



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO 15 OF 1995

TABITHA CHEMESUDE SIRMA *on behalf of the estate of*

NICANOR SIRMA.....1ST PLAINTIFF

JAMES KUTO.....2ND PLAINTIFF

BOAZ BIWOTT.....3RD PLAINTIFF

VERSUS

JOSHUA KIPKURGAT RUTO.....1ST DEFENDANT

SALOME KORGOREN.....2ND DEFENDANT

DAVID CHUMO.....3RD DEFENDANT

CHARLES METTO.....4TH DEFENDANT

SAMSON KIPKALUM KOLOMBOS.....5TH DEFENDANT

CHEPCHUMBA ROTICH.....6TH DEFENDANT

AND

STEPHEN OLE MOSI, JULIUS CHEPSIROR

& 34 OTHERS (SEGERO GROUP).....CO-DEFENDANTS

JUDGMENT

1. The plaintiffs assert ownership of land known as L.R. No. 9478 or Kuinet “B” Farm in Uasin Gishu District (hereafter *the suit land*). The land is 702 acres or thereabouts. The defendants are in possession of about 110 acres of the land. The plaintiffs brought this suit for a declaration that the defendants are trespassers; that they have no rights or interest in the suit land; an order for their eviction or delivery of vacant possession; a permanent injunction restraining them from dealing with the land; general damages; and, costs.
2. The defendants deny the claim *in toto*. The defendants claim to be the lawful owners of a portion of the land. The co-defendants on the other hand intimated to the court that they would withdraw their claims. In the event, they did not lead any evidence in the suit.

3. This is an emotive dispute over land. The suit was filed way back on 26th January 1995. The matter has stagnated for a number of reasons: procrastination by the plaintiffs (the suit was dismissed on two separate occasions for want of prosecution but reinstated on terms); the death of some parties; multiplicity of interlocutory applications; numerous requests for adjournments by the parties; a congested court diary; and, the transfer of the trial judge. Nicanor Sirma (originally the 1st plaintiff) and the 4th, 5th and 6th defendants have died in the course of the litigation. All the plaintiffs' witnesses and two defendants were heard by Ibrahim J (as he then was). I took over the proceedings on 22nd October 2014. On 8th June 2015, I heard the last two defence witnesses.
4. The plaintiffs called two witnesses. PW1 was Boaz Sigei (the 3rd plaintiff). He testified that he resides on the suit land. He was the secretary of Soy Farmers Company. The other officials were Nicanor K. Sirma who was the chairman and James Kutto as the treasurer. He referred to a letter dated 16th February 1983 (exhibit 1) from the Ministry of Lands, Settlement and Physical Planning addressed to Mr. Sirma offering him the land. The witness said the offer was to Mr. Sirma and his group of people. The purchase price was Kshs. 1,500,000. A 10% of Kshs 150,000 was paid to Settlement Fund Trustees (SFT) as per the draft from the Soy Farms Account (exhibit 2) and receipt from SFT dated 7th April 1983 (exhibit 3). The signatories were N.K. Sirma, James Kuto and Boaz Biwot.
5. PW1 testified that Mr. Sirma contributed Kshs. 65,000; and, Mr. James Kutor Kshs. 48,000 with 23 partners. Boaz Biwot contributed Kshs. 37,000 with 53 partners. He testified that at that point the defendants were not in the picture; and, he could not remember when they joined the transaction. He said they made further payments of Kshs. 200,000 in two equal installments on 26th July 1993 and 11th October 1994. He could not remember the exact date when they took over possession.
6. The witness referred to a surveyor's letter dated 9th December 1983 from Omondi Opuodho & Co (exhibit 6). The demarcation or survey fees were agreed at Kshs. 90,000 (exhibit 6(a)). PW1 said they paid Kshs 45,000 deposit. A further sum of Kshs 22,500 was paid (exhibit 6b). He said by that time the defendants had joined them in the transaction. The 1st defendant had requested to be sold land by Mr. Sirma for himself and his group of 30 members as per the minutes dated 26th June 1983 (exhibit 5). As a result, the 1st defendant was appointed the vice-chairman of Soy Farms. His group had 30 members (exhibit 7).
7. He testified that the defendants paid a total of Kshs.107, 740. The land was demarcated. The members took possession in 1983 or 1984 and built houses on the land. Later the 1st defendant claimed back the money of the whole group. He made the demand to the officials of Soy Farmers Company. The money was transferred into his account. The 1st defendant acknowledged it through a receipt. The witness testified that the 1st defendant said he would refund the members who did not get land. He clarified that Mr. Ruto approached them personally but he was acting on behalf of his group. He referred to receipts returned by the defendants exhibits 10 (a) to (n) issued in 1978 and 1979 signifying they had received the refund.
8. The witness said the defendants are still on the land. He testified that the balance of the purchase price has not been paid to SFT because of the litigation; but the plaintiffs are in a position to pay. He prayed that the defendants be evicted. He also prayed for damages and costs. Upon cross-examination, the witness said Mr. Ruto's group was known as *Chukura*. He said the 10% deposit had included the contribution by Chukura of Kshs 107,000. He said he was present when the money was refunded to Mr. Ruto's account.
9. PW2 was the widow of Nicanor Sirma. She was substituted as the 1st plaintiff on 9th June 2008. She is the administratrix of the estate. She said her husband was the MP for Eldoret North. In 1983, the deceased was offered the land by SFT. He was joined by James Kuto, Boaz Biwott and Joshua Ruto. They were in groups, Soy Group; Chukura Group; and, Segero Group. James Kuto led the Segero Group while Chukura was led by Joshua Ruto. Soy was led by Boaz Biwott and Nicanor Sirma (deceased).
10. PW2 testified that later Joshua Ruto asked to be refunded the deposit made by Chukura group. She said the plaintiffs refunded the money to Joshua Ruto and David Chumo. She referred to a transfer of Kshs. 105,740 from the joint account of the plaintiffs to David Chumo's and Joshua Ruto's account (exhibits 9(a) and (b)). She said the Soy and Segero groups are entitled to the land.

