



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KERICHO**

**CIVIL SUIT NO. 81 OF 2011**

**SITONIK CHEROSE ARAP SOI.....PLAINTIFF**

**VERSUS**

**RICHARD K. SOI. ....DEFENDANT**

**JUDGEMENT**

*(Suit by the plaintiff to be registered as proprietor of certain land; the said land being a subdivision of a larger parcel; plaintiff having sued the registered proprietor of the larger parcel and obtaining judgment in his favour; before executing the judgment, defendant subdividing the land and selling one portion to the defendant herein; plaintiff suing for the subdivision; already decided in the previous suit that plaintiff is proper owner of the whole land and this would include the subdivisions; defendant could not therefore get a good title; judgment entered for the plaintiff)*

This case was commenced by way of plaint filed on **28<sup>th</sup> September 2011**. In his plaint, the plaintiff pleaded that in the **year 1978**, he purchased shares from Sogoo Group Ranch measuring 13.5 acres and registered as **Narok/Cis Mara/Ololulunga/139**. He has pleaded that after purchasing the land, he took possession and occupation and developed it. He pleaded that one David Sareto Mopir fraudulently took his title and caused it to be registered in his name and a new title deed issued to him on **7<sup>th</sup> November 2002** which read **Narok/Cis Mara/Ololulunga/4688** (also described herein as **parcel No. 4688**). It is pleaded that David Mopir then subdivided this land into four different portions which were registered as **Narok/Ololulunga/11506, 11507, 11508 and 11509** (also described herein as **parcel numbers 11506, 11507, 11509**). The **land parcel Narok/Ololulunga/11507** was later sold to one Kingasunya Enole Keemi who thereafter sold it to the defendant. It is pleaded that the plaintiff had earlier sued David Mopir over the original **land parcel No. 139** vide **Kericho HCCC No. 40 of 2002** and obtained judgment. The court found that the title of David Mopir to the **land parcel No. 4688** was acquired fraudulently and ordered the same to be cancelled and the title to revert back to the plaintiff. When the plaintiff attempted to effect the court order, he discovered that David Mopir had already subdivided the land. The plaintiff has averred that the title of the defendant is a bad title as David Mopir had no title to transfer to Kingasunya and the latter had no better title to transfer to the defendant. In this suit, the plaintiff wants the title to the **land parcel No. 11507** cancelled and transferred to him.

The **1<sup>st</sup>** defendant filed defence. He pleaded that he was not among the original allottees of the land in question. He pleaded that he is not privy to the sale between the plaintiff and David Mopir. He nonetheless pleaded that David Mopir was justified in transferring the land to Kingasunya. He also pleaded that at no time did he enter into an agreement with Kingasunya.

In his evidence, the plaintiff testified that he purchased the **land parcel Cis Mara/Ololulunga/139** in the **year 1978** from David Mopir who was the original member of Sogoo Group Ranch where the land parcel

originated from. He purchased 13.5 acres. It was put to him in cross-examination that he only purchased 3 acres and an extra acre was given to him for clearing the forest but he denied this. He was not aware that David Mopir held the land in trust for Kingasunya (also known as Obot Cherotich) who happens to be David's mother. He was also questioned on why he has only chosen to sue Richard Soi in respect of the **land parcel No. 11507**, yet the other subdivided parcels are in the name of other persons whom he has not sued. His answer was that he has not enjoined them because he is not aware that the original land has been subdivided.

PW -2 was Francis Kimalel Sitonik a son of the plaintiff. He testified that he now resides in the **land parcel No.11506** and that the rest of the parcels are occupied by the larger Cherose family.

In his defence, the 1<sup>st</sup> defendant testified that he was previously working as a driver with ICDC. He owns the suit property. He stated that he purchased it from Kingasunya. When he purchased the land it was in her name. he stated that Kingasunya was an original member of Sogoo ranch and she was allocated 7 acres. When her husband died, The Plaintiff bought 3 acres from her. Her land was however registered in the name of David Mopir. He testified that the plaintiff first sued David Mopir before the Land Disputes Tribunal which awarded 3 acres to the Plaintiff, and to David Mopir one acre. Another acre was added to the Plaintiff to make 4 acres for him on the basis that it is him who had cleared the land. He stated that he bought the 2 acres in his name from Kingasunya. He purchased the land in the **year 2009** and also added another 0.3 acres from an adjacent land. He stated that David Mopir has one acre which is comprised in **title No. 11508. Parcel No. 11509** is in the name of Stephen Kiptesot a son of the Plaintiff. When he bought the land he was told that it had a case which had been concluded.

