



Lagat v Rono & 2 others; Kipkoech (Interested Party) (Sued As The Legal Representative Of The Estate Of Hellen Jeptum Birgen – Deceased) (Environment & Land Case 967 of 2021) [2023] KEELC 22005 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22005 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 967 OF 2021
MN MWANYALE, J
NOVEMBER 30, 2023**

BETWEEN

ESTHER JEPTANUI LAGAT PLAINTIFF

AND

EMILY JEBOR RONO 1ST DEFENDANT

ANDREW KOSKEI 2ND DEFENDANT

DANIEL KIPKOECH 3RD DEFENDANT

AND

DANIEL KIPKOECH INTERESTED PARTY

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HELLEN
JEPTUM BIRGEN – DECEASED**

JUDGMENT

1. Esther Jeptanui Lagat the Plaintiff herein *vide* her plaint dated 29th September, 2021 sued the Defendants Emily Jebor Rono and Andrew Koskei seeking *inter alia*;
 - a) permanent injunction restraining the Defendants, their agents and/or servants from entering, trespassing, encroaching, ploughing, planting or dealing in any manner with all that parcel of land known as Nandi/Chemuswo/530.
 - b) An eviction order be issued against the Defendants and their agents, servants and employees.
 - c) Mesne profits
 - d) Costs of the suits



- e) Interests
 - f) any other relief that the Honourable Court deems just fit to grant.
2. Before the matter was heard and determined, Mr. Daniel Kipkoech filed a Notice of Motion application seeking joinder in the matter as an interested party as a legal representative of Hellen Jeptum Birgen, which application was allowed hence Daniel Kipkoech joined the suit as an Interested Party.
 3. Even though Emily Jebor Rono was used in her personal capacity, she filed her statement of defence and counterclaim describing herself as a legal representative of the Estate of Sofia Tamarta Lagat (Deceased), who had been a co-wife of the Plaintiff, both having been wives of the late Kichwen Lagat Anwoto.

Plaintiff's Case And Evidence: -

4. It is the Plaintiff's case that she is the registered owner of all the parcel of land known as Nandi/Chemuswo/530 the suit property.
5. The suit property was originally registered in the name of her late husband Kichwen Lagat Anwoto and pursuant to Eldoret High Court succession cause no 201/2009 "herein after referred to as the succession cause", the Plaintiff was confirmed to be entitled to the suit property as the second house of the late Kichwen Lagat while the 1st Defendant was entitled to Nandi/Chemuswo/531, being the Administrator of the Estate of Tamarta Lagat (Deceased) the first wife.
6. Despite the Plaintiff's confirmed interest in the suit property, the 1st and 2nd Defendant have continually and forcefully encroached into the suit property without any colour of right, claim or any privity of contract and have denied her, her proprietary rights over the suit property hence she has suffered damage and loss as a result of the Defendant's illegal trespass and encroachment into her land.

On the strength of the above averments the Plaintiffs sought for the prayers set out at paragraph 1 of this judgment.

7. The Plaintiff testified as the sole witness PW1 in support of her case. She adopted her witness statement as part of her evidence in chief and produced in evidence a copy of her title as P Exhibit 1 while P Exhibit 2 was the judgment in Eldoret Succession Cause no 201/2009.
8. It was her further testimony that the 1st Defendant was a daughter in law to her late co-wife, while the 2nd Defendant was a grandson of her co-wife, and that her co-wife was the late Tamarta Lagat both of them having been wives of the late Kichwen Lagat, she stated that she was the registered owner of Nandi/Chemuswo/530 her title deed having been issued on 21/4/2021 and the said property measured about 9 acres.
9. The property initially belonged to her late husband and vide succession cause no 201/2009 she was granted the said parcel, she produced a copy of the confirmation of grant as P Exhibit 3.
10. She further testified that her late husband had two properties Nandi/Chemuswo/530 and Nandi/Chemuswo/531. Through the succession proceedings Nandi/Chemuswo/530 was transmitted to her while family of her co-wife was given Nandi/Chemuswo/531, hence the Defendants and the Interested Parties were entitled to portions in Nandi/Chemuswo/531.
11. She stated further that her late husband had sold 3 acres out of Nandi/Chemuswo/ 530 to three persons Simon, Joshua and Wilson each having bought 1 acre, but the said purchasers could not utilize the same since the Defendants were utilizing the property and had chased her out of the suit property, and was given a temporary place of stay by a Mr. Japhet Chumo. She was to exchange her 4 acres in Nandi/Chemuswo/530 with 3 acres in Kapseya belonging to Mr. Chumo. She was aware of a previous



