



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 652 OF 2012

Formerly HCC 146 OF 2010

JOSEPH KIBET TUWEI.....PLAINTIFF

VS

LJT.....1ST DEFENDANT

CHERUIYOT A. LIMO.....2ND DEFENDANT

(Claim for land on behalf of estate of a deceased person; land having been sold without there being succession proceedings; land transferred to the purchaser who subsequently sold to a second purchaser; whether such transactions can be upheld; whether such titles were obtained regularly; held that the titles were irregularly obtained; titles cancelled to revert back to the name of the deceased for proper distribution)

JUDGMENT

A. INTRODUCTION AND PLEADINGS

This suit was commenced by way of plaint filed on 22 October 2010. The plaintiff has described himself as the son of one Mesa Mukoro (deceased) who was the registered proprietor of the land parcels [Particulars Withheld] and [Particulars Withheld] (the suit properties). It is pleaded that Mesa Mukoro died on 24 March 1995 and that he was the registered proprietor and in occupation of the two parcels of land until his death. It is pleaded that through fraud, deceit and misrepresentation, the 1st defendant got herself registered as proprietor of the two parcels of land on 24 September 2004 which was well after the demise of Mesa Mukoro. It is pleaded that the 1st defendant caused to be transferred to the 2nd defendant the suit properties, purportedly pretending to be the true and bona fide owner, which is claimed to be unprocedural. It is averred that the registration of the 1st and 2nd defendants was fraudulent and deceitful as the same were effected when Mesa Mukoro had died and no succession proceedings had been undertaken. The plaintiff has now sought the following principal orders :-

(a) A declaration that the defendants' registration as proprietors of the suit properties is unprocedural, illegal, null and void ab initio and their registration as the subsequent proprietors be cancelled and the name of Mesa Mukoro be restored as the registered legal owner.

(b) An order of permanent injunction restraining the defendants from dealing with the suit properties.

The defendants filed separate defences. The 1st defendant pleaded that she is a bona fide purchaser for valuable consideration, having bought the parcels of land from one Joseph Kiprono Sitienei, and pleaded that she intended to file third party proceedings at the opportune time. It was also pleaded that the plaintiff has no capacity to file the suit.

The 2nd defendant pleaded that he is the registered proprietor of the suit properties and pleaded that he is a stranger to all the allegations of the plaintiff.

Through an application dated 12 July 2011, the 1st defendant applied to issue a Third Party Notice upon one Joseph Kiprono Sitienei but that application was later abandoned.

B. EVIDENCE OF THE PARTIES

The plaintiff testified that he is the son of Mesa Mukoro who died on 28 March 1995. He holds a grant of letters of administration ad litem for the estate of this late father issued on 11 October 2010. He testified that succession proceedings were later filed and he holds a grant of letters of administration issued on 4 May 2011. He testified that his late father was the registered proprietor of the two suit properties, having become registered as proprietor of the land parcel [Particulars Withheld] on 10 September 1987, and [Particulars Withheld] on 9 June 1988. He testified that no succession proceedings have been undertaken. On 25 February 2004, the 1st defendant lodged a caution claiming a purchaser's interest on both parcels of land. The cautions were withdrawn on 24 September 2004 on the same day that the 1st defendant became registered as proprietor of both suit properties. On 9 September 2008, and 9 October 2008, the land parcels [Particulars Withheld] and [Particulars Withheld] were respectively transferred to the 2nd defendant. He testified that the two suit properties had been purchased by one Joseph Kiprono Sitienei who was unable to pay the purchase price. The properties were then sold to HK. HK happens to be the former husband of the 1st defendant as the two are now divorced. He stated that although the properties were sold to HK, he has decided to file this suit because 2 acres out of the land parcel No. 582 were not sold, and belong to one Daniel Sitienei a brother to Mesa Mukoro. He also has issue with the entire process of transfer of the land parcels, which he considers to be irregular, as the same were transferred without any succession proceedings first being undertaken. In cross-examination, the plaintiff testified that it is his mother who sold the two suit properties to HK but that he was not aware how the land was sold to Cheruiyot Limo the 2nd defendant. He stated that he wants the two parcels to revert back to the name of Mesa Mukoro so that he can distribute the same to the buyers.

PW-2 was HKKT. He is a retired athlete. He testified that he got married to the 1st defendant in the year 1997 but got divorced in the year 2006. He testified that he purchased the two suit properties on 26 October 1997 after the demise of Mesa Mukoro. He produced the sale agreement. He testified that it cannot be that the 1st defendant purchased the suit properties, and neither could the 1st defendant have gone to the land board, as Mesa Mukoro was already dead by the time the properties were transferred to her. He stated that he is the one in occupation of the suit properties together with David Sitienei who occupies 2 acres. In cross-examination, it was put to him that the agreement for sale that he produced showed himself and the 1st defendant as joint purchasers, and the witness stated that he considered himself as the purchaser, since he is the one who provided the purchase money. He denied that the plaintiff has filed this suit under his instructions or that he has financed the case for the plaintiff. He stated that he has never authorized the 1st defendant to sell the properties.