In cross-examination, he stated that even before the **year 2009**, he knew the family of Kingasunya and that of the Plaintiff. He had been informed that the land had a case but was advised that it had been concluded. He was even shown the judgment and he read it. He stated that at no point was David Mopir summoned to court. He stated that at the time of purchase he did not know of the High Court order against David. It is the Tribunal case that he was informed about. When he purchased the land, Sitonik Cherose was using it. There was also a house used as a "singira". He testified that even at the moment the family of Cherose still use the land. He stated that the court order was not directed to him.

DW- 2 was Kingasunya. She is also called Obot Cherutich. She testified that she is originally from Sogoo and she got land in Sogoo Group Ranch. She stated that she sold 3 acres to Cherose and added him another 1 acre because Cherose continuously sued him. She remained with 3 acres. Out of the 3 acres, she gave out one to Richard Soi (1<sup>st</sup> defendant) and another acre to David Mopir who was her 1st born. In cross-examination, she stated that her land is 7 acres. She agreed that at the time she sold the land to Richard Soi, it was the family of the plaintiff that was using it. She stated that the land has never been 13 acres but is only 8 acres.

DW- 3 was David Sareto Mopir. He testified that the history of the land is that Cherose purchased 3 acres from Kingasunya before the Group Ranch was dissolved. Upon dissolution of the Group Ranch, Kingasunya was given 7 acres. She was not around and the land got registered in his name as son to Kingasunya. Cherose asked for more land and to settle his demands, Kingasunya added him an extra 1 acre. He testified that this 7 acres was registered as **land parcel No. 4688**. They went to the land control board and he gave out 4 acres to Cherose. His mother gave him one acre and remained with 2 acres. These 2 acres are those comprised in the **land parcel No. 11507**. His one acre is **land parcel No. 11508** while Cherose's 4 acres is parcel No. 11506. He stated that his mother, Kingasunya, later sold her 2 acres to Richard Soi. He stated that he is not the one who sold land to Cherose but he is the one who transferred 4 acres to him. He stated that he is not aware of the case **Kericho HCCC No. 40 of 2002**. He said that he was never served with summons. To his knowledge, this was a first suit.

In cross-examination, he testified that the original land was not 13 acres and that his mother did not have that size of land. He testified that he does not reside in his one acre but that it is the family of Cherose who reside in it. He testified that it him who transferred the **land parcel No. 11506** to Cherose. That land is 4 acres and he said that is what was sold to him by Kingasunya. As far as he was concerned, the **land parcel No. 4688** was only subdivided into 3 portions and not 4 portions. He refuted being the owner of

the **parcel No. 11509** which he said should be in the name of one Mujeri Oke Lekeiyo. He stated that he was not present when the 1<sup>st</sup> defendant purchased land from Kingasunya. He testified that he did not record the case **HCCC No. 40 of 2002** in his statement. He agreed that he has not applied to review the decision in **HCCC No. 40 of 2002**. In re-examination, he stated that the **land parcel No. 11509** was not derived from the **parcel No. 4688**.

With the above evidence, the 1<sup>st</sup> defendant closed his case.

No appearance was entered for the 2<sup>nd</sup> defendant, the Land Registrar, and they did not participate in these proceedings.

Both Mr. Koko for the plaintiff and Mr. Kirui for the 1<sup>st</sup> defendant filed submissions. Mr. Koko inter alia submitted that the 1<sup>st</sup> defendant could not have obtained a good title since the title of David Mopir was already quashed by the decision in **Kericho HCCC No. 40 of 2002**. He also submitted that the 1<sup>st</sup> defendant was aware of the case, and of the occupation of the plaintiffs on the land, but still proceeded to buy it. On his part, Mr. Kirui inter alia questioned why the plaintiff has not sued David Mopir for the 1 acre comprised in the **parcel No. 11508**. He also submitted that no particulars of fraud have been pleaded. He further submitted that there was never any 13 .5 acres that was owned by the original owner, Kingasunya, but only 7 acres. He submitted that the 1<sup>st</sup> defendant was not party to the suit **Kericho HCCC No. 40 of 2002** and that the said decision cannot be imported herein.

I have considered all issues and I am of the following view.

