



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 18 OF 2013(O.S)

ELIZABETH CHEPKURUI GOJ PLAINTIFF

AND

JOSEPH RONO1ST DEFENDANT

DANIEL RONO2ND DEFENDANT

NICKSON KIPKEMOI RONO3RD DEFENDANT

PETER RONO4TH DEFENDANT

ROBERT KOECH5TH DEFENDANT

JAMES KIPKEMOI KOECH6TH DEFENDANT

PETER KIPKORIR KOECH7TH DEFENDANT

J U D G M E N T

(Suit for declaration on ownership of land; land claimed by plaintiff to have been owned solely by her deceased father; defendants raising counterclaim that land was jointly owned by the deceased and two of his brothers; defendants being sons to brothers of the deceased; claim of trust; evidence showing that land was solely owned by the deceased only that he permitted his brothers and the defendants use of it as licencees; no evidence of any trust; plaintiff's suit succeeds with costs)

A. INTRODUCTION AND PLEADINGS

This suit was commenced by way of an Originating Summons filed on 28th March 2013 and said to have been taken out pursuant *inter alia* to the provisions of **Order 37 Rules 1 (a) (e) and (f) , 2(b), 14 and 15**, of the **Civil Procedure Rules**. The Originating Summons as drawn sought answers to the following questions :-

1. *Whether a declaratory orders (sic) do issue by this honourable court that the late Kipkoskei arap Bii alias Kipkoskei Bii, alias Philip Kipkoskei Bii is the absolute registered owner of that entire land parcel known as L.R No. Kericho/Chesoan/1555 and land parcel known as L.R No. Kericho/Chesoan/1564.*
2. *Whether the defendants/respondents herein have any rights and/or interest in law as heirs and/or dependants of the estate of the late Kipkoskei arap Bii alias Kipkoskei Bii alias Philip Kipkoskei Bii.*

3. *That an eviction order do issue evicting the defendants, their servants, agents and/or any other person in possession, occupation and use of the suit property.*
4. *(Though drawn as 1) Whether an order of permanent injunction do issue restraining the defendants... should issue.*
5. *(Though again drawn as 1) That this honourable court be pleased to grant such other and/or further relief as may be just and fair in the circumstances.*
6. *(Though drawn as 2) That the costs of this suit be provided for by the defendants.*

There is a supporting affidavit to the Originating Summons sworn by **Elizabeth Chepkurui Goj**, the applicant (*whom I will refer to as the plaintiff*). *Inter alia*, it is deponed that she holds a grant of letters of administration *ad litem* for purposes of filing suit on behalf of the estate of **Kipkoskei Bii** (*deceased*); that the deceased died on 18th May 2012; that he was the registered owner of the land parcels Kericho/Chesoan/1555 and 1564; that the defendants are not children of Kipkoskei Bii nor were they his dependants; that the defendants have however trespassed into the two properties and threatened violence; that a declaratory order should issue that Kipkoskei Bii is the absolute owner of the two properties and that a permanent injunction do issue against the defendants.

The defendants filed papers to oppose the Originating Summons. What they filed was described as a Reply/Defence to Originating Summons filed through the law firm of M/s E.K. Chirchir & Company Advocates. Basically, their response is that the land parcel Kericho/Chesoan/1555 was being held in trust by Kipkoskei Bii for the benefit of his two biological brothers and their heirs, defendants included, and that the land ought to be held in equal shares by the three brothers. They have asked that the land parcel Kericho/Chesoan/1555 be sub-divided into equal shares between the houses of the late Kipkoskei Bii, the late Kipkoech arap Bii and Kiprono arap Bii. Later in time, the defendants continued the suit on their own without counsel.

On 26th January 2015, I directed that the Originating Summons do proceed as if commenced by plaintiff and the reply filed by the defendants be deemed a defence. This is allowed by **Order 37 Rule 19** of the **Civil Procedure Rules**. I further directed that the suit be heard by way of viva voce evidence. In giving these directions, I was not persuaded that this was a fit case to be heard by way of affidavit evidence. In fact, I doubt if the matter, as drawn, was one that could fall under the provisions of **Order 37 Rules 1 (a) (e) and (f) , 2(b), 14 and 15**, of the **Civil Procedure Rules**. Be as it may, no party has suffered prejudice by the procedure adopted in commencing this suit as the issues therein were canvassed by way of oral evidence.

