



REPUBLIC OF KENYA



KENYA LAW
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**Kigen v Tilitei & another (Environment and Land Appeal
E001 of 2023) [2024] KEELC 4867 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

L WAITHAKA, J

JUNE 5, 2024

BETWEEN

PHILIP CHERUIYOT KIGEN APPELLANT

AND

PIUS KIPLAGAT TILITEI 1ST RESPONDENT

JACOB KIPLAGAT 2ND RESPONDENT

*(Being an appeal from the Judgement OF Hon. V Karanja SPM Iten
delivered on 15th December 2022 in Iten SPM ELC NO. 19 OF 2021)*

JUDGMENT

Introduction

1. By a plaint dated 26th April 2021, the plaintiff (now appellant), instituted a suit in the lower court to wit Iten SPMC Case No. E019 of 2021 seeking judgment against the defendants (now respondents) for a declaration that that registration of the 1st defendant as the proprietor of parcel of land known as Elgeyo Marakwet/Kessup B/674 (hereinafter referred to as the suit property) was effected by fraud and/or through deliberate misrepresentation of the 1st defendant hence null and void; a declaration that the registration of the suit property in the name of the 1st defendant is subject to a trust in favour of the estate of the late Kigen Rukaruk Chepkwony; and a declaration that the 1st defendant's title to the suit property had been extinguished by his adverse possession thereof.
2. The plaintiff also sought an order of cancellation of the title held by the 1st defendant and registration of the suit property in his name as the administrator/legal representative of the estate of Kigen Rukaruk Chepkwony, deceased; an order of permanent injunction to restrain the defendants by themselves, their servants, agents and/or employees from trespassing on the suit property or cultivating it or any portion thereof and/or interfering with his occupation and possession of the suit property.



3. As can be discerned from the averments in the plaint, the plaintiff's suit is premised on the grounds that he (the plaintiff) is the administrator of the estate of his father, Kigen Rukaruk Chepkwony comprised in the suit property; that the suit property is ancestral/ family land which was fraudulently and/or through misrepresentation, registered in the name of the 1st defendant during land adjudication some time in 1974 or 1975.
4. The pleaded particulars of fraud and misrepresentation leveled against the 1st defendant are listed in paragraph 12 of the plaint as follows:-
 - a. Knowingly presenting himself as having an entitlement to the suit land when he knew he was not the owner of the suit property;
 - b. Taking advantage of the plaintiff father's absence and/or ignorance to stake a claim on land that did not belong to him;
 - c. Registering himself as the proprietor of the suit land while clearly knowing that it was ancestral land belonging to the Kapkaruk house;
 - d. Lying to the adjudication committee that the suit property was the inheritance of the Kaptilitei house when in fact he knew it was the inheritance of the Kapkukaruk lineage;
 - e. Presenting himself as a beneficiary in the Kaprukaruk house when in fact he was not;
 - f. Intentionally disregarding how Barmosop Maiyani alias Maiyani Rukaruk had long settled the four families and interfering with Kap Kukaruk family entitlement.
5. The plaintiff's claim is also premised on his deceased father's alleged long period of use, possession and control of the suit property.
6. The suit was undefended.
7. When the case came up for hearing, the plaintiff relied on his witness statement dated 26th April 2021 after it was adopted as his evidence in chief. The statement is basically a restatement of the plaintiff's pleaded case.
8. The plaintiff produced the documents contained in his list of documents dated 15th April 2021 after they were admitted in evidence as Pexbt 1 to 9. He also produced a grant of letters of administration intestate issued to him in respect of the estate of Kigen Rugaruk Chepkwony, dated 10th June 2020, as Pexbt 10.
9. William Chemjor, relied on his witness statement dated 15th April 2021 after it was adopted as his evidence in chief.
10. Upon considering the plaintiff's case, the learned trial magistrate held that the plaintiff had failed to prove his pleaded case on a balance of probabilities. Consequently, he dismissed it with no orders as to costs. In so doing, the learned trial magistrate *inter alia* observed:-

“...I have carefully considered the evidence adduced by the plaintiff and his witnesses and the exhibits produced in support of the case. I have also considered the filed written submissions and the authorities relied upon by the plaintiff.