suit Eldoret CM E&L no 145/2004 which suit did not give Tamarta Lagat any interests in no Nandi/Chemoswo/530. Thus, she asked for the Court to assist her recover the suit property.

12. On cross – examination, the witness stated that she knew the late Tamarta Lagat who was her co-wife and lived together with their husband in Nandi/Chemoswo/530. She stated that her husband had sold 3 acres but the purchasers had not taken possession. She had left the suit property in 2000 during the lifetime of her husband, she knew of the dispute between her husband and her co-wife, but did not know the outcome of that case. She did not know when the 1st Defendant was married but found her living in Nandi/Chemoswo/531, and Kibiwot lived in Nandi/Chemoswo/530. The witness did not have the agreement for exchange of the property between her and Mr. Japhet Chumo. She stated that her husband did not sell her share, and she was not aware whether there was a vacant portion in Nandi/Chemoswo/530, as the Defendants were using the whole property.
13. In re-examination, the witness stated that the whole property was 9 acres and that Kibiwot was using Nandi/Chemoswo/530 yet he was the son of Emily the 1st Defendant. The witness stated that Mr. Japheth Chumo had testified in the succession cause.
14. With the testimony of the Plaintiff as the sole witness, the Plaintiff's case was closed.

Defendant's Case And Evidence: -

15. The two Defendants filed a joint statement of defence and counterclaim. The counterclaim by 1st Defendant was in respect of the Estate of Tamarta Lagat (Deceased).
It was their defence that the Plaintiff was registered as owner of Nandi/Chemoswo/530 in 2021, while the original owner was Kichwen Lagat Anwoto who was the 1st Defendant's father in law and the 2nd Defendant's grandfather.
That the 2nd Defendant has been occupying a portion of Nandi/Chemoswo/530 measuring 4 acres which belonged to her late grandmother Tamarta Lagat hence Plaintiff was not entitled to the whole property.
16. The Plaintiff had left the suit property in 2003 and settled elsewhere, while the 2nd Defendant has been living thereon all through his life.
17. That the suit land was ancestral land and had been subdivided into three portions for the late Tamarta Lagat, Hellen Jeptum Birgen and Esther Jeptanui Lagat in the following shares.
 - a) Tamarta Lagat 4 acres
 - b) Hellen Jeptum Birgen 1.5 acres
 - c) Esther Jeptanui Lagat 3 acres
18. Hence the beneficiaries of the estate of Tamarta Lagat, and Hellen Jeptum Birgen are in occupation of their allocated portions.
The Defendant aver that the late Tamarta Lagat had lodged a case Civil Suit no 145/2004 against Kichwen Lagat Anwoto and Japhet Chumo and obtained judgment delivered on 14/11/2006 which judgment was still in force.
19. *Vide* their counterclaim, the Defendants, claimed a portion measuring 4 acres to be transferred to Emily Jebor Rono as they have been in open occupation of their own portions.
20. The 1st Defendant Emily Jebor Rono testified as the sole witness in the Defence case. She adopted her witness statement as part of her evidence in chief and stated it was her further testimony that she knew



the Plaintiff herein who was her mother in law as the co-wife of Tamarta Lagat her mother in law and that the Late Kichwen Lagat was her father in law.

