



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 4 OF 2013

ESTATE OF PHILOMENA CHEPETUI

represented by

JOSEPH MARIACH PLAINTIFF

VERSUS

MIRIAM CHEMAIN DEFENDANT

J U D G M E N T

INTRODUCTION

1. The plaintiff is the administrator of the estate of his late mother **Philomena Chepetui** who died on **20/5/1978** (deceased). The deceased was the wife of **Philimona Cheptor** who died in **1971**. The defendant is the wife of **Joel Chemain** who is the paternal grandfather of the plaintiff. The deceased was the owner of **Plot No. 174 Siyoi**. The plot was about **35 acres**.

2. Before the deceased died, she had sold **6 acres** to the defendant. The defendant later claimed that she had bought the remaining **29 acres** from the deceased. She had herself registered as owner of the **35 acres**. The plaintiff brought this suit seeking a declaration that the defendant is holding **29 acres** part of **LR. No. West Pokot/Siyoi/174** (suit land) in trust of the estate of the deceased and the trust should be terminated and the suit land subdivided and distributed equally between him and his brother.

PLAINTIFF'S CASE

3. The plaintiff testified that the deceased had two sons and a daughter. Before the deceased died she sold 6 acres to the defendant. The deceased used to lease out the remainder of the land. When the deceased died, the plaintiff was taken in by his maternal uncle who was living at Sigor. His younger brother David was taken in by his paternal uncle Simon who was living at Muino.

4. In Pokot tradition once a person dies, a remembrance ceremony is conducted after one month. It is during this ceremony that it is decided on how deceased's properties are to be treated. In the case of the deceased's property it was decided that the plaintiff's grandfather Joel Chemain was to take care of the deceased's land until the plaintiff and his brother were able to take over. The plaintiff sought to come back to suit land. The defendant's husband told him that they had taken a loan and used the property as

security. He asked the plaintiff to wait until they cleared the loan. The defendant's husband later offered to purchase three acres for him and his brother which offer he declined.

5. The plaintiff went to the lands office where he carried out a search. The search revealed that the defendant had registered herself as the owner of the entire land which included the 29 acres she had not bought. The plaintiff went and had a caution lodged against the title to the suit land in 2004. The plaintiff now wants the court to declare that the defendant is holding the suit land in trust for the estate of the deceased.

DEFENDANT'S CASE

6. The defendant testified that on **14/3/1977** she bought **6 acres** out of **Plot No. 174** from the deceased. She paid Kshs.6000/= for the six acres. The deceased remained with 29 acres which she later on bought from her. She testified that she does not recall when she bought the remaining 29 acres but that it was in 1977. She said that she paid Kshs.29,000/= for the 29 acres.

7. The deceased asked her to let her stay on the land until she could harvest her maize and move out of the land which she had sold. She allowed her to stay on but the deceased became sick and died three months later. She buried the deceased on the suit land as the deceased had nowhere having sold all her entire land. She then proceeded to demolish the deceased's house.

8. The defendant contended that the plaintiff moved out of the suit land because the same had been sold to her and that she is the one who took the plaintiff to a driving school where he finished and was employed by a company called Mowlem which was constructing Kapenguria - Lodwar road. The plaintiff was later employed as a driver by her husband. She states that the plaintiff was an adult when she bought land from the deceased and that the plaintiff was a witness to both agreements; the one for 6 acres and the one for 29 acres.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

9. The plaintiff contends that the defendant only bought 6 acres from the deceased and that she did not purchase the balance of 29 acres. The defendant on the other hand contends that she at first bought 6 acres and later on bought the remaining 29 acres. The issue which emerges for determination from the rival contentions is whether the defendant bought 29 acres from the deceased or not. There is no contention that the defendant bought 6 acres from the deceased. There were witnesses to the agreement for sale. The witnesses included the plaintiff. The purchase of the 6 acres was reflected in the adjudication register held by the Ministry of Lands. The adjudication register was brought to court by **PW4 Samuel Philip Majani** who produced an extract of the register [Exhibit 6] after the court viewed the original register. It is indicated in the adjudication register that 6 acres were sold to the defendant

10. The defendant contends that she later on bought 29 acres from the deceased. She does not recall when she bought the 29 acres. She only says that it was in 1977. The defendant produced an agreement which she says was in respect of the 29 acres. She produced it as Defence Exhibit 2. This agreement is not dated. The amount of the purchase price is not indicated. The agreement is a coupon copy of the original. There was no evidence adduced as to where the original was.