The issue for determination is whether or not to cancel title deed Elgeyo Marakwet/Kessup B/674 registered in the name of the 1st defendant on grounds of fraud.



From the evidence the plaintiff and the 1st defendant are great grandchildren of Barmosop Maiyani alias Maiyani Rukaruk. The father of the plaintiff and the 1st defendant inherited the land from their fathers and each settled on the land. the plaintiff stated that the suit property was an inheritance of his house (Kapkaruk) and the 1st defendant who belongs to the house of Kaptilitei fraudulently registered the land in his name.

From the green card produced, Pexbt 1, the 1st defendant is the registered owner of the suit land and the title deed was issued on 9/12/1994. The plaintiff registered a restriction on the title deed 25 years later, on 13/3/2019. The plaintiff alleged fraud on the part of the 1st defendant.

Fraud allegations must strictly be proved after being distinctly pleaded and that fraud is a matter of evidence. The plaintiff only provides a copy of green card and minutes for the meetings held on various occasions to discuss the matter.

Although the 1st and the 2nd defendant did not file their defence; the plaintiff ought to have filed evidence before this court capable of proving that the registration of the 1st defendant was in contravention of section 26(1) of the Land Registration Act. He failed to demonstrate how the 1st defendant had misrepresented himself as the son of Kigen Rukaruk.

The plaintiff claimed the suit land by virtue of adverse possession; that his father had lived on the land for over 40 years and he even leased it out to third parties before the 1st defendant brought the 2nd defendant. This land was ancestral and four houses were to get a share of it. The plaintiff indicated that the 1st defendant had taken his father's share by misrepresentation and he is entitled to that through adverse possession. The plaintiff must prove that he was in exclusive possession of the land openly as of right and without interruption for a period of twelve (12) years. From the record, the plaintiff indicated that the 1st defendant first interfered with their possession in 2016 when he sent the 2nd defendant to disturb the plaintiff's lessee.

The doctrine of recent possession cannot apply, there was interruption by the registered owner.

The upshot is that the plaintiff has failed to prove his case on a balance of probabilities and he cannot be granted the prayers in the plaint.”

11. Dissatisfied with the decision of the trial court, the plaintiff appealed to this court on the grounds that the learned trial magistrate erred by:-
 1. Dismissing his case while disregarding the evidence he tendered;
 2. Failing to find that he, the appellant, had discharged the burden of proof and established his case to the required standard;
 3. Disregarding the minutes presented as evidence or by improperly interpreting the minutes;
 4. Failing to appreciate that the uncontroverted evidence contained in the witness statements were adopted clearly proved the claim on adverse possession in his favour;
 5. Ignoring his submissions in their entirety;
 6. Failing to find in his favour.



12. The plaintiff/appellant urges this court to set aside the decision of the lower court and to substitute it with an order allowing his case.
13. Pursuant to directions given on 7th February 2024, the appeal was disposed off by way of written submissions.