21. It was her evidence that she had lived in Nandi/Chemoswo/531 since 1981 and her parents in law had lived on Nandi/Chemoswo/530. She stated that her mother in law had sued her father in law in Eldoret case no 145/2004 and she produced the judgment thereof as D Exhibit no 1.
22. Her mother in law had passed on in 2009 and her suit was on behalf of the Estate of Tamarta Lagat and she produced letters of Administration as D Exhibit 2. It was her case that the late Tamarta Lagat had allowed Kibiwott to use Nandi/Chemoswo/530. She stated that the Plaintiff was using 3 acres and her parents in law had both been buried in Nandi/Chemoswo/530 and that the Plaintiff was not utilizing the property as she was living on Japheth's property.
23. In cross – examination, the witness stated that she did not know whether Esther owned the parcels belonging to Japheth with regard to P Exhibit 1, the witness stated that she was not aware whether the Plaintiff was granted a title in respect of Nandi/Chemoswo/530.
24. It was her response in further cross examination that the suit property originally belonged to Kichwen Lagat Anwoto and the Plaintiff had filed succession proceedings, which she had objected to so as to get 4 acres in Nandi/Chemoswo/530 together with her son Andrew Kibiwott and Koskei, it was her response that Tamarta Lagat family given 4 ½ acres in Nandi/Chemoswo/530. She had not seen the judgment in the succession cause and she was not aware what acreage Esther had gotten and she had not appealed the decision of the succession cause. She stated that Esther was not using Nandi/Chemoswo/530 and Tarmata did not have a title deed in respect of Nandi/Chemoswo/530 she insisted that Tarmata was given 4 ½ acres in Nandi/Chemoswo/530; and that Kichwen had sold 3 acres to others purchasers during his lifetime but she had stopped them from utilizing them. Her late husband had no title of Nandi/Chemoswo/531 in his name.
25. That Daniel Kipkoech the Interested Party was a son of Hellen Jeptum who was a daughter of Tarmata and he lived in Nandi/Chemoswo/530.
26. In re-examination, the witness stated that she had attended the succession proceedings at the Eldoret High Court and that Daniel Kipekoech's mother Hellen Jeptum had lived in Nandi/Chemoswo/530 while she was utilizing Nandi/Chemoswo/531 from 1989, while her parents in law never lived in Nandi/Chemoswo/531.
27. After the testimony of the 1st Defendant as a sole witness the Defence case was closed.

Interested Parties Case: -

28. It was the Interested Party's Mr. Daniel Kipkoech Korir's case while adopting his witness statement that he knew Tarmata Lagat and Kichwen Lagat, as well as the Plaintiff.
29. He also knew of Nandi/Chemoswo/530 where he was using half an acre. Which property had been given to his mother Hellen Cheptum; and he produced an Adlitem in respect of his mother's Estate Hellen Cheptum as Exhibit 1. He indicated that he had been on the property since birth and that her mother had been buried on his grandfather's property.
30. In cross – examination by Mr. Kibii Learned Counsel for the Plaintiff, the witness stated that he was the son of Hellen Cheptum Birgen, who was a daughter of Tamarta Lagat, and he was using Nandi/Chemoswo/530. He did not know which property Esther was given but her mother did not have a title to property Nandi/Chemoswo/530. She stated that Emily had not refused to give him his mother's share and he had not seen title giving Tarmata 4 ½ acres. He was not aware of the case between Tarmata



and his grandfather. He stated that the Plaintiff Esther neither utilizes Nandi/Chemoswo/530 to Nandi/Chemoswo/531; but he utilizes the property. He did not know whether the property Esther utilized belonging

31. The witness did not know whether the property properly utilized by Esther belonged to Japheth Chumo, the stated that no appeal had been lodged against the decision in the succession cause. He did not know who had title for Nandi/Chemoswo/530 and he stated Andrew Koskei and himself utilized Nandi/Chemoswo/530 while Andrew Koskei's mother utilized the other property. The family of Tamarta were using both portions, that Kichwen had sold to 3 individuals who had utilized but were stopped from their portions, which portions are now being utilized by Andrew and himself.
32. In re-examination, the witness stated that his mother had been gifted 1.5 acre although he utilized only half an acre. He stated that they did not evict the purchasers and that they were utilizing the whole 9 acres. With the testimony of the Intended Party, he closed his case.

