



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 203 of 1992

KOBILO CHESONTIN.....1ST PLAINTIFF

CHEPTANUI SINYEI ROTICH.....2ND PLAINTIFF

VERSUS

CHESEREK CHELANGA KIPROTICH.....DEFENDANT

JUDGEMENT

In a Plaint dated 5th day of October 1992 the Plaintiffs sued the Defendant seeking the following reliefs:

- a)A declaration that LR. No. Cherangany /Kapoherop/44 belongs to the 1st and 2nd plaintiff.**
- b)An Order that the Defendant holds the said land subject to the rights of actual occupation, possession and use by the plaintiffs.**
- c) A declaration that the plaintiffs are entitled to the ownership of land by adverse possession.**
- d)THAT the Defendant holds the said land as trustee for the benefit of the plaintiff as the rightful owners of the said land.**
- e)Costs of this suit.**
- f) Further or other relief that this Honourable court may deem fit to grant.**

The Plaintiffs averred that at all material times the land known as Cherangany/Kapcherop/44 hereinafter “the suit property” was originally the property of Chelimo Cheboror the father of the 1st Plaintiff and on his death bequeathed the property to her the 2nd plaintiff who is also daughter of the first plaintiff. That sometime before the year 1970 the Defendant had been allowed to make use of a portion of the suit property by the said Chelimo Cheboror and that after the death of Chelimo Cheboror the Defendant registered himself as proprietor. The plaintiffs averred that the registration of the Defendant was subject to their rights of actual use, occupation and possession and that the Defendant was thus a trustee of the legal title in favour of the plaintiffs. That the plaintiff’s possession has been continuous adverse and uninterrupted since 1942.

Upon been served the Defendant filed a defence and counterclaim. He denied all the allegations of the plaintiffs and in his counterclaim prayed for an order of eviction of the plaintiff. The Defendant

averred in the counterclaim that he is the sole registered proprietor of the suit property. That the plaintiffs have unlawfully and without any colour of right encroached and trespassed on the Defendants suit property.

The parties framed the following issues as arising for determination:

- 1. Is the parcel of land known as Cherangany /Kapcherop/44 originally owned by one Chelimo Cheboror who later bequeathed the same to the 1st and 2nd plaintiff?**
- 2. Was the said parcel of land leased to the Defendant prior to and or in 1970 for use and did the Defendant thereafter acquire wrongfully title thereto without he permission or consent of Chelimo Cheboror father of the 1st Defendant?**
- 3. Is the said registration of the said parcel of land by the Defendant as the legal owner subject to the rights of actual occupation, possession and use by the plaintiff?**
- 4. Is the said parcel of land held by the Defendant in trust for the plaintiffs?**
- 5. Have the plaintiffs been in continuous possession, occupation and use of the said parcel of land since 1942 to date and is their interest therein adverse to that of the Defendant?**
- 6. Have the plaintiffs encroached and trespassed on he said piece of land?**
- 7. Have demand and notice of intention to sue been given and if so, has the Defendant refused and/or neglected to make good the plaintiffs' claim to the said land?**
- 8. Are the plaintiffs entitled to any relief?**
- 9. What are the courts orders as to costs and interest?**

After pre-steps the case was confirmed for hearing and hearing started on 13th June 2000 before Honourable Justice Nambuye. The 1st plaintiff was sworn in as PW1. Her father was Chelimo Cheboror. Her father belongs to the *rika of kimnyigei*. She did not know her age group. Her father was residing near Tugengo Secondary School. It is in Kapcherop area. Her father had land in Kapcherop and shared it to his children and gave her share. Her self she was given the land that the Defendant had taken. She lived there since his birth and death. The Defendant took the land after her father died. The Defendant has his own shamba. He is not on his shamba. He resides on his land but registered himself in respect of the land in question. He planted on another shamba of his while residing on their land. He did not purchase the land. He had asked for a place to put up a store for his maize. When her father died is when the Defendant started the process of registering the land in his name. She has resided on the land and planted trees. She has been on the land for over 12 years. The Defendant has never come to the land to ask her to move out. All he did was to have the land registered in his name. All he says is that since he has a title deed, there is nothing she can do to him. Her prayer is that the land is hers and she was born there. She just has one daughter. The Defendant was not entitled to inherit a share of the estate of her father.