11. The agreement which is written in Swahili states as follows:

“mimi nimekubali kumuuzia Mrs. Miriam Chemain shamba langu lote. Tangu mwaka jana mwezi wa April ekari (6) na baadaye mwezi huo huo April,1977 nikamuuzia shamba lote liliobakia”

It is important to note that there is no date in this agreement. The agreement is suggesting that in April of the previous year, the deceased sold 6 acres and in the same year in the month of April the deceased sold the remainder of her land. This agreement is not clear. To begin with the sale of the six acres was not in April, 1977. The sale was on 14/3/1977. Whichever way one would interpret the agreement produced as

Defence Exhibit 2, it cannot make sense. Even if it is assumed that the sale took place in March and April, 1977, one wonders why one agreement written a month earlier would clearly spell out the terms of the agreement and yet in the following month, another agreement involving the same parties is drafted in an incomprehensible manner. The plaintiff, and the deceased are alleged to have signed the agreement for 29 acres. It is the defendant's evidence that the first agreement of 14/3/1977 was drafted by the plaintiff. Why wasn't the plaintiff asked to draft the second agreement as well if indeed there was sale of 29 acres?. The truth of the matter is that there was no such agreement as claimed by the defendant. The signature of the plaintiff may have been taken from the agreement of 14/3/1977 and copied on to the agreement produced as Defence Exhibit 2. This is because Defence Exhibit 2 is a coupon copy and not the original copy.

12. If there was any sale of 29 acres, then the same would have been reflected on the adjudication register at the lands office just like the first sale of six acres which was reflected in the register.

13. The defendant while under cross-examination stated that she did not produce the agreement produced as Defence Exhibit 2 when she went to process title for the land. One then wonders how the lands officials were able to process title for the entire land when the record showed that she only bought 6 acres. Titles were processed based on the records in the adjudication register. The adjudication register showed that the defendant had bought six acres. There was no way she would have been properly registered as owner of the entire land whose records indicated that the deceased was owner of the remainder having sold six acres to the defendant. The extract of the adjudication register produced show that the deceased's name was deleted and replaced with that of the defendant. There are no remarks accompanying the deletion. The only remarks which are on record are in respect of sale of 6 acres vide agreement of 14/3/1973. I therefore find that there was no sale between the deceased and the defendant for the remainder of her land. The agreement produced as Defence Exhibit 2 was actually a forgery which was intended to defraud the deceased of her land. This forgery may have been committed after the demise of the deceased. **PW2 Joshua Lokorua** who is alleged to have signed the agreement denounced the same. He did not sign the agreement.

14. The next issue for determination is whether the defendant is holding the suit land (29 acres) in trust for the estate of the deceased. There is evidence on record that the plaintiff is relative of the defendant's husband. This is conceded by the defendant in her own evidence. The husband of the defendant is a grandfather to the plaintiff. There is also evidence that when the deceased died, the plaintiff and her brother went to stay with relatives. **PW3 Cheringanyang Pkurkat Murui** a 77 years old man testified on what he knew about the land in issue. He testified that the defendant had bought 6 acres from the deceased. After the deceased died, a remembrance ceremony was conducted where the task of taking care of the 29 acres was given to the defendant's husband. The defendant's husband was given this task because he had previously assisted in resolving a dispute between the deceased and persons who had leased the land from the deceased. Besides this, the defendant's husband was related to the plaintiff's family. The plaintiff and his younger brother had already been taken in by their uncles.

15. **PW5 Simon Kanyirit Lokelisi** is uncle to the plaintiff. He testified that after the deceased died, he went with the plaintiff's younger brother David Ruto to stay with him at Muino in Sigor. A remembrance ceremony was conducted after one month where the defendant's husband was given the task of taking care of the land which the deceased had not sold. Chemain the husband of the defendant was to take care of the land on behalf of the children of the deceased. This witness testified on how he came to know that the defendant had had herself registered as owner of the land which they had been given to take care of on behalf of the deceased's children. This witness testified that the family of Chemain were present during the remembrance ceremony when Mr. Chemain was given the task of taking care of the land left by the deceased.

16. The defendant had the land registered in her name on **17/5/1979**. The evidence adduced by the plaintiff has shown that she only bought 6 acres. It is therefore clear that she is holding the 29 acres in trust for the estate of the deceased. The defendant's argument that the plaintiff and his brother moved out of the suit land because it had been sold has no basis. Evidence has shown that the two brothers were young and could not take care of the land by themselves. There is evidence that there were people who

had disputes with the deceased and that it is the husband of the defendant who resolved the dispute. The plaintiff was barely out of his teenage and that is why he went to stay with his uncle not that their land had been sold.

DISPOSITION

17. Having found that the defendant did not purchase 29 acres from the deceased and having found that the defendant is holding 29 acres in trust for the estate of the deceased, I order that the said trust be terminated and the 29 acres be shared equally between the children of the deceased. The defendant should have her six acres which she lawfully bought from the deceased. The defendant shall bear the costs of this suit.

Dated, signed and delivered at Kitale on this **28th** day of October, 2015.

E. OBAGA

JUDGE

In the presence of M/s Mufutu for Mr. Kiarie for Plaintiff and M/s Munialo for M/s Arunga for Defendant.

Court Assistant – Omulindi.

E. OBAGA

JUDGE

28/10/15