Plaintiff's Submissions: -

33. In her submissions before Court, the Plaintiff framed and submitted on 4 issues for determination to wit;
 - i) whether the Plaintiff's suit is *resjudicata*
 - ii) whether the Plaintiff is the bonafide owner of the suit property
 - iii) whether the Plaintiff is entitled to the orders sought
 - iv) who should bear the costs of the suit?
34. On issue number 1, the Plaintiff submits that the suit is not *resjudicata* in terms of Section 7 of the *Civil Procedure Act* and the decision of *resjudicata* in the decision in the case of *Christopher Kenyariri v Salama Beach* 2017 (eKLR), since the parties in the Eldoret Civil Case no 145/2004 were different from the present ones and the issues were different from the present case and that the ownership dispute was not determined in the said case hence this suit is not *resjudicata*.
35. With regard to issues number (i) and (iii) the Plaintiff has submitted on the said issues jointly, and submits that the suit property belonged and remained the property of Kichwen Lagat Anwoto till his demise whereupon the same was subjected to succession proceedings vide Eldoret Succession Cause no 201/2009 (P Exhibit 2) where the suit property was distributed to the Plaintiff whereas the 1st Defendant as the legal representative of Tamarta Lagat was granted Nandi/Chemoswo/531 and through the said transmission the Plaintiff become the legal and registered owner of the suit property, Nandi/Chemoswo/530.
36. The Plaintiff submits that despite the Defendants having their interests in Nandi/Chemoswo/531 they have invaded and occupied the suit property. The Plaintiff submits thus that she has demonstrated that the suit property belongs to her and is entitled to the reliefs sought in the plaint.
37. The Plaintiff while placing reliance on the decision in the case *Re Estate of Late Gedicon Mantbui Nzioka* 2015 (eKLR) submits that no proof of a gift *inter vivos* in respect of the Defendants was proven. The Plaintiff calls for the protection of her title in accordance with Section 24, 25 and 26 of the *Land Registration Act* and seeks the prayers sought in the Plaintiff.
38. The Defendant and Interested Party were represented by the same firm of Advocate and filed a joint set of submissions.



Defendants and Interested Party Submissions: -

39. On their part the Defendant and Interested party framed 3 issues for determination. On the 1st issue of *resjudicata* the Defence submits placing on Section 7 of the [Civil Procedure Act](#) submits that the suit herein is *resjudicata* Kapsabet E & L case no 145/2004 where an order of permanent injunction was granted in favour of Tamarta Lagat. The Defendant places reliance on the decision on the case of [Kennedy Mokua Ongiri v John Nyasende Musoima and Florence Nyanoita Nyasende](#) to the effect that the suit herein is *resjudicata*.
40. On issue number 2, the Defendant submits while placing reliance on Section 42 of the [Law of succession Act](#) that a gift *intervivos* existed in favour of the Defendant and the Interested Parties.
41. The 1st Defendant submits that she was gifted Nandi/Chemuswo/531 during the lifetime of Kichwen Lagat and the same was distributed to her and her claim is what belonged to the Estate of Tamarta Lagat in Nandi/Chemuswo/530 as was settled in Kapsabet E & L no 145/2004.
42. The Defendant has also submitted entitled by way of adverse possession having lived thereon for continuous occupation, peaceful and uninterrupted possession, and since the parties are related adverse possession would not be inferred but the issue of gift *intervivos* ought to be considered.
43. The Defendant submits that due to their occupation they are not trespassers on the suit land and the prayers sought in the suit should not be issued.
44. The Defendant thus prays for the dismissal of the Plaintiffs suit. the Interested Party was represented by the same Advocate for the Defendant and did not file separate submissions but associated himself with the submissions of the Defendant and sought for dismissal of the suit.
45. Before framing the issues for determination, the Court makes note of the following issues that were settled in the course of hearing.
46. Firstly, the Plaintiff, the Defendants and the Interested Party are all relatives, the Plaintiff being the second and surviving wife of the late Kichwen Arap Lagat Anwoto, the 1st Defendant being a daughter in law and 2nd Defendant being a son of the 1st Defendant and grandson of Kichwen Arap Lagat.
47. The Interested Party is a grandson of Kichwen arap Lagat.
The Defendants and the Interested Party belonged to the second house of Kichwen arap Lagat being a daughter in law and grandsons of the late Tamarta Lagat.
48. Secondly, the suit secondly properties were originally registered to the late Kichwen arap Lagat till his death and was subject of succession cause no 201/2009 in Estate of Kichwen Lagat Anwoto before the High Court at Eldoret. Pursuant to a judgment delivered on 30/4/2020 (P Exhibit 2) in respect of an objection filed by the Defendants as objectors, the High Court confirmed the Grant of Letters of Administration and distributed to Estate of Kichwen arap Lagat, thereby the Plaintiff becoming entitled and was registered as proprietor of Nandi/Chemuswo/530 subject to purchasers interested of 3 acres therein while the 1st Defendant was awarded Nandi/Chemuswo/531, on behalf of the first house of Kichwen Lagat, i.e. Tamarta Lagat.