On cross examination she stated that she has no blood relationship with the Defendant. He is a person from far off Marakwet. All she knows is that she is entitled to the land. She is aware that Cheserek has title to the land. They had blocked it and she did not know how the Defendant obtained title. She resides on the land with her husband called Kiprono Arap Serem. She is a Nandi. Her father gave land to her. Her father gave land to all her children. She resides with her daughter. She married but her husband died. The Defendant does not reside on the land so they do not meet. There was a case before the elders and it ended when Wazees resolved that I be given the land. It is not true that the Defendant bought land from her father. The Defendant used to grow maize in the foreet and asked to be allowed to put up a store for keeping his maize. The Defendant has not been looking after the land for him. The Defendant is on his own land and the plaintiff on the suit property. Further hearing was adjourned to 3rd July 2000.

On 3rd July 2000 the Second plaintiff was sworn in as PW2. She confirmed that the first plaintiff is her mother. They reside on the land given to them by their grandfather. The land is 42 acres and it belonged to Chelimo Cheboror who was her grandfather. She was present when the 1st plaintiff was given the land by her grandfather. The grandfather had distributed his land to his sons. The suit property was given to the first plaintiff. That the Defendant could not explain how he got the land. He moved to Chepsir and later came to settle on his land at Marakwet. The Defendant knows that they reside on the land. That the Wazees ordered that the Defendant to leave the land. She is praying that the court declares that the land belongs to them. The Defendant obtained title without consent of the plaintiffs.

On cross examination she said that she was born in 1935 about 65 years ago. She was born on the land. She did not marry. She was the only child. She has eight children. She wants the land because it is theirs. She had been tending tea on the land. She later stopped. They want the land because the Defendant has his own land. He obtained title without their knowledge and consent.

Joseph Kipruto Kipsang' was sworn in as PW3. He is a relative of the plaintiffs. He confirmed that Chelimo Cheboror who was his grandfather was the owner of the land. He knows the Defendant. The Defendant was residing in the forest. He requested for a place to store his maize. He came to reside on the suit property in 1974. He was herding on the suit property and put up a grass thatched house and was sued by the 1st plaintiff before the wazees. He left and did not come back. Since 1974 the plaintiffs have resided on the land. They have planted over 3000 trees. The Defendant has never tried to remove them. He also resides on the suit property together with the plaintiffs. On cross examination he said that he is 42 years old. His grandfather gave his father a different land and he informed his father that the 1st plaintiff will come to reside on the suit property. His grandfather informed him that he had given the 1st plaintiff the land and cattle. The Grandfather did not sell the land to the Defendant. The title was issued in 1981. A person could collect his title from 1972. He got registered in error from 1968. The 1st plaintiff was not present during land adjudication. Her grandfather died in 1967. The Defendant has no house on the land. He resides far off. The 1st plaintiff has a house on the land. He knows that the Defendant was summoned before Keitany Paramount Chief and he did not come.

PW4 was Daudi Kimatusek Chepkanga. He resides at Kapcherop within Marakwet District. He knows the plaintiffs as his neighbours. He knew the late Chelimo Cheboror. The suit property was his shamba. The plaintiffs reside on the shamba. He knows the Defendant by appearance. He has never resided there. In 1973-74 he was residing at Kapcherop. He did not have any herd of cattle on the land. He put up a store for maize earlier on. Since 1974 he has never seen the Defendant come back to the land. On cross examination he confirmed that the Defendant had put up a maize store. When the matter went to the wazee the Defendant contended that the land was his because he had a title. He did not know if the Defendant gave any goats and cattle for the land. He did not know when the Defendant took the title. The plaintiff closed their case.

Justice Nambuye was transferred and proceedings had to be typed. On 27th April 2005 the parties agreed that the matter should proceed from where it had reached. The plaintiff had closed their case and the defence case was to begin. On 13th June 2007, Mr. Buluma was holding brief for Birir and he sought an adjournment. The application was opposed and in a short ruling I declined the application for adjournment taking into account the age of this case and the fact that the date was taken by consent. I fixed the matter for hearing at 11am. At 12.10pm there was still no appearance for the Defendant and the Defendant was also not present. Counsel for plaintiff prayed that defence case be closed and I ordered that the defence case be closed as per provisions of Order IXB rule 3. I directed the plaintiff's counsel to file written submissions. On 25th July 2007 I fixed the case for judgment on 9th November 2007. I regret the delay in delivering this judgment. The delay was occasioned by factors beyond my control.

I have considered the pleadings, the evidence on record and the submissions of the plaintiff. I will proceed with the analysis taking into account the issues as agreed by the parties.

The first issue was whether the suit property was originally owned by one Chelimo Cheboror. From the evidence of PW1, PW2, PW3 and PW4 it is clear that Chelimo Cheboror was once resident on this

piece of land. He died in 1967 and there was land adjudication in 1968. During the land adjudication the Defendant got himself registered as proprietor of the land. As from 1972 it was possible to obtain title according to PW3. By this I think he meant that the adjudication register had been finalized. Counsel for the Defendant in cross examination pursued the line that the Defendant had purchased the suit property from Chelimo Cheboror. This to me was an admission that the deceased had 'title to the land'. I understand the predicament of the plaintiffs in not being able to produce any document to support the ownership of Chelimo Cheboror. The adjudication exercise had not started by the time Chelimo Cheboror died. In the absence of any evidence to the contrary I find that the suit property was originally owned by the late Chelimo Cheboror.