There is no question that the suit property **land parcel No. 11507** was derived from a subdivision of the **parcel No. 4688**. I have seen the mutation form which shows that the said **land parcel No. 4688** was subdivided on **22 October 2002**. At the time that land was being subdivided, there was an ongoing suit, that is **Kericho HCCC No. 40 of 2002**, which case was filed on 16<sup>th</sup> May 2002. That suit was filed by the plaintiff herein against David Mopir. In that case, the plaintiff sought a declaration that David Mopir has acquired the **land parcel No. 4688** by way of fraud. He also sought orders to have David Mopir transfer the said land to him. David Mopir did not enter appearance to that suit and it proceeded ex-parte. In a judgment read on **23<sup>rd</sup> February 2004**, the court (Musinga J, as he then was) found that David Mopir had acquired that land by way of fraud and ordered him to execute a transfer of that parcel to the name of the plaintiff. When the plaintiff went to execute that judgment, he found that David Mopir has already subdivided the **land parcel No. 4688** into the **land parcels No. 11506, 11507, 11508 and 11509**. David Mopir then proceeded to transfer the **land parcel No. 11507** to Kingasunya, who subsequently transferred it to Richard Soi, the 1st defendant.

It has already been decided, in the suit **Kericho HCCC No. 40 of 2002**, that David acquired the land by way of fraud. That being the case, David had no title to transfer to Kingasunya, and Kingasunya could not possibly have any good title to pass to Richard Soi. It was argued that Richard Soi did not participate in the **case No. 40 of 2002**. That is true, but he could not have been sued, as at that time, the land was in the name of David Mopir. The 1<sup>st</sup> defendant only came into the picture after purchasing the land from David Mopir in the **year 2009**. He could not therefore have been sued in the **year 2002**. In his evidence, he stated that he knew that there was a Tribunal proceeding. It follows that he was aware of a dispute over the land that David Mopir had with the plaintiff. He has also all along been aware that the plaintiff is in occupation of the suit land. Clearly, he purchased the land in the knowledge that the same was under controversy. I do not think that he is an innocent purchaser without notice. Not that it would have mattered even if he was an innocent purchaser, for he purchased a bad title, one that could not properly pass to him as the seller had no title to pass.

A lot was said about the history of the land and this is demonstrated in the evidence outlined earlier in this judgment. To me, all that is immaterial as the question of whether or not the title of David Mopir was a good title or not was settled in **Kericho HCCC No. 40 of 2002**. David Mopir has never moved to set aside that judgment. I am not convinced that he was unaware of the suit and unaware of the judgment. The record in **Kericho HCCC No. 40 of 2002** shows that he was served and he failed to attend court. He

only has himself to blame. He cannot feign ignorance because he himself wrote a statement for this suit and he clearly knew, even at that point in time, that there was already a decree against him. He never bothered to set aside that judgment and it remains a valid determination about the sort of title that he held. The opportunity to assert that his title was a good title was provided in the said case but David Mopir spurned his chances. He cannot now purport to say that he has a good title. All the evidence tendered, which attempts to show that David had a good title, is completely immaterial as the issue is res judicata. This is captured in **Section 7 of the Civil Procedure Act** which provides as follows :-

### **7. Res judicata**

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

The above law forbids me from revisiting the question as to whether the title of David Mopir is a good title or a bad title. I cannot sit on appeal against that decision. The court already held that the plaintiff is entitled to hold the whole of the **parcel no. 4688**. It means that the plaintiff is entitled to all the subdivisions of that land including the **parcel No. 11507** which is the subject of this litigation. Mr. Kirui questioned in his submissions, why the plaintiff has not sued other persons who hold titles to the other subdivisions. I do not have an answer to that. But the fact that he has not sued other persons does not mean that he cannot sue only for the **land parcel No. 11507** or that he cannot succeed in a case where he has only sued for the **parcel No. 11507** without including the rest of the subdivisions. He may have his reasons for not suing the other proprietors. That is his discretion. But it is absurd to argue that his case cannot succeed because he has not sued for the other subdivisions in this case. His right over the **land parcel No. 11507** is not tied to him suing for the other subdivisions.

I think I have said enough to demonstrate that the plaintiff is entitled to be registered as proprietor of the **land parcel No. 11507** as it is a subdivision of the **land parcel No. 4688** and it has already been decided that the plaintiff is entitled to the whole of the **land parcel No. 4688**. I therefore enter judgment for the plaintiff. I proceed to cancel the title of the 1<sup>st</sup> defendant and direct the Land Registrar to proceed to enter the name of Sitonik Cherose arap Lasoi as absolute proprietor of the **land parcel Narok/Cis Mara/Ololulunga/11507**.

The plaintiff shall also have the costs of this suit as against the 1<sup>st</sup> defendant.

It is so ordered.

**Dated, Signed and delivered on this 29<sup>th</sup> day of July, 2016**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**PRESENT**

Mr. Koko for Plaintiff

Ms Kitur for defendant

Court Assistant – Gladys Wambany