



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 193 OF 2013

PETER MITEI CHEKOCHOI.....PLAINTIFF

VS

ESTHER JELAGAT NG'ENY & 3 OTHERS.....PLAINTIFFS

(Application for injunction; principles upon which the court will allow an application for injunction; plaintiff alleging that suit land was purchased jointly in 1975 with his deceased brother but that his brother registered the land in his own name; Brother of the plaintiff later transferring the land to the 2nd defendant who transferred it to the 3rd defendant who then transferred it to the 4th defendant; plaintiff seeking to have the land owing to the alleged agreement of 1975; plaintiff having sued his deceased brother in a previous suit which was never concluded; whether suit is res judicata; whether agreement or fraud committed in 1975 makes suit time barred; prima facie case; whether plaintiff has demonstrated a prima facie case; application dismissed)

RULING

The application before me is the Motion dated 3 April 2013 filed by the plaintiff. It is an application seeking to have the 4th defendant restrained by way of an injunction from dealing with the land parcel Uasin Gishu/Tapsagoi/93 pending the hearing and determination of this suit.

The application is supported by two affidavits filed by the plaintiff and is founded on the grounds inter alia that the disputed land belongs to the plaintiff; that the deceased husband to the 1st defendant obtained title in his name without the knowledge of the plaintiff; that the deceased husband to the 1st defendant sold the land to the 2nd defendant/respondent who in turn sold the same to the 3rd defendant who in turn sold to the 4th defendant all without the knowledge of the plaintiff; that the applicant has been residing on the land since 1975; that the land was sold when there was in existence the suit Eldoret CMCC No.31 of 1991; that the 4th defendant has entered the suit land with policemen and demolished the plaintiff's houses and felled several trees; and, that the acquisition of title by the 4th defendant is illegal.

The application is opposed by the respondents who have filed replying affidavits.

The plaintiff's case is discernible from the plaint and the affidavit in support which are fairly lengthy. In a nutshell, it is the plaintiff's case that he is entitled to the land parcel Uasin Gishu/Tapsagoi/93 which land is registered in the name of the 4th defendant. The plaintiff is the brother of the late Kimaiyo arap Ng'eny who is the late husband to the 1st plaintiff. The 1st defendant is administrator of the estate of Kimaiyo arap Ng'eny. Kimaiyo arap Ng'eny died in the year 2009. Kimaiyo arap Ng'eny was previously the registered proprietor of the suit land having obtained title in his name in the year 1989.

It is averred that in the year 1965 or thereabouts the plaintiff together with another one of his brothers, by name of Alfred Kiptgom Mitei, contributed money and bought a land parcel Nandi/Salient/226

measuring 44 acres. In the year 1974 the plaintiff now together with his two brothers, Kiptogom and the late Kimaiyo arap Ng'eny, again contributed some money and purchased a land parcel Uasin Gishu/Tapsagoi/61 measuring about 30 acres. In the year 1975, the plaintiff again with his two brothers, contributed money and purchased the suit land, Uasin Gishu/Tapsagoi/93. This money that was contributed was allegedly handed to Kimaiyo arap Ng'eny to pay for their purchase.

It is pleaded that in the year 1985, the families of the plaintiff and his brothers, held a meeting and it was agreed that the plaintiff would keep the suit land Uasin Gishu/Tapsagoi/93; that Kimaiyo arap Ng'eny would keep the land Nandi/Salient/226, and Kiptogom Mitei would keep the land Uasin Gishu/Tapsagoi/61. Pursuant to this resolution, it is averred that each brother took possession of their respective parcels of land. The plaintiff later learnt that Kimaiyo had registered the properties in his own name. He was prevailed to relinquish the titles but he only surrendered the title to Uasin Gishu/Tapsagoi/61 to Kiptogom. As for the suit land, he obtained the title deed in his name in the year 1989, which the plaintiff alleges was obtained by fraud, inter alia, failing to disclose the interest of the plaintiff in the property.