PW-3 was Daniel Sitienei Koech. He is brother of Mesa Mukoro. He stated that he lives on 2 acres of the land parcel No. 582 and that the rest of the land is utilized by Hosea. He testified that he is entitled to the 2 acres. In cross-examination, he stated that he was aware of the sale to Hosea and Lydia (1st defendant) but that 2 acres was to be put aside for him. He was not aware of the sale to the 2nd

defendant. With the above evidence, the plaintiff closed his case.

DW-1 was the 1st defendant. She is an international athlete. She testified that she purchased the two suit properties from a person called Joseph Sitienei in 1997. She stated that she provided the purchase price, and while abroad, sent the money to her former husband, H, to pay part of the purchase price. She stated that an agreement was drawn between H and the seller, Joseph Sitienei, which agreement she produced as an exhibit. When she came back to the country, she paid the balance of the purchase price which was Kshs. 807,500/=. An agreement was then written between herself, Sitienei, Sitienei's wife and H. She testified that there was also another agreement written dated 26 October 1997 between Mesa Mukoro's wife (Aska Nyaboke Mesa) and the plaintiff, and H and herself, who were the previous owners before Sitienei. She testified that H used the two properties for about 1 year to plant maize. They differed with Hosea, and she filed divorce in the year 2004, which is the same year that she got title to the properties. She sold them in the year 2008 to Francis Limo by way of exchange with another parcel that Limo had in Burnt Forest area. In cross-examination, she testified that when they purchased the properties, the same were in the name of Mesa Mukoro and not Joseph Sitienei. They however purchased the properties from Joseph Sitienei because he had purchased the same from the family of Mesa Mukoro. She testified that she got a special consent from the Land Control Board. She stated that she was aware that David Sitienei was entitled to 2 acres. She stated that the family of Mesa Mukoro was aware of the sale of the land to her by Joseph Sitienei.

DW-2 was Cheruiyot arap Limo, the 2nd defendant. He testified that he is the registered proprietor of the two suit properties and produced the title deeds as exhibits. He testified that he got title after exchanging his land in Burnt Forest for the two suit properties. They had an exchange agreement with the 1st defendant. They proceeded to the Land Control Board which gave consent. He had bought the whole of the suit properties, but David Sitienei was in occupation of 2 acres, and he refused to move out. For these 2 acres, the 1st defendant paid him some money to compensate him. He testified that he attempted to utilize the land in the year 2009 but H prevented him from doing so. In cross-examination, DW-2 could not explain why the application for consent is dated 3 October 2008 whereas the consent of the Land Control Board was issued on 18 September 2008 prior to the application. He was also unaware of the transactions that made the 1st defendant the registered owner of the suit properties.

With the above evidence, the defendants closed their cases.

C. SUBMISSIONS OF COUNSEL

Mr. Kipkoske Choge for the plaintiff submitted that the plaintiff had demonstrated that he has capacity to file the suit. He also submitted that the contracts between the parties were illegal and cannot be enforced, and further, that the transfer of the properties was done when Mesa Mukoro had died. He relied on various authorities none of which was however annexed.

Mr. Koros for the 1st defendant, submitted that the grant of letters of administration of the plaintiff was obtained fraudulently by not listing his siblings as dependants. He submitted that the plaintiff is a mere proxy of H who has no interest in the property. He submitted that if H has scores to settle, he should settle them in the matrimonial case with the 1st defendant, and not in the present suit. It was his view that the sale transaction between Mesa Mukoro and Joseph Sitienei was proper, and that the 1st defendant also got registered as proprietor in the proper way. He submitted that no one challenged the title of Lydia (1st defendant) until the same was transferred to the 2nd defendant as a bona fide purchaser for value. He further submitted that the Land Registrar needed to be enjoined in the suit if an order of cancellation of title was to be made. He relied on Sections 12 and 13 of the Registration of Documents Act, CAP 285 and submitted that the Land Registrar was satisfied that all legal requirements

had been met before registering the transfers. He also relied on Section 24 of the Land Registration Act, as outlining the rights of a registered proprietor and Section 23 of the Registration of Titles Act.

D. ANALYSIS AND DECISION

It is with the above pleadings, evidence and submissions that I need to decide this matter.

Before I proceed further, I need to offset a preliminary issue that has arisen about the capacity of the plaintiff to institute this suit. On my part I see no problem with the capacity of the plaintiff. Prior to the filing of this suit, he held a limited grant ad litem authorizing him to file suit on behalf of the estate of Mesa Mukoro (deceased). That should sort out the issue of capacity.