Submissions

The Appellant's/Plaintiffs Submissions

14. In his submissions, dated 27th February 2024, an overview of the plaintiff/appellant's pleaded case and evidence is given and one issue framed for the court's determination namely, whether the learned trial magistrate was justified in dismissing the plaintiff/appellant's case.
15. Concerning that issue, it is pointed out that the plaintiff/appellant's case was premised on the ground that the 1st defendant fraudulently got himself registered as the proprietor of the suit property by lying or misrepresenting to land adjudication officials that he had a claim to the land despite knowing quite well that the land is ancestral land claimed as a birth right by the appellant; that the plaintiff/appellant's family had been in occupation of the suit property since time immemorial.
16. It is also pointed out that the plaintiff/appellant adopted his witness statement as his evidence and produced documents listed in his list of documents as his exhibits.
17. It is further pointed out that P.W.2 adopted his witness statement as his evidence and submitted that the only evidence on record was that of the plaintiff and his witness.
18. An overview of the plaintiff/appellant's statement, the statement of P.W.2 and the minutes produced in evidence is given and submitted that the plaintiff proved that the suit property belonged to the Kapkaruk family hence there is no way it would have been registered in the name of the 1st defendant during land adjudication.
19. The plaintiff/appellant reiterates his assertion that the registration of the suit property in the name of the 1st defendant was effected by fraud/misrepresentation and submits that his contention/assertion that registration of the 1st defendant as proprietor of the suit property was not controverted through pleadings or evidence.
20. It is further submitted that the 1st defendant's conduct of failing to evict the plaintiff from the suit property and failing to file a defence to the suit is said to be evidence that he had no claim to the suit property.
21. The trial magistrate's observation that "the father of the plaintiff and the 1st defendant inherited the land from their fathers and each settled on the land is said to be a complete misapprehension of the evidence produced in court.
22. According to the plaintiff/appellant, the uncontroverted evidence produced in court is that the defendant never settled on the land and that the land has all along been in use by him or his father and most certainly the Kapkaruk family.
23. Concerning his plea to be declared the owner of the suit property by virtue of having been in adverse possession of it, reference is made to the learned trial magistrate's decision concerning that claim and submitted that the learned trial magistrate misunderstood the appellant's case. Regarding that prayer/claim, the plaintiff/appellant submits that through his witness statement, he demonstrated that it is his father who was in use and occupation of the suit property.



24. According to the plaintiff/appellant, time for purposes of adverse possession began to run in 1994.
25. It is the plaintiff/appellant's case that in 2016, when the 1st defendant/respondent attempted to remove them from the suit property, the time had lapsed (they had become entitled to the suit property by adverse possession).
26. The learned trial magistrate is said to have ignored the long trail of evidence of exclusive, open, peaceful and continuous possession of the suit property by the appellant and/or his father. The learned trial magistrate is also said to have failed to give reasons as to why she disbelieved the appellant's case.
27. In conclusion, it is submitted that evidence existed upon which the learned trial magistrate ought to have found that the alternative claim of adverse possession had been established.

Analysis and Determination

28. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see the cases of *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
29. From the pleadings, it is clear that the plaintiff based part of his claim on the allegation that the 1st defendant fraudulently or through misrepresentation got himself registered as the proprietor of the suit property. The plaintiff gave particulars of the pleaded fraud and misrepresentation in paragraph 12 of the plaint. In essence, the plaintiff's claim in that regard is that the 1st defendant while knowing that the suit property belonged to their family, Kapkaruk family, presented himself to the land adjudication committee as the owner.
30. Part of his evidence given in a bid to prove that claim or assertion, is that during land adjudication, the plaintiff's father lived at Kamariny location which is far from Kessup Location where the suit property is located; that the plaintiff's father allowed his step sister, Mary Mayiani, to live on the land because she became landless after her marriage broke down; that in 1974 and 75, when Kessup was subjected to land adjudication, because the plaintiff's father was away coupled with the condition of Mary (was elderly and sick), it was sons of Kaptilitei house who took charge of presenting claims before the land adjudication committee on behalf of their relatives who had claims in Kessup area; that while knowing that the suit property was the plaintiff father's inheritance, the 1st defendant presented himself as the owner of the suit property.
31. Maintaining that the registration of the 1st defendant as proprietor of the suit property was done fraudulently, the plaintiff states that they never got to know about the registration of the 1st defendant as proprietor of the suit property until very late in the day.
32. The plaintiff claims that the process of registration was kept a secret and that the 1st defendant hid information from them awaiting his father's death.
33. That was the oral evidence given in support of the plaintiff's pleaded case of fraud in registration of the suit property in the name of the defendant.



