



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 31 OF 2015

BETWEEN

FELISTA CHEMAIYO SOSTEN.....APPELLANT

AND

SAMSON MUTAI.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (Munyao, J.) dated 11th day of November, 2014

in

ENVIRONMENT AND LAND CASE NO. 942 OF 2012)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (**Munyao Sila, J.**) dismissing the appellant's suit and revoking land titles No. Nandi/Baraton/1646 and Nandi/Baraton/1647.

[2] In a plaint dated 16th September, 2011, the appellant averred that she was the registered proprietor of land title No. Nandi/Baraton/1646 measuring 3.18 hectares that on 10th September, 2011, the respondent without any colour of right trespassed on land and ploughed the land with the intention of planting, thereby causing wastage to the property. The remedy sought was a permanent injunction restraining the respondent from entering and occupying the land and damages for trespass. The respondent in his statement of defence denied trespass and averred that he has a purchaser's interest and that there has been previous proceedings over the same subject matter namely, Kapsabet PMCC NO. 100 of 2010; Kapsabet Land Tribunal Dispute Case No. 52 of 2009 and Eldoret HCCC No. 37 of 2011. He prayed that the suit be dismissed.

[3] The dispute has a long history. The appellant is the daughter of Jepkuto Barngetuny who was registered as the proprietor of land title No. Nandi/Baraton/382 measuring 4.2 hectares on 29th August, 2006. The certificate of official search dated 3rd August, 2005 shows that the original owner was Jepkuto Kobot Kibirgen who was registered as proprietor on 27th April, 1971.

In 2007, the respondent filed a Land Dispute Tribunal Case No. 85 of 2007 before the Kapsabet Land Disputes Tribunal, claiming that in 1995, Jepkuto and her son Joseph Koech sold 4.4 acres of land to him which they later refused to transfer. The Land Disputes Tribunal heard the dispute and on 26th June, 2007 made an award as follows:

“That the Honourable Court assist in the subdivision of parcel No. 382. That Mrs. Jepkuto to get 5 acres and son 5 acres;

That Mrs. Jepkuto to give Dr. Samson Mutai 1.2 acres which he fully paid;

That Joseph Koech to give Dr. Samson Mutai 3.2 acres. That may the Honourable Court to order Jepkuto to give Dr. Samson 0.2 acres which he paid Kshs.40,000/= recently”.

It seems that the award of the Land Disputes Tribunal was reviewed by the same Tribunal on 12th August, 2008 which now awarded 4.7 acres to the respondent against Jepkuto in relation to land title No. Nandi/Baraton/382. The decision of the Land Disputes Tribunal was adopted as a judgment of the court in Kapsabet Principal Magistrate’s Court, Land Disputes Tribunal Case No. 52 of 2008 on or about 11th June, 2009.

[4] The appellant’s mother, Jepkuto, filed an appeal against the award before the Provincial Land Appeals Committee, Rift Valley Province, being appeal No.50 of 2008. The appeal was partially allowed on 6th May, 2011. The Provincial Land Appeals Committee made a finding, *inter alia*, that Jepkuto had given a portion of 5 acres to her son, Joseph Koech (*deceased*) which the deceased had already sold and awarded the remaining 1.2 acres to the respondent and 4.3 acres to Jepkuto.

[5] On 25th May, 2011, the respondent being dissatisfied with the decision of the Provincial Land Appeals Committee, filed an application in the High Court for leave to apply for an order of certiorari to quash the decision and also for an order that leave so granted do operate as stay of enforcement of the decision. The leave and order of stay were granted on 26th May, 2011.

On 15th June, 2011, the respondent filed the application for judicial review, in the High Court - Judicial Review Application No.37 of 2011 seeking an order of certiorari to quash the decision. On her part, Jepkuto filed Civil Appeal No.116 of 2011 in the High Court against the decision of the Provincial Land Appeals Committee awarding the respondent 1.2 acres.

The Judicial Review application and the Appeal were pending for hearing by the time the decision, the subject of the appeal before us was made. The abstract of titles show that land title No. Nandi/Baraton/382 was subdivided and sub-division title No. Nandi/Baraton/1647 measuring 3.18 Hectares registered in the name of the appellant on 19th August, 2011, while sub-division title No. Nandi/Baraton/1647 measuring 1.01 Hectares was registered in the name of Jepkuto Barngatuny on the same day. Thereafter, the respondent lodged a caution against the two titles.

[6] At the trial, the appellant testified that she was given the land in dispute as a gift by her mother, Jepkuto. On the other hand, the respondent testified amongst other things that Jepkuto had two pieces of land - Nandi/Baraton/279 which was 4.4 acres and which he bought from her and Nandi/Baraton/382. He claimed that he also bought part of the latter but admitted that consent of the Land Control Board was not given. He also claimed that the sale of Nandi/Baraton/279 was not in dispute.

The learned judge made a finding that, the ownership of Nandi/Baraton/382 would be decided in Judicial Review application No.37 of 2011 and that titles Nandi/Baraton/1646 and 1647 were obtained illegally, unprocedurally or through a corrupt scheme as there was an order staying the enforcement of the decision of the Provincial Land Appeal Committee. The learned judge dismissed the suit, revoked the two titles and directed that the parties do await the outcome of the Judicial Review application.