- Upon cross-examination, she conceded that a title has not been issued in favour of the plaintiffs. She said she did not know what was being paid for in the year 1995. She said the refund to Mr. Ruto was in June 1987. That marked the close of the plaintiffs' case.
11. The defendants called three witnesses. DW1 was Joshua Ruto. He is the 1st defendant. He said he was a director of Chukura. He testified that Chukura had 53 members. Mr. Sirma approached him for money to buy land. He gave him Kshs.250,000 on behalf of the Chukura group. Mr. Sirma showed him the receipt from SFT for Kshs.150,000 (exhibit 3). He said he was refunded the Kshs. 100,000 but could not recall the date. He said he paid Kshs.90,000 on behalf of Chukura. He said Sirma was unhappy with the delays by Chukura. He said the defendants are in occupation of a section of the land.
 12. He said that at some point, the dispute was referred to a panel of elders. The elders resolved that Soy Group gets 300 acres; Chukura 188.6 acres; and, Segero 220 acres. He conceded on cross-examination that the award by the elders was set aside. He said they still owe over Kshs 1,000,000 to SFT. He said he has cultivated 5 acres of land. 23 members of Chukura are not in possession. Thirty of the members reside on the land on two acres each.
 13. Upon cross-examination, he said he paid Kshs.250,000 but was only given a receipt for Kshs.150,000. That is why he sought a refund of Kshs.100,000. It was paid into his account by the 1st plaintiff. From that refund he paid SFT Kshs.90,000. He said Mr. Sirma accompanied him to SFT where he made the payment. He said he utilized the balance of Kshs 10,000. Upon further examination, he conceded he was refunded Kshs 105,000 but that the sum of Kshs 5000 was owed to him personally. He said Chukura group were buying 230 acres of the suit land.
 14. DW2 was David Chumo (the 3rd defendant). He was the Secretary of Chukura group. He testified that he met Mr. Sirma between 1976 and 1977 when they agreed to purchase some land. According to him, they were joining only one group, Soy – Segero, in the transaction. He said they paid Kshs 250,000 to Sirma at Kenya Commercial Bank, Eldoret branch. He referred to a bank withdrawal slip dated 25th July 1978.
 15. The witness said that between 1978 and 1980, they collected sum of Kshs.211,430 which they deposited in Sirma's account. He thus claimed that Chukura paid a total of Kshs. 461,430. He testified that Chukura wanted the land to be divided into two but Mr. Sirma refused. He made a suggestion for establishment of a school but Mr. Sirma still objected. That is how the matter ended up in the hands of the elders.
 16. At that point in his testimony, DW2 was stood down. When he resumed testimony on 8th June 2015, he was frail and on hand clutches; he required to be supported. He informed the court he was diabetic. He conceded he was the one who used to collect money from the members of Chukura. He could not remember how much he had collected; or, whether the plaintiffs knew the figure. He said that DW1 claimed he paid Ksh.107,740 but he could not remember. He could not also remember whether Kshs 105,740 was refunded to Mr. Ruto. Upon cross-examination, he said he could not recall the sum of Kshs.2,000 being refunded through Kiplimo Bitok. He could not tell whether Mr. Sirma and other plaintiffs received the money directly.
 17. DW3 was Salome Korgoren (the 2nd defendant). She relied on her witness statement. The statement was admitted in evidence in chief by consent. She said they took possession of the suit land in 1978. She said they contributed Kshs. 250,000 which was paid to Mr. Sirma. She said the 1st plaintiff only paid Ksh.150,000 to SFT. She said the 1st plaintiff did not allow the section occupied by Chukura to be surveyed. That was the genesis of the litigation. That marked the close of the defence case.
 18. The court had allowed an application by the co-defendants to be enjoined into the suit. On 22nd October 2014, learned counsel for co-defendants Mr. Kibii indicated that they were withdrawing their claims. The co-defendants did not lead any evidence in the suit.
 19. The plaintiffs and defendants have filed detailed written submissions. Those by the plaintiffs were filed on 20th July 2015; those by the defendants on 23rd September 2015. I have considered the pleadings, witness statements, oral testimony, the documents and rival submissions.
 20. From the pleadings and the evidence, the following broad issues call for determination-

