



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 59 OF 2011

ZIPPORAH CHELAGAT MAIYO

RAEL CHEPNGETICH

LILIAN CHEPTANUI KEMEI..... PLAINTIFFS

VERSUS

1. TITO KIPLIMO CHEPKWONY

2. SILAS KIPTANUI DEFENDANTS

JUDGEMENT

INTRODUCTION

1. The three plaintiffs are daughters of John Chepkwony Kemei. The first defendant is a step brother of the plaintiffs. The second defendant is a nephew of the first defendant.
2. John Chepkwony Kemei married two wives. The first wife was Milkah Chepkering Chepkwony who is the mother of the first defendant. The second wife was Priscillah Cherono Chepkowny now deceased and who was the mother of the plaintiffs.
3. John Chepkowny Kemei separated with his first wife in 1973 after the first defendant had been born.
4. The three parcels of land which are the subject of this suit namely Kimondo Endebess Block 2/ Mubere/243, 242 and 241 (suit lands) are as a result of dub division of parcel No. Kimondo/Endebess Block 2/Mubere/185 which had been registered in the name of Priscillah Cherono Chepkwony mother to the three plaintiffs. The suit lands are now registered in the names of the plaintiffs in the respective order mentioned hereinabove. The registration was as a result of succession cause No. 81 of 2009 at Kitale High Court.
5. The Plaintiffs claim is an order of eviction against the defendants from the suit lands and a permanent injunction restraining the defendants from in any manner interfering with the suit lands.

PLAINTIFFS CASE

6. PW1 Zipporah Chelagat Maiyo testified that the suit lands were initially owned by their mother who died in 2003. The land owned by her mother was Kimondo/Endebess Block 2/Mubere/185. When her mother died, their father obtained grant in respect of her estate. Their father then shared out the land to the plaintiffs who are now the registered owners.
7. PW1 testified that the land owned by her mother was 11.2 acres and that her deceased mother bought the same from a white settler. She testified that the land registered in the name of her

- mother was not their ancestral land and that their father was given 4 ½ acres from their paternal grandfather.
8. PW1 further testified that the first defendant forcefully occupied 8 acres of the suit lands in 2009. That the eight acres cut across the three parcels which are now registered in the plaintiffs names. She contends that the first defendant should have claimed a share of the ancestral land and not from the land which was owned by her late mother.
 9. PW1 contends that she does not know the first defendant and that he should be evicted from the suit lands. On the part of the second defendant, she testified that he is on the suit lands at the instance of the first defendant who asked him to take care of the suit lands on his behalf.
 10. PW2 John Chepkowny Kemei testified that he had two wives. The first one is the mother of the first defendant and that they separated with his first wife in 1968. He later married a second wife who is mother of the plaintiff. He testified that the plaintiffs mother bought 11.2 acres from Agricultural Development Corporation through proceeds from sale of cows and farming. He further testified that he inherited 7 acres from his father being the ancestral land. He gave out three acres to his brother and he remained with 4 acres.
 11. PW2 contends that the first defendant is not entitled to any land which belonged to the mother of the plaintiffs. He testified that he is willing to give the first defendant part of the ancestral land. He testified that the first defendant had taken him before Kwanza Land Disputes claiming 5 acres.

DEFENDANTS CASE

12. DW1 Tito Kiplimo testified that he is son of John Chepkwony Kemei through his first wife whom he divorced. His grandfather Kipkemei Tiony Chemirmir gave him 5 acres of their ancestral land. When his grandfather died, he asked his father to give him 5 acres which had been given to him by his grandfather. His father refused to give him the 5 acres. This forced him to go before Kwanza Land Disputes Tribunal. The tribunal ruled that he should be given 5 acres which his grandfather had given him.
13. DW1 further testified that his father later bought his own land besides the one he inherited from his father. The first defendant contended that the land in issue was not bought by the mother of the plaintiffs as alleged but that it was his father who had the land registered in the name of the plaintiffs mother.
14. DW2 Silas Kiptanui testified that he is nephew of the first defendant who had asked him to take care of the first defendant's land as he was away in Eldoret. He contends that he should not have been sued as he has no interest in the land.

ISSUES FOR DETERMINATION

15. The issues for determination are firstly whether the land initially registered in the name of the plaintiffs mother was bought by her or not. Secondly I have to determination whether the land initially registered in the name of the plaintiffs mother was ancestral land given to the father of both the plaintiffs and first defendant by their grandfather. Thirdly whether the grandfather of the first defendant gave him 5 acres of the ancestral land. Fourthly is the first defendant entitled to a share from the suit lands?.