[7] The nineteen grounds of appeal deal mainly with three issues, namely: the cancellation of the titles; the impropriety of the order directing parties to await the outcome of judicial review application and the merits of the judicial review application. The appellant states that the court erred in law in cancelling the titles because:

(i) *Jepkuto was not a party to the suit;*

(ii) *The order was made without Jepkuto being afforded an opportunity to be heard;*

(iii) *The court with jurisdiction to deal with contempt of the court order was the Judicial Review Court;*

(iv) *The respondent did not in his defence seek the revocation of the titles and no basis was laid for cancellation of titles;*

(v) *The order of Judicial Review Court was not registered against the title nor was Jepkuto enforcing the order.*

The order directing the parties to await the outcome of the Judicial Review application is assailed on the grounds, *inter alia*, that, the appellant was not a party to the judicial review proceedings, the court had no jurisdiction to make the order after the dismissal of the suit and that the court should have instead stayed the proceedings before the dismissal order was made. The appellant further averred in the grounds of appeal that the judicial review application was an abuse of the process of the court as the sale of land was null and void in the absence of the consent of the Land Control Board and that the tribunal was not competent to entertain a claim for sale of land.

[8] Mr. Komen, learned counsel for the appellant, made oral submissions in support of the grounds of appeal. Mr. Aseso, the learned counsel for the respondent, in reply submitted, among other things, that the purpose of the suit was to defeat the order of stay granted in Judicial Review No.37 of 2011; that Jepkuto and the appellant worked in cahoots to transfer the land, that the appellant was a witness for Jepkuto in the tribunal proceedings; that the High Court had jurisdiction to make necessary orders and that the court did not make findings on ownership of Nandi/Baraton/1646 and 1647. He disclosed that the Judicial Review Case No.37 of 2011 had been re-registered as case No.1 of 2017 in the Environment and Land Court.

[9] We have considered the grounds of appeal and the submissions of the respective counsel. The appellant's claim against the respondent was for trespass to land title No. Nandi/Baraton/1646. The land was registered in her name as at the time the suit was filed. The respondent claimed that he had a purchaser's interest in the land and referred to previous proceedings including Judicial Review application No.37 of 2011.

He further claimed that the suit did not disclose a cause of action and asked the court to dismiss the suit with costs. The respondent did not file a counter claim. The order dated 26th May, 2011 granting a stay was in the following terms:

“The grant of leave in (a) above does operate a stay of the enforcement of the decision made by the 1st respondent tribunal on 6th May, 2011 in Nakuru Provincial Land Disputes Appeals Committee Appeal No. 50 of 2008 pending the hearing and determination of the substantive application for Judicial Review and or until further orders of the court”.

Jepkuto was the only party named as an interested party in the judicial review application.

We are satisfied that in the light of the previous proceedings, and the pendency of the - Judicial Review application No. 37 of 2011 and Civil Appeal No. 116 of 2011, the claim of trespass to land had no merit and was properly dismissed.

[10] However, regarding the order cancelling the titles, the respondent did not seek such orders in his defence. The respondent had known that the land had been sub-divided before he filed his defence on 9th October, 2011 for he had on 7th September, 2011 lodged a caution against both titles. In spite of that, he did not file a counter-claim joining Jepkuto as a defendant.

Further, the order of stay of enforcement of the decision of the Provincial Land Appeals Committee was made by a different court in different proceedings. It is the Judicial Review court which had jurisdiction to interpret its own orders. The decision that the titles were obtained illegally, unprocedurally and through a corrupt scheme was made without giving Jepkuto an opportunity to be heard and also without giving the appellant a fair opportunity to be heard.

Lastly, as the learned judge appreciated, the order for cancellation of the titles was a drastic order. As **section 26(1) of the Land Registration Act** provides a certificate of title issued by a registrar *inter alia*, upon a transfer is *prima facie* evidence that the proprietor is the absolute and indefeasible owner and could not be subject to challenge except, *inter alia*, where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme.

In our view, such a drastic order could not have been properly made by a court other than the one which issued the order, nor could it be made without a substantive claim and without giving all the parties affected by the order a fair hearing as stipulated by **Article 50 (1) of the Constitution**. The order partially determined the Judicial Review application which was pending before the Judicial Review Court. In the premises, it is our finding that the order cancelling the titles was made in excess of jurisdiction.

[11] For obvious reasons, we decline to discuss the merits of the pending judicial review application or the claim pending before the Environment and Land Court.

[12] For the foregoing reasons, the appeal succeeds in part and we make the following orders:

- (i) The appeal against the order dismissing the claim for trespass is dismissed.
- (ii) The appeal against the order cancelling the two titles and the order directing the parties to await the outcome of the judicial review proceedings is allowed and consequently the order cancelling title Nos. Nandi/Baraton/1646 and 1647 is set aside and replaced with an order that the two titles are hereby reinstated on the respective registers pending the hearing and determination of the Judicial Review application or the land case pending before the Environment and Land Court.
- (iii) Each party to bear her/his own costs of the appeal.

Orders accordingly.

DATED and delivered at Eldoret this 22nd day of March, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.



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