i) Whether the plaintiffs are entitled to the ownership and quiet possession of the entire suit land;

ii) Whether the defendants are entitled to any portion of the suit land;

iii) Whether the defendants paid part or whole of the consideration for any portion of the suit land;

iv) Whether the plaintiffs can maintain a claim for title, eviction or injunction or any other relief sought in the plaint;

v) Whether the defendants should be evicted from the suit land;

vi) Whether the co-defendants have a valid interest in the suit land; and,

vii) Who should bear the costs of the suit?

21. I would add the general question of *jurisdiction*. I stated at the beginning that this is a claim for recovery of title. Under article 162 (2) of the Constitution of Kenya 2010, it is a matter squarely within the sphere of the Environment and Land Court. Jurisdiction is everything. Without it, the court must lay down its tools. Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1. But that would be to simplify the matter too much. This suit predates the Constitution: it was presented to the High Court on 26th January 1995. Its hearing commenced before the promulgation of the Constitution of Kenya 2010. Under the Land Court Act, all land matters partly heard by the High Court were to proceed before the High Court. I thus find the court has jurisdiction to determine the suit. See Trufosa Mudembei & another v John Malembi & another, Eldoret, High Court, Civil Case 148 of 2000 [2015] eKLR. Furthermore none of the parties has contested the jurisdiction of the Court.

22. I will begin with the claims by the co-defendants. Despite their joinder, the nature of their claims remained vague. Like I stated, on 22nd October 2014, their learned counsel informed the court they were withdrawing their claim. In any event, they did not lead any evidence in the matter. The claims by the co-defendants are thus without evidential foundation. The answer to issue number vi) above is that the co-defendants have *not* established any right over the suit land. Accordingly, their claim is dismissed. In the interests of justice I will make no order on costs.