34. The plaintiff also relied on minutes of various meetings held by elders in a bid to resolve the dispute between him and the 1st defendant. One of the meetings worthy mention is the meeting held on 5th July 2018. It is indicated in the minutes of that day that the plaintiff stated “that he came to know about the land when he was informed by a neighbour to the land William Changwony, He further added that he was informed that one family used to work on the land when they were given by their aunt Tapkurgor the family name is Kap Arap Langat, Lately when he inquired the land at the land registrar’s office he realised that it is tittled to Pius who also claims it is his.”
35. I have carefully reviewed the evidence against the pleaded case of fraud urged against the 1st defendant. On account of what is captured in the minutes of 5th July 2018, to the effect that the plaintiff learnt about the suit property from his neighbour, William Changwony, I find the plaintiff’s evidence purporting that he was aware of the dealing with the suit property from the time of adjudication to be unreliable. The evidence of use of the land by his father or himself, either by themselves or through third parties, is not elicited in his evidence before the elders. If he had knowledge about the manner the land was used, he would not have stated before the elders that he got information of the land and it’s use from a neighbour.
36. The allegation that the plaintiff’s family was entitled to a share of land in Kessup and that it is the defendant’s family or house that was to present their claim to the land adjudication committee was not proven. I am also not convinced by the plaintiff’s explanation that the 1st defendant hid information from them concerning the status of the suit property. From his own statement, the plaintiff suggests that his father was aware of the adjudication process. I take judicial notice of the fact that at the end of adjudication, the adjudication register is usually published so that any person not satisfied with the recorded claims to land, may raise objections.
37. In view of the foregoing, I agree with the learned trial magistrate that the plaintiff did not prove the pleaded case of fraud and/or misrepresentation to the required standard namely on a standard beyond proof on balance of probabilities lower than beyond reasonable doubt. In that regard see the case of *Ardhi Highway Development Limited V West End Butchery Limited & 6 others* [2015] eKLR, where the court of Appeal stated;
- “It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but beyond a reasonable doubt”.
38. Concerning the other limb of the plaintiff’s pleaded case, that he had become entitled to the suit property by adverse possession, it is noted that beside claiming that it is he or his family who have all along been in use, possession and control of the suit property, the plaintiff did not produce any documentary evidence capable of showing that it is his father or family members who had all along been in use, possession and control of the suit property. The plaintiff talked of his father or he having leased the suit property to several people but only gave a lease agreement for the period they had a dispute with the defendant over ownership of the suit property. No lease agreements were given in respect of the other persons said to have been leased the suit property before the dispute between the plaintiff and the defendant arose. There is no indication as to when the leasing was done. It appears from the evidence, that the plaintiff and his father, by themselves, never lived in the suit property. The evidence given by the plaintiff concerning dealings with the suit property appear to be hearsay. In that regard, see the proceedings of the meeting held on 5th July 2018 where it is indicated as follows:-
- “Philip who is the complainant (Philip is the plaintiff/plaintiff appellant in this case) states that he came to know about the land when he was informed by a neighbour to the land, William Changwony. He further added that he was informed that one family used to work



on the land when they were given by their aunt Tapkurgor the family name is Kap Arap Langat. Lately, when he inquired the land at the land registrar's office he realized that it is titled to Pius (Pius is the first defendant/respondent in this case).”

39. It is clear from the foregoing excerpt of the minutes of the meeting that what the plaintiff/appellant told the elders was based on hearsay. His statement before the court, suggesting that he is speaking from a position of knowledge on what transpired during land adjudication is neither factual nor believable, as it is not grounded on facts within his knowledge, if that was the case, he would have told the elders as much.

40. Despite the case having been undefended, the duty to prove the case to the required standard of proof lay with the plaintiff. In that regard, see section 107 of the *Evidence Act*, Cap 80 Laws of Kenya which provides as follows;

- “ 1. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

41. In the case of *CMC Aviation Ltd vs. Cruisair Ltd* (No.1) (1987)KLR 103, the court held:-

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend on evidence for proof of their contents”

42. Upon carefully reviewing the evidence adduced before the lower court, I find it to be incapable of proving the plaintiff's pleaded case to the required standard of proof. Consequently, I find the appeal to be lacking in merit and dismiss it with no orders as to costs as it was undefended.

43. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 5TH DAY OF JUNE, 2024.

L. N. WAITHAKA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgment delivered electronically in the presence of:-

Mr. Oduor for the appellant

N/A for the respondent

Court Asst.: Christine