Issues for Determination: -

49. Having analyzed the pleadings, evidence on record and submissions and the law the Court frames the following as issues for determination.



- i) whether there exists a gift in portions of Nandi/Chemuswo/530 in favour of the 2nd Defendant and Interested Party
 - ii) whether the Plaintiff suit and Defendants counterclaim are resjudicata
 - iii) Who is the rightful owner of Nandi/Chemuswo/530 and has the plaintiff proved her case?
 - iv) What reliefs ought to issue?
50. It is the 2nd Defendant's and Interested Parties case that a gift *intervivos* existed in their favour as they had settled on definite portions of Nandi/Chemuswo/530 during the lifetime of Kichwen Arap Lagat.
51. It was the 2nd Defendants case that he was gifted 4 acres by his late grandmother Tamarta Lagat, and that he is therefore entitled to the same, while the first Interested Party's case is that he settled on 1.5 acres that belonged to his late mother who had been gifted the same in her lifetime by her father the Interested Party grandfather.
52. In support of the above, the Defendant and first Interested Parties Advocate place reliance on Section 42 of the [Law of Succession](#).
53. In opposition to this, the Plaintiff submits placing reliance on the decision in the case of [Re Estate of the Late Gedion Mantbi Nzioka](#) (2015). Nyamweya J as she then was, stated as follows
- “ in law, gifts are of two types, there are gifts made between living person (gifts *intervivos*) and gifts made in contemplation of death (gifts *mortis causa*) Section 31 of the [Law Succession Act](#) provides as follows with respect to gift made in contemplation of death.
-for gifts *intervivos*, the requirements of laws are that the said gift may be granted a deed, an instrument in writing or by delivery, by way of declaration of Trust by the donor, or by way of resulting trusts or the presumption of gifts of Land must be way6 of registered transfer or if the land is not registered it must be in writing or by way of declaration of trust in writing gifts *intervivos* must be complete for the same to be valid that the supposed gift was incomplete and invalid.”
54. The second Defendant case is that he is entitled to the 4 acres which he was gifted by Tamarta Lagat. It is noted that the su8it property Nandi/Chemuswo/530 was originally registered in the name of Kichwen Lagat and not Tarmarta Lagat, and hence Tarmata Lagat could not be donor to donate what did not belong to her. In respect of the 2nd Defendant, the Court finds that no gift existed in his favour and the Estate of Tamarta Lagat as a whole.
55. In respect of the interested party, his claim is that 1.5 acres was his late mothers share as a beneficiary of the Estate of Kichwen Arap Lagat.
56. Under Rule 41 (3) of the [Probate and Administration Rules](#), all shares of beneficiaries ought to be decided prior to Confirmation of the Grant.
57. A challenge to the mode of distribution of the Estate was mounted by the Defendants as objectors and pursuant to P Exhibit 2, a judgment delivered by the High Court that objection was dismissed and the Grant was confirmed and Estate distributed, in accordance to the certificate of confirmation of Grant dated 5th October, 2020 produced as P Exhibit 3.
58. It follows that the issues of all the shares of the beneficiaries, the Interested Party included were settled in the said judgment and in the Certificate of Confirmation of Grant, the alleged gift to the Interested Party was not valid in view of the fact that no perfection of the gift was made as a result the same