In the year 1991, the plaintiff filed a suit in the Chief Magistrate's Court at Eldoret being Eldoret CMCC No. 31 of 1991. The suit has never been concluded but the plaintiff has pleaded that he will seek to have it transferred to this court.

In the year 1999, Kimaiyo arap Ng'eny sold the suit land to the 2nd defendant who was then a Judge of the High Court of Kenya. The 2nd defendant in the year 2003 transferred the land to his son, who is the 3rd defendant herein. In early 2013, the 3rd defendant transferred the suit land to the 4th defendant and the 4th defendant, is now the registered proprietor.

It is pleaded that in March 2013, the 4th defendant accompanied by police officers, descended on the suit land and demolished houses which belong to the plaintiff and asked the plaintiff to vacate. It is for this reason that the plaintiff seeks restraining orders against the 4th defendant.

The prayers sought in the plaint are for orders to declare the sale by the late Kimaiyo to the 2nd defendant as illegal, null and void. The plaintiff also seeks a declaration that the sale, by the 2nd defendant to the 3rd defendant, and the sale, by the 3rd defendant to the 4th defendant, are also illegal, null and void. He has also sought orders that the title deed of the suit land held by the 4th defendant be cancelled as it was obtained by fraud or mistake. He has sought for the 4th defendant to be permanently restrained from the suit land and for a declaration that he (the plaintiff) be declared the rightful owner of the suit land.

The defendants entered appearance and filed Defence. The 1st and 4th defendants are represented by M/s Tom Mutei & Co Advocates whereas the 2nd and 3rd defendants are represented by the firm of M/s Sing'oei & Murkomen Advocates. The 1st & 4th defendants have refuted the plaintiff's claims. It is averred that the suit land was solely purchased by the late Kimaiyo without any financial contribution from the plaintiff or Kiptogom. As to the three properties, it is pleaded that Nandi/Salient/226 was vested upon the late Kimaiyo; Uasin Gishu/Tapsagoi/61 was vested upon Kiptogom; and a family land in Aldai measuring 75 acres was vested upon the plaintiff. It is pleaded that the late Kimaiyo had exclusive use and possession from 1975 until he sold it in 1999 to the 2nd defendant.

The 2nd and 3rd defendants on their part have pleaded that the late Kimaiyo sold to the 2nd defendant, the suit land, around 1999. They have pleaded that there was no caution or inhibition registered against the title and the 2nd defendant has denied being aware of any dispute over the land when he purchased it. In 2003, the land was transferred to the 3rd defendant. It is denied that the plaintiff has ever lived on the suit land except that in 2008 a son of the plaintiff, one Benjamin Kiplagat Mitei, attempted to enter the land and was charged in Eldoret Criminal Case No. 49 of 2009. A civil suit, Eldoret HCCC No. 19 of 2008, was also filed against him to restrain him from entering the land. However, they had difficulties in utilizing the land and they handed it back to the deceased (Kimaiyo) who promised to refund the purchase price. The suit Eldoret HCCC No. 19 of 2008 was therefore withdrawn. They have also pleaded that they have been wrongly sued and that the case cannot stand as it is based on fraud that was allegedly committed over 30 years ago.

In her replying affidavit, the 1st defendant has elaborated what is pleaded in the Defence. She accepts that she is the administrator of the Estate of the late Kimaiyo. She has deponed that she lives in the land Nandi/Salient/226 whereas the plaintiff lives on land in Aldai. The parcel number in Aldai is not disclosed.

She has deponed that the suit land was purchased solely by Kimaiyo in 1975 and that they had exclusive possession of the same. She has denied that the plaintiff contributed to its purchase. She has averred that the subject matter herein is the subject matter in Eldoret CMCC No. 31 of 1991. She has deponed that her late husband moved his mother to live in the suit land and she resided there upto 2008 when she became too old and moved to reside with Kimaiyo in Nandi/Salient. She has deponed that it is then that the plaintiff threatened to take possession of the suit land but Kimaiyo resisted. She has averred that owing to the resistance, Kimaiyo was killed in 2009, with the preliminary investigations linking Alfred Kiptogom, Benjamin Kiplagat (son of the plaintiff) and Alex Kiprotich (grandson of the plaintiff) to the murder. They were charged with the offence of murder in Eldoret High Court.