B. EVIDENCE OF THE PARTIES

The plaintiff testified as PW-1. She is the daughter of Kipkoskei Bii also known as Philip Kipkoskei Bii. She testified that the defendants are her cousins, being sons of Kipkoech Bii and Kiprono Bii, the brothers of her late father. Kipkoskei Bii, the plaintiff's father, died on 18th May 2012. Kipkoech Bii, is also deceased but Kiprono Bii is alive. She testified that her father and her two brothers through the proceeds of dowry paid to their sister, jointly purchased a land parcel Kericho/Chesoan/1558. She produced a copy of title deed and search to this property. She testified that upon demise of her father, a succession cause was filed. The plaintiff's mother was granted 1/3rd of this property (parcel No.1558) and she later sub-divided it into three portions so that she can get title deed in her name. This was duly done and she got the title to the land parcel Kericho/Chesoan/2936. The other two portions of the original parcel No. 1558 are to go to the families of Kipkoech Bii and Kiprono Bii, as the land was jointly owned between the three brothers. She testified that there is no problem over the ownership of the land parcel No. 1558 and that the same is occupied by the three families, with each family, settling on clearly demarcated portions of it.

She testified that the problem is over the land parcels Kericho/Chesoan/1555 and 1564, as the defendants have started laying claims over the two parcels. The land parcels were originally registered in the name of her father, but after the succession proceedings, they have now been transferred to the names of her mother, Anna Cherono Bii. The plaintiff holds a power of attorney donated by Anna Cherono Bii.

She testified that before her father died, he attempted to resolve the matter amicably, by calling clan elders. A meeting of the clan was held on 5th May 2012 and a resolution was reached. *Inter alia*, it was resolved that the family of Kipkoech Bii and Kiprono Bii, have no share in the land parcels No. 1555 and 1564. Despite this, the defendants have continued to cause them problems, culminating in several criminal cases for trespass, filed in the Bomet Magistrate's Court. She testified that the two properties were wholly owned by her father who had in fact charged them to secure some financial accommodation.

In cross-examination, she stated that her father bought the land parcels No. 1555 and 1564 through his own sweat as he was gainfully employed in a tea company. She agreed that there was no dispute over the parcel No. 1558 and that her father lived peacefully with his brothers. No case was filed when all the three brothers were alive as there was no dispute. She denied that she is the one who is causing problems over the two properties. She denied that the defendants were resident in the parcel No. 1555. She stated that parcel No. 1564 has tea grown on it and that the defendants have threatened that the tea will never be picked but will grow into trees. She insisted that it was only parcel No. 1558 that was jointly bought using the dowry of the sister to the three brothers. She admitted that some of the defendants had planted trees on the land parcel No. 1555 and she stated that this was the reason that her father had called for the clan meeting. She was of the view that if the defendants had been using land parcel No. 1555 when her father was still alive, this was illegal, and that is the very reason that her father tried to resolve the matter by calling the clan. She denied that the defendants used to plant maize on this land parcel. She stated that all defendants live in the land parcel No. 1558.

PW-2 was Anna Cheroni Bii, the wife to the late Kipkoskei Bii. She testified that the three brothers bought the land parcel No. 1558 using the proceeds of the dowry of their sister and each brother occupied separate but distinct portions of this land. She testified that her husband later bought the other two parcels. He first purchased the parcel No. 1564 and later the parcel No. 1555. This parcel No. 1555 is immediately adjacent to the parcel No. 1558, that she stated was jointly bought, only that they are separated by a road. She testified that her husband bought these latter two parcels using his own money as he was gainfully employed. She testified that some of the defendants planted trees in the parcel No. 1555 which prompted her husband to call a clan meeting. The meeting resolved that the defendants cut and remove the trees. This was done, but the defendants later stopped the plaintiff from tilling the land, and continued to graze their cattle on this land. She testified that all attempts at resolving the matter have come to naught.