ANALYSIS OF EVIDENCE

16. On the issue as to whether the land initially registered in the name of the plaintiffs mother was bought by their mother, the first plaintiff's evidence is that it is her mother who bought the land from the Government. On the other hand the first plaintiff called her father as a witness. Her father testified that the plaintiffs mother bought the land from Agricultural Development Corporation through proceeds of farm produce and sale of cows.
17. The plot in issue was registered in the name of the plaintiff's mother in 2006. The first defendant called DW 3 William Some Kitur and DW4 Philip Kiprotich Bett. The two are director and secretary of Mubere Farm respectively. They testified that Mubere Farm comprised of members who came from Nandi to Trans – Nzoia to buy land. The group bought land known as Mubere Farm in Endebess. One of the members of Mubere Farm was Kipkemei Arap Tiony who was the

- father of John Chepkwony Kemei. Kipkemei Arap Tiony was a shareholder who owned 24 acres. The said Kipkemei Arap Tiony sold part of his land and he finally remained with about 11 acres which his son John Chepkwony Kemei inherited after the demise of his father in 1982.
18. The two officials of Mubere Farm gave the history of the land in dispute. They said that the land never belonged to the second wife of John Chepkwony Kemei as alleged. DW3 testified that John Chepkwony Kemei later bought 4 acres of his own land. He was a witness to the sale agreement.
 19. The two witnesses further testified that they were aware that Kipkemei Arap Tiony had given 5 acres of his land to the first defendant but that his father had refused to give him the five acres. DW3 testified that he was a witness before the Kwanza Land Disputes Tribunal which ruled that the first defendant should be given 5 acres by his father.
 20. The proceedings before the Kwanza Land Disputes Tribunal are contained in the Land Case No. 34 of 2011 at the Chief Magistrate's Court Kitale. The verdict of the Tribunal was adopted as judgement of the court. The Tribunal ordered the first defendant's father to give him five acres. The case file was produced by DW7 Hassan Ali of the Civil Registry as defence exhibit 1.
 21. The defendant's witnesses have shown that the land in question was not bought by the mother of the plaintiff. It was infact ancestral land which the father of the plaintiff and the first defendant inherited from his father Kipkemei Arap Tiony. I therefore find that the land in issue was not bought by the mother of the plaintiff.
 22. On the issue as to whether the land in issue was ancestral land inherited by John Chepkwony Kemei from his father Kipkemei Arap Tiony, there is evidence from DW3 and DW4 who were officials of Mubere Farm. They testified that the land belonged to Kipkemei Arap Tiony who died in 1982 after which his son John Chepkwony Kemei inherited it. I find that the land in issue was ancestral land.
 23. On the issue whether the first defendant's grandfather gave him 5 acres, there is overwhelming evidence that indeed the first defendant's grandfather gave him the 5 acres. The proceedings before the Kwanza Land Disputes Tribunal show that the second plaintiff is on record as having said that she was aware that the first defendant was entitled to 5 acres which his grandfather gave him. She was opposed to her father's reluctance to give the first defendant his five acres. No wonder that is why she did not come to court to testify in this case which appears to have been filed by the first plaintiff who had the audacity to denounce his own half brother when all the rest are acknowledging him.
 24. In the proceedings before the Kwanza Land Disputes Tribunal, three sisters of John Chepkwony Kemei testified. They all said that their father had expressed his wish to give his grandson the first defendant 5 acres but that his father had refused to give him the 5 acres. This is despite the fact that they have been urging him to give him the 5 acres to no avail. One of the three sisters testified before this court She is DW6 Dorcas Kandagor. She testified that she was aware that her father who is grandfather of first defendant had given him 5 acres.
 25. The first defendant's father never appealed from the decision of the Tribunal. The verdict therefore stands and the first defendant can execute the decree therefrom. The land which the first defendant's father has is 16 acres. There are the eleven acres which was registered in the name of the mother of the plaintiffs as well as the 4 acres which he bought making it 16 acres. The 1st defendant is therefore entitled to a share of his father's land.

DECISION

26. On the strength of the evidence adduced and the reasons given hereinabove, I find that the plaintiffs suit cannot be sustained. They cannot evict their half brother from land where he is entitled to a share. The result hereof is that the plaintiffs suit fails and the same is hereby dismissed with costs to the defendants.

Dated, signed and delivered at Kitale on this 22nd day of May, 2014.

E. OBAGA

JUDGE

In the presence of Mr Kaosa for Plaintiffs and Mr Bororio for defendants. Court Clerk –
Kassachoon.

E. OBAGA

JUDGE

22/5/2014