She has deponed that prior to his demise, Kimaiyo had sold the land to the 2nd defendant and through subsequent transactions, the suit land was transferred to the 4th defendant. She has also deponed that the issues claimed cannot be adjudicated as the cause of action arose over 40 years ago and the witnesses are either dead or their whereabouts are unknown.

In his replying affidavit, the 2nd defendant has repeated more or less the averments in the Defence. He has added that he agreed with the deceased to purchase the suit land between 1997 and 1999. He later transferred the suit land to his son, the 3rd defendant. However, owing to threats, he was unable to use the land and the same was to be returned to the late Kimaiyo. However, Kimaiyo was murdered before the property could be transferred back to him. It is deponed that the plaintiff's son, and the plaintiff's grandson are suspects in the death of the deceased and have been charged in Eldoret High Court Criminal Case No. 49 of 2009. It is averred that the plaintiff cannot benefit from the illegal acts of his son and grandson.

Mr. E.O. Miyiinda for the plaintiff, urged me to allow the application for injunction. He averred that the plaintiff has been living on the suit land since 1975. He stated that it is not clear how the transactions leading to the land being transferred to the 4th defendant were conducted. He stated that no document showing consent of the land control board has been exhibited. He asserted that the transfers were aimed at concealing the manner in which the 1st defendant obtained the land in the first instance. He stated that the 2nd defendant was a judge of the High Court at the material time and that the transfer to him was aimed at dampening the chances of the plaintiff acquiring title to the land.

He stated that no explanation has been given why the 2nd defendant chose to transfer the land to his son, the 3rd defendant. He averred that when the transfers took place, the suit Eldoret CMCC No. 31 of 1991 was pending. He stated that the 4th defendant went to the suit land for the first time in March 2013 and has destroyed the plaintiff's houses and attempted to evict the plaintiff. He averred that the 4th defendant needs to be restrained pending hearing of the suit.

Mr. Tororey for the 1st and 4th defendants, stated that the plaintiff has not demonstrated a prima facie case with a probability of success. He pointed out that the plaintiff's case is based on fraud that was allegedly committed in 1975 and thus the suit was time barred following the provisions of Section 7 of the Limitation of Actions Act (CAP 22) Laws of Kenya. He averred that if the suit was based on trust, then it became time barred 6 years after the cause of action following the provisions of Section 20 of the Limitation of Actions Act. He contended that the plaintiff has never been on the land and referred me to the evidence of the plaintiff's mother given in Eldoret CMCC No. of 1991 where she testified that she was resident on the suit land. He averred that the 4th defendant holds title and the same ought to be protected. He also argued that the plaintiff has not demonstrated any irreparable loss and that the balance of convenience tilts in favour of the 4th defendant as owner.

Mrs. Bor for the 2nd and 3rd defendants, argued that it cannot be true that the plaintiff has been in possession of the suit land. She pointed out that in the suit Eldoret HCCC No. 19 of 2008, the 3rd

defendant had sued the plaintiff and other persons who were in possession and that the court ordered their removal from the suit land. She stated that the plaintiff has never taken any action since 1975 when he discovered the fraud. She stated that the title was issued to the deceased in 1989 and no action was taken by the plaintiff. She averred that the 2nd defendant obtained a clean title and it was within his rights to transfer the land to the 3rd defendant.

It is with the above pleadings, depositions and arguments that I need to make a determination on this application for injunction.

First I think it is important that I dispel a perception held by the 1st and 4th defendants. They have pleaded in their defence, and it is deponed in their replying affidavits, that the plaintiff cannot benefit from the death of the late Kimaiyo because the plaintiff's son, grandson and brother are facing murder charges in relation to the death of Kimaiyo in Eldoret High Court Criminal Case No. 49 of 2009. I must make it clear that the accused persons in that case are innocent unless proven guilty. Just because they are suspects, and they are facing murder charges, does not mean that they killed the late Kimaiyo. It is a Constitutional principle enshrined in Article 50(2) (a) of the Constitution of Kenya 2010, that any accused person is innocent unless proven guilty. For the record, the fact that the three are facing criminal charges, has not influenced my decision herein.