In cross-examination, PW-2 stated that the land parcel No. 1555 was purchased in the year 1962. She testified that her late husband permitted his brothers use of the land to graze cattle as a way of assisting them while they established themselves. She testified that the said land was not developed and was mostly used for grazing, though at some point, Ludia, the wife to one of the brothers, was allowed to till a portion of it for a short time. She stated that the defendants, and not their parents, were sued because it is they who have been causing trouble over the land. It was put to the witness that the defendants have not yet got alternative land to graze their cattle, the suggestion being that the permission granted by the deceased must continue, but PW-2 stated that they are no longer interested in allowing them use of the land. She stated that her late husband had already asked the defendants to vacate even before his death.

PW-3 was Lucio Nyamweno. She is sister to the three brothers. She testified that their family was poor and had no land. When she got married, she encouraged her brothers to use the dowry paid to purchase land, so that they can be able to raise their families. That is how the land parcel No. 1558 was bought. In addition to this land jointly acquired, Kipkoskei bought two other parcels from his own pocket, which properties were not for sharing. In cross-examination, she affirmed that what was bought using her dowry was where the three brothers settled, which is parcel No. 1558.

PW-4 was Paul Kipkurui Soi. He comes from the same clan as the defendant and is a distant relative to them. He testified that before he died, Kipkoskei called the clan elders to resolve the dispute. The clan deliberated and resolved that the land in issue solely belonged to Kipkoskei. He produced the minutes and resolution as an exhibit.

With the above evidence, the plaintiff closed her case.

The defendants are sons of the brothers of Kipkoskei. The totality of the evidence of the defendants was that from when they were born, they utilized the land parcel No. 1555, though they resided in the parcel No. 1558. They testified that the land parcel No. 1558 was divided into three portions where each of the three brothers settled and built their houses. The defendants have also built their houses in the former parcel No. 1558. The parcel No. 1555 was mostly used for grazing cattle and Kipkoskei also allowed them to plant trees in a portion of it. They testified that there was no problem before Kipkoskei died, but that it is Elizabeth (the plaintiff), who is causing trouble by denying them use of the land parcel No. 1555 and by insisting on ploughing it yet they (defendants) have no alternative grazing land. They insisted that the land parcel No. 1555 was jointly owned by the three brothers although they had no document to show any evidence of joint ownership. They stated that they have no claim over the land parcel No. 1564.

DW-8 was Ludia. She is the wife of Kipkoech Bii, one of the brothers of Kipkoskei. Her husband is also deceased, having preceded Kipkoskei. She testified that when she got married, Kipkoskei showed them where to reside and also allowed her to till the land parcel No. 1555. She stated that previously the land was being tilled by all the three families. In cross-examination, she agreed that the land parcel No. 1555 was never developed and that they all resided in the land parcel No. 1558. She agreed that she was allowed by Anna, wife to Kipkoskei, to till a small portion of the land parcel No. 1555. She was of the opinion that the clan meeting was not about ownership of the land parcel No. 1555 but that Kipkoskei's complaint was that he wanted the trees planted by the defendants removed. She was also of the view that her family should get a share of the land.

DW-9 was John Kiprono Bii, the surviving brother of Kipkoskei. He testified that the land in issue belongs to the three brothers and that Kipkoskei only had one land parcel for himself (in reference to the parcel No. 1564). He testified that the land was jointly owned by the three brothers only that Kipkoskei registered it in his own name. In cross-examination, he agreed that dowry was used to pay for the land parcel No. 1558. He was however at pains to explain how the land parcel No. 1555 was jointly bought.

DW-10 was Andrew Kiprotich Langat. He is a village elder. He testified that before Kipkoskei died he heard from one arap Koech, that he (Kipkoskei) had given him cows for purchase of the disputed land.

With the above evidence the defendants closed their case.

None of the parties submitted.

C. DECISION

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

Although the plaintiff claimed that the dispute was over the land parcels No. 1555 and 1564, it emerged in the course of the proceedings, that there is no dispute over the land parcel No. 1564. There was consensus among the defendants that they have no claim over it. Neither is there any dispute over the land formerly registered as parcel No. 1558. That land has been carved into three portions and each family is resident in their portion. The dispute herein is squarely over the land parcel No. 1555.