was distributed as per the certificate of Grant (P Exhibit 3) and the judgment (P Exhibit 2) and the Interested Party herein having belonged to the 1st house of Tamarta Lagat, his share of the Estate is to be found in the said house in Nandi/Chemoswo/531 and not in the Nandi/Chemoswo/530 which was distributed wholly to the Plaintiff subject to the purchaser's right and the exchange should be Plaintiff wish to proceed with the same.

59. On issue number 2, the issues of shares and distributions were handled in the succession cause as appearing at paragraph 2, 9, 21, 24, 37, 44, 46 - 57 of the said judgment and could not be raised afresh in the counterclaim as they are clearly *resjudicata*.
60. The Defendants and Interested Party submit that the Plaintiff's suit is *resjudicata*, as there existed a previous to wit Civil Suit Eldoret CMC 145/2004 between *Tarmata Lagat v Kichwen Lagat Anwoto and Japhet Chumo*.
61. I have perused the judgment in the said case which issued a permanent injunction but the Court noted that being a matrimonial cause, the property forum was matrimonial proceedings before the High Court, consequently the issue of ownership of the suit property was not dealt with in the said judgment and hence the Plaintiff's suit on its own is not *resjudicata*.
62. On issue number 2, the Court finds the Plaintiff's suit is not *resjudicata* but the Defendant's counterclaim for reasons advanced above is *resjudicata*.
63. On issue 3, the Plaintiffs has proven to be the registered owner of Nandi/Chemoswo/530. She produced a title deed as P Exhibit 1, a judgment of the High Court in Succession Cause no 201/20009, Eldoret and a Certificate of Confirmation of Grant.
The Plaintiff has thus proven and demonstrated ownership of the Nandi/Chemoswo/530. Is the Plaintiff's title to be protected?
64. Under Section 44 (2) (d) of the *Evidence Act*, the judgment by the Succession Court in the Succession Cause is conclusive proof of the rights conferred on the beneficiaries, the Plaintiff included.
Having demonstrated proper and lawful acquisition of Nandi/Chemoswo/530 by transmission, the Plaintiff has thus acquired an indefeasible title to the said property, which title ought to be protected under Section 25 and 26 of the *Land Registration Act*.
65. The upshot is that the Defendants and Interested Party have no claim against the suit property as the same rightful and lawfully belongs to the Plaintiff, the plaintiff having succeeded in her suit is entitled to the reliefs sought in the plaint.
66. Accordingly, Judgment is entered in favour of for the Plaintiff in terms;
 - a) permanent injunction is hereby issued restraining the Defendants and the Interested Party, their servants and/or agents and whomsoever claims under them from entering, trespassing encroaching, ploughing and planting or dealing in any manner whatsoever with Nandi/Chemoswo/530.
 - b) An order of eviction issues against the Defendants and Interested Party, the Plaintiff to issue the relevant eviction notices in accordance with Section 152 (a) of the *Land Act*.
 - c) Costs of the suit and counterclaim are awarded to the Plaintiff.
 - d) Mesne profits having not been proved and are not awarded.

JUDGMENT, DELIVERED AND DATED THIS 30TH DAY OF NOVEMBER, 2023.



HON. M. N. MWANYALE,

JUDGE.

In the presence of;

1. Mr. Kibii for Plaintiff

2. Mr. Mutai holding brief for Mr. Tallam for the Defendant and Interested Party.