For the plaintiff to succeed in this application, I need to be convinced that he has demonstrated a prima facie case with a probability of success; be alive to the tenet that an injunction will not normally be granted unless damages are an inappropriate remedy; and finally, if in doubt, decide the application on a balance of convenience. These are the principles laid out in the case of *Giella v Cassman Brown (1973) EA 358*, to guide the court when faced with an application for injunction.

It ought however not be forgotten that the court in determining an application for injunction, is essentially making a decision, on how best the subject matter of the suit ought to be preserved. The determination of an application for injunction is never a final determination of the matter, though the court, for purposes of determining whether a prima facie case has been demonstrated, is inevitably called upon to make a preliminary assessment of the plaintiff's case. This assessment, I must say, is not a final pronouncement of the matter, and the court faced with evidence on trial can depart from this preliminary assessment.

It will be discerned from the pleadings that the plaintiff's case is that as three brothers, Andrew Kiptogom, the late Kimaiyo and the plaintiff, contributed some money to purchase several parcels of land. It is the plaintiff's case that the properties were distributed to the three brothers and the plaintiff's entitlement is the suit land. The plaintiff alleges that the late Kimaiyo fraudulently registered the land in his own name and obtained title in the year 1989. All these averments are vehemently denied by the defendants. The collective case of the defendants is that the late Kimaiyo purchased the suit land with his own funds and later on sold the land to the 2nd defendant who later transferred it to his son, the 3rd defendant, and the 3rd defendant transferred it to the 4th defendant, who is now the registered owner. The 4th defendant moved to take possession of the suit land and that is what prompted this suit.

I have seen that the 1st registered owner of the suit land was one Okumu Ogisa who on 13th August 1975 obtained a letter of consent from the Land Control Board to transfer the land to the late Kimaiyo. The certificate of title reveals that Kimaiyo became the second registered owner of the suit land on 30th June 1989. The plaintiff was not happy with this and he instituted the suit Eldoret CMCC No. 31 of 1991. I have seen the proceedings of the said suit which were annexed by the plaintiff in his supporting affidavit. The matter seems to have proceeded to defence hearing and the last entry that I can see is for 9th July 1998. If these are the complete proceedings then the matter was last in court on 9th July 1998. The pleadings to the said suit were not annexed by any of the parties but there is no doubt from the evidence adduced by the parties in the said suit, that the plaintiff in the said suit is the plaintiff herein, and the defendant was the late Kimaiyo. The plaintiff was claiming ownership of the same land, Uasin Gishu/Tapsagoi/93. That suit has never been determined and is still pending, subject of course to any determination, that it has abated.

The question that arises is whether this suit is caught up by the provisions of Section 6 and 7 of the Civil

Procedure Act CAO 21) Laws of Kenya which sections bring forth the doctrine of *res judicata*. My view at this stage, and from the material presented by the parties, is that this suit may very well be *res judicata*. The cause of action in this matter, which is fraud, could have been a ground of attack in Eldoret CMCC No. 31 of 1991. As was held in the case of **Pop-In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich (1990) KLR 609**, the plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time.

The case in the Magistrates Court is still pending or has abated. If it is pending, then this suit is caught up by the provisions of Section 6 of the Civil Procedure Act. If it has abated, then this suit is caught up by the provisions of Section 7 of the Civil Procedure Act, for under Order 24 Rule 7, no fresh suit may be brought where a suit has abated on the same cause of action. That being the case, the plaintiff is precluded from instituting a suit claiming similar reliefs, or reliefs that could have been claimed in the former suit. If the suit Eldoret CMCC No.31 had been concluded, the matters in this suit would have been finalized. This suit to me appears to be *res judicata*.

