



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITALE**  
**CIVIL SUIT NO. 95 OF 2011**  
**ROSA CHEMUTAI NGOSOSEI**  
**JONAH KIPSEREM.....PLAINTIFFS**  
**VERSUS**  
**SYLVESTER ONDERE.....DEFENDANT**

**J U D G E M E N T**

**INTRODUCTION**

1. The Plaintiffs are administrators of the estate of the late Daniel Kiboy Arap Ngososei who died in 1988 (Deceased). The deceased owned an unsurveyed portion of land at Kimoson farm.
2. The plaintiffs have brought this suit against the defendant seeking an order of eviction and injunction in respect of LR NO. Waitaluk/Kapkoi Block 6/Kimoson/51.
3. The defendant who was duly served with summons neither entered appearance nor filed defence. The hearing therefore proceed by way of formal proof.

**PLAINTIFFS CASE**

4. At the hearing, the first plaintiff stated that she was wife to the deceased and that the second plaintiff is her son. Prior to the death of the deceased, the deceased had moved his family from Kimoson farm to Moiben where he died in 1988.
5. The plaintiffs processed grant of letters of administration which was issued to them. The grant was duly confirmed. The plaintiffs then had the survey on the deceased property carried out after which they obtained title in 2002.
6. The first plaintiff testified that when they came back to the land to construct, they found the defendant who had occupied it. When they asked him why he was on their land, he told them that he had bought the land from the deceased.
7. The first plaintiff testified that the defendant had taken her to the Land Disputes Tribunal where the tribunal ruled in her favour. She told the court that she had filed all documents in support of her case in

court and that she wished to rely on them.

8. The second plaintiff associated himself with what the first plaintiff had stated in court and contended that the suit land belonged to them.

### **ANALYSIS OF EVIDENCE**

9. The plaintiff's have averred in their plaint that the defendant herein had bought 0.2 acres from one Simon Kago Muranga who had bought land from the deceased. The plaintiff's contend in the pleadings that the defendant has since encroached on to the suit land and put up structures and planted trees without regard to the plaintiffs as owners.

10. Despite the plaintiffs averments in the plaint, there was no evidence adduced whether the defendant is occupying the entire 1.379 of the suit land or he is occupying part of it.

11. As at the time the deceased died, the land had not been surveyed. There is no evidence adduced to show how much land the deceased had. However from the documents filed in court, it is clear that the deceased had sold part of his land to third parties.

12. Though the first plaintiff testified that the defendant took her before the Land Disputes Tribunal which ruled in her favour, no such evidence was produced. What the first plaintiff filed in court is a copy of a ruling arising from a judicial review application which had been filed by three individuals including the present defendant. The three were contending that the verdict of the Lands Disputes Tribunal had been given in favour of the first plaintiff herein where she was given 6 acres without regard to the fact that they had bought land from the first plaintiff's deceased husband. The application by the three was allowed and the verdict of the Tribunal and the court's judgement adopting the same were quashed.

13. It is not clear how then the plaintiff 's herein finally managed to have themselves registered as owned of 1.379 hectares which is slightly above 3 acres.

14. A look at the certificate of confirmation of grant issued to the plaintiffs on 15/3/2001 shows that the Kimoson plot referred to as Plot 51 had been sold and that the court expected the administrators to declare the sale to court before further orders could be made. This therefore means that the Kimoson plot which forms part of the suit land was not distributed as part of the estate of the deceased as the same had been sold and the sale had not been declared.

15. The question which then arises for determination is whether the plaintiffs have proved their case on a balance of probabilities to warrant issue of the orders they are praying for.

16. An order of eviction should only be given when there is clear evidence that the defendant is residing on a plot where he is not supposed to occupy. In the present case there is evidence that the defendant at least bought some land which belonged to the deceased. There is no evidence which has been adduced by the plaintiffs to show that he is occupying a portion other than the one he bought.

17. There is evidence (documentary) that the defendant and three others managed to convince the High Court in Miscellaneous Civil Application No. 23 of 2000 to quash a tribunal decision which had given the first plaintiff 6 acres.

18. The plaintiffs obtained title in 2002 for three acres. There is no evidence to show that the defendant was given a separate title for what he had purchased from the deceased. It will therefore be unfair for the court to give eviction order on insufficient evidence. Eviction orders cannot be given merely on the basis of title. There must be evidence that the person sought to be evicted is actually on the land. It is very possible that the deceased may have sold all his land and moved his family before he died. It is also possible that the plaintiff came to process title for the same property which had been sold. I am fortified in this by the certificate of confirmation of grant which indicates that plot 51 had been sold and that the same had not been declared as the judge indicated. The property was not part of the estate of the

deceased otherwise nothing would have been easier than stating so during distribution of the deceased's estate.

19.It was incumbent upon the plaintiffs to prove their case to the required standards that is on a balance of probabilities. In the **case of Bachu -Vs- Wainaina 1982 KLR 108** it was held that the burden of proof at a formal proof is the same as that required in any civil case.

### **DECISION**

For the reasons given hereinabove, I find that the plaintiffs have not proved their case against the defendant on a balance of probabilities. The same is hereby dismissed with no order as to costs.

Dated, signed and delivered at Kitale on this 25th day of February, 2014.

**E. OBAGA,**

**JUDGE**

In the presence of first plaintiff. Court clerk – Kassachoon.