The position of the plaintiff is that this land parcel No. 1555 was purchased through the sweat of her late father, Kipkoskei, and that the family of the brothers of Kipkoskei have no share in it. It is the plaintiff's case that the only property that was owned jointly, was the parcel No. 1558, which was bought using the dowry of the sister of the three brothers. The position of the defendants is that this too, that is, parcel No. 1555 was jointly owned by the three brothers.

I have looked at the title deeds produced by the plaintiff in this case. Of the three title deeds produced, only one, that is the title deed to the land parcel Kericho/Chepsoen/1558 was jointly registered in the names of the three brothers. That title was issued in the year 1975 and it is indicated that each brother has a 1/3rd undivided share in the said land. The other two parcels, that is parcel numbers 1564 and the disputed parcel No. 1555 were in the sole name of Kipkoskei. Although the defendants attempted to argue that Kipkoskei held the said land in trust for the three of them, I have seen no evidence of any trust. None

of the defence witnesses tabled any evidence that the other two brothers contributed towards the purchase of this land parcel No. 1555. Neither can it be argued that there is a customary trust as the said land was not the ancestral land of the three brothers.

I also find it informative that the land parcel No. 1558 was registered jointly, yet the land parcel No. 1555 was only registered in the name of Kipkoskei. If the trend was to register jointly what was jointly owned, then you would also have expected the land parcel No. 1555 to be registered in the joint names of the three brothers, in the same manner that the land parcel No. 1558 was jointly registered. It was not. It was solely registered in the name of Kipkoskei.

There is also no evidence that any of the brothers of Kipkoskei attempted to claim the land while Kipkoskei was still alive. They seem to have kept a respectful distance when it came to the utility of the land in dispute. The plaintiff's witnesses appeared to me forthright and truthful and I believe their evidence that Kipkoskei only allowed his brothers and their families to make use of the parcel No. 1555 so as to establish themselves in life. He expected that the two brothers would improve their lot, just as he had improved his own, and that they would purchase more land for themselves. This clearly never happened. Neither can the defendants be heard to argue that since they have not yet been able to establish themselves and be able to buy land for themselves, then they must own a share of the land parcel No. 1555. That is a convoluted argument for a licence can be revoked at any time. The defendants should not be bitter that the family of Kipkoskei seem to be doing well while they have been left behind. I can do no better than echo the advice that their aunt, PW-3 gave them while she was giving evidence. She asked them to work hard and get their own land, and stop eyeing the land of others. That is precisely what the defendants should do and I sincerely wish them the best in their life and hope that their lot will improve by sheer hard work.

The upshot of the above is that I find that the defendants and the families of Kipkoech and Kiprono, the two brothers of Kipkoskei, have no claim whatsoever over the land parcel No. 1555. As admitted, they have no claim either over the land parcel No. 1564. I am of the firm belief that neither land parcel No. 1564 nor the land parcel No. 1555 were ever held by Kipkoskei in trust for his other two brothers or their families. I therefore see no reason why the plaintiff's case should not succeed. It succeeds. I enter judgment for the plaintiff and make the following final orders :-

- 1. I declare the family of Philip Kipkoskei Bii, represented by the plaintiff, as the rightful owners of the land parcel Kericho/Chesoan/1555 and Kericho/Chesoan/1564.*
- 2. I hold that the late Philip Kipkoskei Bii did not hold the land parcels Kericho/Chesoan/1555 and Kericho/Chesoan/1564 in trust for his two brothers, Kipkoech Bii and Kiprono Bii, nor in trust for the descendants of the two brothers, who include the defendants herein, and further hold that the defendants have no claim whatsoever over the land parcels Kericho/Chesoan/1555 and Kericho/Chesoan/1564.*
- 3. I issue a permanent injunction restraining the defendants from the land parcels Kericho/Chesoan/1555 and Kericho/Chesoan/1564.*
- 4. The defendants shall jointly and/or severally shoulder the costs of this suit.*

It is so ordered.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 27TH DAY OF FEBRUARY, 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of

Plaintiff - present

Defendants - present

No appearance for M/S Kiplenge & Kurgat & Co.

Advocates for the plaintiff

Defendants acting in person - present

Lilian – Court Assistant