It has been pleaded that the plaintiff will seek to have transferred to this court the suit Eldoret CMCC No. 31 of 1991 because the Magistrate's Court lacks the jurisdiction to handle it. That cannot be the position, because if the Magistrate's Court had jurisdiction to try the matter when it was filed in 1991, that jurisdiction has not been taken away and the court still retains jurisdiction to try the matter. If it never had jurisdiction in the first place, then there is nothing to transfer as the suit would be a *nullity ab initio*. This was my holding in the case of **Sarah Chelagat vs Musa Kipkering Eldoret E& L Misc. No.10 of 2013**.

I had mentioned that the title of the suit land was registered in the name of Kimaiyo in the year 1989. This suit has been filed in the year 2013. It is about 24 years since Kimaiyo became registered as proprietor. The cause of action is fraud that occurred in the year 1975. Section 7 of the Limitation of Actions Act, CAP 22, provides as follows:-

Section 7. *An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.*

The Limitation of Actions Act, thus provides that suits for the recovery of land must be instituted within 12 years of the cause of action. There is reprieve granted under Section 26 of the Act in cases of fraud. The same provides as follows :-

26. *Where, in the case of an action for which a period of limitation is prescribed, either-*

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent;

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it;

Provided this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) the case of mistake, has been purchased for valuable consideration, after the transaction in which

the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

The key words are that *"the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it"* contained in Section 26 (c). In such event the limitation period starts running from the discovery of the fraud or the period when the plaintiff could have discovered the fraud by exercise of reasonable diligence.

Assuming that the plaintiff became aware of the fraud shortly after the year 1989, it is now more than 20 years later and he cannot seek reprieve under Section 26 of the Limitation of Actions Act.

I have not seen on my part, the applicability of Section 20 of the Limitation of Actions Act cited by Mr. Tororey for that section relates to recover of trust property. The case of the plaintiff is related to fraud and not trust.

My preliminary assessment on limitation, is that this suit has been filed out of the limitation period. True, the title is now held by the 4th defendant who became registered in March 2013. But the cause of action of the plaintiff is solely based on the alleged fraud by the late Kimaiyo which occurred in the year 1975 and which the plaintiff must have known in the year 1989, and latest in the year 1991 when he filed the suit before the Magistrates Court.

The only particulars of fraud pleaded are those alleged against the late Kimaiyo. No particulars of fraud have been pleaded against any of the other defendants.

The plaintiff seeks to have the title of the 4th defendant cancelled. To enable me cancel his title as sought by the plaintiff, I have to be convinced that the provisions of Section 26 of the Land Registration Act, Act No.3 of 2012 have been met. Section 26 is drawn in the following terms.

Section 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

As may be observed, the law is extremely protective of title and provides only two instances for the cancellation of the same. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

For purposes of this application, the plaintiff needs to demonstrate, prima facie, that the title of the 4th defendant is liable to be cancelled. As I stated earlier, no particulars of fraud or misrepresentation have been alleged against the 4th defendant. Neither has there been anything brought forth by the plaintiff to show, prima facie, that the certificate of title of the 4th defendant was obtained illegally, unprocedurally or through a corrupt scheme.

Mr. Miyienda argued that the defendants have not shown that there was consent of the land control board. However, the burden of proof rests on he who alleges. Unless there is some evidence of irregularity, for which the plaintiff has not demonstrated, I cannot shift the burden to the respondents.

From the foregoing, it is my view that the plaintiff has failed to demonstrate a prima facie case against the defendants. That being the case, I need not consider the other principles of the case of ***Giella v Cassman***

Brown. I have little option but to dismiss this application with costs. I also vacate all interim orders that I had issued. I direct that the 4th defendant be in charge of the suit land pending the hearing and determination of this suit. If the plaintiff or his servants/agents/assigns are on the suit land, I order them to vacate as we await the final determination of this matter. The plaintiff may of course turn tables if he presents sufficient evidence at the hearing of the suit that is capable of sustaining his claim. But for now, this application for injunction is dismissed

That is my order.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JUNE 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. E.O. Miyianda present for the plaintiff.

N. Tororei for the 1st & 4th defendants

Mr P.K. Birech h/b for Mrs Bor of Ms Singoei & Murkomen advocates