaction is void. There has been a chain of authorities on this point and the matter is well settled. There was no consent issued by the Land Control Board in this instance, and therefore the agreement between the respondent and the deceased became void, 6 months after it was drawn, as outlined in Section 8 of the Land Control Act, for that is the period prescribed for lodging an application for consent. It is not in dispute that the parties to the transaction never applied to the Land Control Board for consent. That transaction having been declared null and void by operation of law could not be enforced. The trial Magistrate therefore erred in attempting to enforce it by decreeing that the appellant should proceed to transfer 1/2 acre of the suit land to the respondent.

15. Apart from the point that no consent of the Land Control Board was ever issued, there is also the other matter of limitation of time. Assuming that the claim was properly pleaded, it is doubtful if it could be

entertained, after a period of 12 years as stipulated by Section 7 of the Limitation of Actions Act, CAP 22. Actions to recover land generally need to be filed within 12 years. The counterclaim came after 35 years, which to me appears to have been out of time. Maybe, the respondent could have lodged a claim for adverse possession, but there was no such claim made, and in any event, such claim could only have been entertained by the High Court, and not the subordinate court.

16. I do not think it necessary to delve into other issues. It is clear to me that the trial Magistrate erred in making an order that the appellant transfers 1/2 acre of the suit land to the respondent. There was no legal basis for doing so. I also see no reason why the trial Magistrate declined to give orders of eviction in favour of the respondent, since the respondent did not to me, make any sustainable claim over the suit land. I have no option but to allow this appeal and set aside the judgment of the learned trial Magistrate.

17. I now make the following orders :-

*(a) This appeal hereby succeeds and the judgment of 30 September 2010 made in Kapsabet PMCC No. 320 of 2006 is hereby set aside.*

*(b) The appellant is entitled to orders of eviction against the respondent and I hereby order the respondent to vacate the land parcel Nandi/Kamobo/4384 within 60 days from the date hereof. In default, the appellant is free to apply for an order of eviction.*

*(c) The appellant is entitled to costs of the suit and of the counterclaim in the subordinate court together with costs of this appeal.*

Judgment accordingly.

**DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF OCTOBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***

***Delivered in the presence of:***

***N/A for M/s C. F. Otieno for appellant.***

***N/A for M/s S.K. Kitur for respondent.***