23. I will now turn to the dispute between the plaintiffs and defendants. One of the parties is obviously less than candid. It is common ground that the suit land is registered in the name of SFT. The latter are not parties to the suit. Critical facts on payment of the consideration have thus been left to competing and conflicting claims by the disputants. I got the distinct impression that the parties wanted to leave the court in a blind spot.

24. In their written submissions, the plaintiffs attempted to distinguish the purchase of the suit land from an earlier transaction over a farm known as *Maji Mingi*. However, the dispute before the court is *not* over previous attempts to purchase land: it is over the sale or purchase of the property known as L.R. No. 9478 or Kuinet "B" Farm in Uasin Gishu District.

25. It is not contested that Mr Sirma was the Member of Parliament for Eldoret North between 1979 and 1983; and that he approached the Ministry of Lands, Settlement and Physical Planning for allocation of land. It was not truly *his* private land. As PW1 testified, the deceased was fronting for a *group* of people. Paragraph 1 of the letter of offer (exhibit 1) leaves no doubt that the offer was to a *group* of purchasers. The convenient vehicle for the transaction then became Soy Farmers Company with Mr. Sirma as Chairman, 3rd plaintiff as secretary and the 2nd plaintiff as treasurer.

26. By a letter dated 16th February 1983 (exhibit 1) from the Ministry, Mr. Sirma and his group was offered the suit land. one condition was that a legally binding "sale agreement between SFT Estate section and [Sirma's] group" was to be drawn. The agreement was not produced at this trial. The purchase price was Kshs. 1,500,000 to be paid to Settlement Fund Trustees (SFT). I am satisfied that 10% deposit of Kshs 150,000 was paid to SFT as per the bank draft from the Soy Farms account (exhibit 2) and receipt from SFT dated 7th April 1983 (exhibit 3). I have studied the original receipt closely. It would seem the original receipt for Kshs 150,000 was made out to Hon. N. K. Sirma. There would then seem to be an alteration by a different hand that added the words "*Chukura/ Soy Farmers*". It is plain to my naked eye that those words are in different *hand*