The main contention of the plaintiff is that the suit properties were transferred when his father was already deceased and no succession proceedings had been undertaken. It is his view that all transactions conducted are therefore illegal and unprocedural, if not fraudulent.

It is not in dispute that Mesa Mukoro died on 24 March 1995. At the time of his demise, he was the registered proprietor of the two suit properties. It appears that shortly thereafter, an agreement was made whereby one Joseph Sitienei, purchased the suit properties. I have not seen that agreement for none of the parties produced it. In turn Joseph Sitienei sold the properties either to L (1st defendant) and/or to HK also known as HT, who is not a party to these proceedings. But an agreement was made between HT and L as purchasers, and the plaintiff and his mother Aska Nyaboge as vendors. This agreement is dated 26 October 1997. Clearly, this agreement cannot be enforced, for at that point in time, the two vendors had no capacity to sell, the estate of Mesa Mukoro having not been distributed to them. It is an agreement that is null and void and devoid of passing any proprietary interest.

It seems that pursuant to that agreement, LT (also known as LJ) became registered as proprietor of the two suit properties. She was registered as proprietor on 24 September 2004. It is not clear how she became registered as proprietor, and who signed the transfer forms on behalf of Mesa Mukoro, for the transfer instruments were not produced as exhibits in this case. Neither is it clear whether the consent of the Land Control Board was ever obtained for none was produced in evidence. Be as it may, the consent of the Land Control Board could not have been obtained without the presence of Mesa Mukoro, and he could not have been present, for at that time he was already dead. It follows that there could not have been a proper consent issued by the Land Control Board giving consent for the transfer of the suit properties from Mesa Mukoro to LJ. I therefore hold that the transfer of the suit properties from Mesa Mukoro to LJ was irregular and unprocedural and the same cannot be allowed to stand.

L of course transferred the two suit properties to the 2nd defendant, in exchange for land that the 2nd defendant owned in Burnt Forest. Again their transaction is tainted by various irregularities. First, L having not obtained title procedurally to the two suit properties could not pass a good title to the 2nd defendant. Even if I am wrong on this point, the transfer of the suit properties to the 2nd defendant would still be irregular, for the consent of the Land Control Board cannot be said to have been issued properly. The consents show that they were applied for on 3 October 2008, yet somehow, consent was issued on 18 September 2008 before the applications were made. No reasonable explanation was given as to the discrepancy on these dates.

It may be that HK has scores to settle with his former wife L, and may have instigated the plaintiff to file suit. But to me, that is neither here nor there. The fact remains that there is some irregularity in the manner in which the suit properties were transferred from the name of Mesa Mukoro to that of LT (1st defendant), and later to that of Cheruiyot Limo (2nd defendant).

Generally, the law protects the title of a registered proprietor, but where title has been obtained irregularly, the same cannot be protected and is liable to be cancelled. This is brought out by Section 26 of the Land Registration Act, Act No. 3 of 2012, which is drawn as follows:-

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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

It will be seen from the above that title obtained by way of fraud or misrepresentation to which the person is proved to be a party is liable to be cancelled. So too, a title that has been obtained illegally, unprocedurally, or through a corrupt scheme. The title of L cannot be said to have been one that was obtained legally or procedurally, as it was obtained after the demise of Mesa Mukoro, and without there being any person with capacity to transact on behalf of Mesa Mukoro. I have also canvassed the transfer of the titles from L to Cheruiyot Limo, and I have pointed out that this too, was tainted with irregularities.

Mr. Koros submitted inter alia that Section 23 of the Registration of Titles Act, CAP 280 (repealed) applies, but I do not see the applicability of that statute, the properties herein having been registered under the Registered Land Act (CAP 300) (now repealed by the Land Registration Act). Neither do I see the applicability of Sections 12 and 13 of the Registration of Documents Act, CAP 285, whose provisions require the registrar to take steps to satisfy himself as to the identity of the person presenting a document for registration. The argument that the Land Registrar was not enjoined in these proceedings does not change anything, for the fact remains that titles were issued irregularly.

For the above reasons, I have no option but to proceed to cancel the title of the 2nd defendant. In place thereof, the titles should revert back to the name of Mesa Mukoro as proprietor, and I direct the Land Registrar who has custody of the titles herein, to give effect to this order. The suit properties should be subjected to the process of succession for distribution in accordance with the law.

As to costs, it appears that the plaintiff himself was an active participant, in the irregularities herein. He entered into an agreement to sell the suit properties when he had no capacity to do so. In those circumstances, I am unable to grant him costs. Each party will therefore bear his or her own costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:



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