- writing* from the rest of the receipt.
27. I am also satisfied that Sirma contributed Kshs. 65,000; James Kuto and 23 partners (Segero Group) Kshs. 48,000; and Boaz Biwot and 53 partners (Soy Group) Kshs. 37,000. Up to that point the defendants had not appeared in the picture or their interests noted. That reinforces my earlier finding about the later insertion of the words *Chukura/Soy Farmers* on the receipt. From a legal standpoint, SFT never made an offer to the defendants to purchase the suit land. It must follow as a corollary, that the defendants could not accept it. It is material that to date, title to the land is registered in the name of SFT. It remains highly doubtful that the plaintiffs could sell that which they did not own. Certainly, it would not pass the legal test.
 28. According to the plaintiffs, the defendants joined the transaction after Sirma, the Soy and Sagero groups had made the deposit to SFT. The plaintiffs contend that the Chukura group paid Kenya 107, 740 and were to be allocated land on pro-rata basis. The plaintiffs' position is that in 1997, the defendants requested and were refunded the money in two tranches: Kshs 105,740 through the 1st Defendant's account held at Kenya Commercial Bank Limited; and, Kshs 2,000 through one Kiplimo Bitok, a member of Chukura group.
 29. The first payment or refund would seem to be supported by plaintiffs' exhibit 9. I say so because exhibit 9 is just a statement of account of the personal account of Mr. Sirma. It shows that on 5th June 1987 there was a transfer of Kshs 105, 740 to another account. It is supported by the debit slip (exhibit 9b).
 30. The defendants on the other hand failed to explain clearly the circumstances of that refund. Their witness DW2 conceded he was the one who used to collect money from the members of Chukura. He could not remember how much he had collected; or, whether the plaintiffs knew the figure. Although DW1 claimed Ksh.107,740 was paid, DW2 had no such recollection. He could not also remember whether Kshs 105,740 was refunded to Mr. Ruto; or, whether Kshs.2,000 refunded through Kiplimo Bitok. He could not also tell whether Mr. Sirma and other plaintiffs received the money directly. I am alive that DW2 was diabetic. He had aged and was frail when he resumed testimony on 8th June 2015. But I found his answers evasive and too convenient. He was not useful to the defendants' case in the premises.
 31. There were glaring inconsistencies in the evidence of DW1 and DW2 on the sums paid or refunds made. DW1 said he paid Kshs.250,000. DW3 confirmed the assertion by DW2 that a sum of KShs 250,000 was paid to Mr. Sirma. DW1 said he was only given a receipt for Kshs.150,000. That is why he sought a refund of Kshs.100,000. It was paid into his account by the 1st plaintiff. From that refund he paid SFT the Kshs.90,000. He said Sirma accompanied him to SFT where he made the payment. He said he used the balance of Kshs 10,000. Upon further examination, he conceded he was refunded Kshs 105,000. He claimed that the sum of Kshs 5000 belonged to him.
 32. It is on that basis that the learned counsel for the defendants submitted that the entire deposit of Kshs. 256,000/= belonged to Chukura group: the amount being Kshs. 150,000 (or the 10% of the consideration) and balance of Ksh. 106,000 deposited on behalf of Chukura group. I am not persuaded by that evidence or submission. For starters, by the time the defendants joined the transaction, the 10% deposit to SFT had already been paid by the plaintiffs. Secondly, although there was evidence of withdrawal of the sum of Kshs 250,000, there was no corresponding transaction of a deposit *into* the plaintiffs' account. There is also no clear evidence of a deposit of Kshs 211,430 as alleged between 1978 and 1980.
 33. I am alive that the alleged payments were made well *before* the letter of offer of 16th February 1983. I have then studied the 14 *original* receipts issued by Soy Farms Company to the defendants between 1978 and 1979 (exhibits 10 a - n). They total Kshs 107, 630 or thereabouts. PW1 testified that the original receipts were returned to the plaintiffs when the defendants received a refund. The defendants did not strongly controvert that evidence.
 34. DW1 conceded that he received a refund of Kshs 100,000 from Mr. Sirma. Although he claims to have paid Kshs 90,000 directly to SFT, there was a dearth of documentary evidence. The document in support of payment of Kshs 90,000 was marked for identification (DMFI 1). It was never formally produced in evidence. I am accordingly not satisfied that a sum of Kshs 90,000 was paid by the defendants to SFT for purchase of *the* suit land.
 35. From plaintiffs' evidence and exhibit 9 (a) and (b), I am persuaded that the defendants withdrew from the partnership in the purchase of the suit land. Their money was refunded in two tranches: Kshs 105,740 through the 1st defendant's account held at Kenya Commercial Bank Limited; and,

- Kshs 2,000 through one Kiplimo Bitok, a member of Chukura group. I am fortified in that finding because the defendants surrendered the receipts that had been issued to them to Boaz Biwot, the secretary (exhibits 10 a -n). Like I pointed out earlier, DW2 upon cross-examination was evasive or feigned ignorance. He was the one who used to collect the monies from the Chukura members. And yet he could not say how much was collected or paid; or, whether there was a refund from the plaintiffs.
36. True, the transaction took place a long time ago. He was diabetic and aged when he resumed testimony on 8th June 2015. But this was a trial, and the burden to prove the defendants' assertions lay on him and the other two witnesses. See sections 107 and 109 of the Evidence Act. See also Evans Nyakwana v Cleophas Ongaro, High Court, Homa Bay, Civil Appeal 7 of 2014 [2015] eKLR.
37. It is also not lost on me that the defendants never made a counterclaim. It is telling that the statement of defence dated 25th May 1999 simply denied the allegations by the plaintiffs and put the latter to strict proof. In the end I am *not* satisfied that the defendants paid consideration for the *portion* of the land they now occupy. Subsequent to receipt of the refund, the Chukura members who have remained on the suit land are simply trespassers. It would follow that they are not entitled to its possession. The answers to issues numbered ii) and iii) that I framed above are thus in the *negative*.
38. That is not the end of the matter. The plaintiffs did not complete the conveyance. Evidence shows that a sum of Kshs 150,000 or 10% deposit was paid. In the plaint, the plaintiffs plead at paragraph 12 that they paid to SFT a further Kshs 200,000. The amount was from the 1st plaintiff Kshs 35,000; and the 2nd and 3rd plaintiffs Kshs 165,000. That is supported by exhibits 4(a) and (b), some bank drafts issued by the Kenya Commercial Bank on 26th July 1993 and 11th October 1994 respectively. The amounts are drawn from the joint account of the 1st plaintiff.
39. The balance of the purchase price has thus never been paid. The plaintiffs are in clear breach of the letter of offer dated 16th February 1983 (exhibit 1) from the Ministry of Lands, Settlement and Physical Planning. It would appear that the plaintiffs were only interested in taking up possession of the land. That may explain why they started in earnest to survey, demarcate and invite the defendants into the land. The title is still registered in the name of SFT. I thus readily find that the plaintiffs do not own the land either. The land belongs to SFT who are not parties to the suit. The plaintiffs however have a beneficial interest subject to payment of the full purchase price; and, the acceptance or further consent of SFT. I have already found that the plaintiffs are in breach of the original contract of sale.
40. A number of matters flow from that finding. The plaintiffs are ill-placed to litigate over a title they do not own. Although they are in possession, they lack the power to evict the defendants. At the moment, only the legal owner, SFT can injunct the defendants from occupation of the land; or, evict the defendants. The prayers by the plaintiffs for a permanent injunction; or, for an order of eviction are on a legal quicksand.
41. My answers to issue numbers i), iv) and v) above are thus as follows. Under the letter of offer dated 16th February 1983 (exhibit 1), *only* the plaintiffs are entitled to possession of the suit land. Due to the breach of contract of sale, the plaintiffs' possession is subject to the continuing *consent* of SFT. Secondly, since the plaintiffs are not the registered owners, they cannot maintain an action to injunct the defendants from occupation or to evict them. See Trufosa Mudembei & another v John Malembi & another, Eldoret, High Court, Civil Case 148 of 2000 [2015] eKLR. It follows that the prayers for injunction and eviction are dismissed.
42. I will now turn to the prayers for damages. The plaintiffs did not lead any tangible evidence to assist the court to assess general damages. There were generalized allegations that the defendants have denied the plaintiffs the use and possession of about 110 acres of the suit land. No evidence was tendered on the losses, if any, suffered by the plaintiffs. He who alleges must prove. See sections 107 and 109 of the Evidence Act. See also Evans Nyakwana v Cleophas Ongaro, High Court, Homa Bay, Civil Appeal 7 of 2014 [2015] eKLR. Like I have stated, the plaintiffs are not the legal owners of the land; they only have a beneficial interest.
43. On a balance of probabilities, the plaintiffs have only established four matters: that the plaintiffs have a beneficial interest in the land; that subject to the consent of STF, they are entitled to possession; that the defendants are not entitled to possession of any portion of the land; and, that

the defendants are trespassers. I thus enter judgment in the following terms-

- a. A declaration that the plaintiffs have (subject to completion of sale contract with the Settlement Fund Trustees) a beneficial interest; and, right to possess the property known as L.R. No. 9478 or Kuinet "B" Farm in Uasin Gishu District.
- b. A declaration that the defendants have no lawful interest, title or right of possession of any portion of the said land.
- c. That since the plaintiffs are *not* the registered owners of the land, the prayers for injunction and eviction of the defendants are *dismissed*.
- d. That the prayers for general damages and interest are also *dismissed*.
- e. The claims by the co-defendants are *dismissed*.
- f. Costs follow the event and are at the discretion of the court. Considering that the named plaintiffs and defendants are acting for a large and fluctuating group of members; and, considering the predicament now faced by the defendants; and, in the interests of justice, each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 19th day of January 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

No appearance for the plaintiffs.

Mr. Misoi for for the defendants instructed by Kiplagat J. Misoi & Company Advocates.

No appearance for the co-defendants.

Mr. Lesinge, Court clerk.