The second issue was whether Chelimo Cheboror deceased had leased the land to the Defendant and further whether the Defendant wrongfully acquired title over the same. All the witnesses agreed that the Defendant had put up a store on the land for keeping maize. According to the plaintiffs testimony Chelimo Cheboror deceased had granted a licence to the Defendant to put a store. The Defendant was planting maize in the forest. That the Defendant started herding cattle and put up a grass thatched house. That the 1st plaintiff sued him before the wazees and he contended that he had title but left the land and did not return. The burden of proof was on the Defendant to show that he had a lease from the late Chelimo Cheboror. He did not discharge this burden. The plaintiffs on the other hand have convinced the court that the Defendant was a licensee on the land. On the further question whether the Defendant wrongly obtained title the burden was on the plaintiffs. From the evidence available it is apparent that the Defendant was registered a proprietor during the adjudication exercise that commenced in the year 1968. The Defendant was the one on the land having erected a store. The plaintiffs were not around. The owner of the land Chelimo Cheboror had died a year earlier. The sons of the late Chelimo Cheboror had been given their shares and was thus not around. I infer that the Defendant capitalized on this vacuum and got himself registered during the adjudication exercise. It was upon the Defendant to show that he had consent of the late Chelimo Cheboror. He did not do so.

The Defendant knew that he was not a beneficiary of the estate of Chelimo Cheboror and it was therefore wrong for him to have misled the land adjudication officers during the land adjudication exercise.

The third issue is whether the title of the Defendant is subject to the rights of occupation, possession and use by the plaintiffs. This is a legal question that has basis on section 30 of the Registered Land Act. This section provides for some interests that do not have to be noted on the register. They are called "overriding interests." Such interests include occupational rights. The rights of persons in actual occupation of the land are overriding as long as they are disclosed when one inspects the land. All the plaintiff's witnesses confirmed that the plaintiffs actually reside on the land as from 1974. That the dispute was taken to the Wazees and the Defendant did not attend. Counsel for the Defendant in cross examination referred to a case No. 137/1990. It was between the Defendant and the first plaintiff. By virtue of section 30 of the Registered Land Act (now repealed) the title of the Defendant was subject to occupation rights of the plaintiff.

The fourth issue was whether the Defendant holds in trust the title of land. From the evidence of PW1, PW2 and PW3 the deceased Chelimo Cheboror bequeathed the land to his daughter the first plaintiff. The Defendant thus meddled with the estate of the deceased by getting himself registered to the prejudice of the plaintiffs who were heirs to the estate. The issue of law is whether the court can imply a trust in these circumstances. Counsel for the plaintiff has cited two decisions in support of the proposition that a constructive or resultant trust can be imposed by the court. In the case of **Kanyi v. Mathiora [1984] KLR 712** the Court of Appeal held that registered land as per section 163 of the Act is subject to the common law of England as modified by equity which brings in the equitable doctrines of implied constructive and resulting trusts. In the case a constructive trust arose when the land of the Respondent's father was registered in the appellant's name in favour of the children of the deceased. The facts in the Kanyi are material. The Appellant was the widower and the Respondent the daughter of the original owner of the suit land. The suit land was registered in the name of the appellant. The Respondent instituted the suit claiming half share of the suit land basing her claim on the inheritance right of unmarried daughter under Kikuyu Customary law and the court found that she was entitled to inherit the

land. The appellant appealed against the decision on the grounds that he was the first registered owner that customary law was not applicable, that the land was not held in trust and that the court could not rectify the register.

The court held that the appellant's registration was a first registration the rectification of which is prohibited by section 143 of the Act, however in this case the addition of the Respondents name does not amount to a rectification but an alteration by addition of the Respondents name to make the register conformable with the transfer for the land. It further held that the registration of the appellant under the Registered Land Act did not extinguish the Respondent's rights under Kikuyu customary law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee.

Counsel also cited **Mutsonga v Nyali [1984] KLR 425**. It was held in that case that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of section 163 of the Act which provides for the application of the common law of England as modified by equity. A constructive trust arose in favour of the plaintiff's father as the owner of the land under customary law when the land was first registered in the name of the Defendant. It was further held that though section 143 of the Act forbids any rectification of the land register where such rectification concerns a first registration, the meaning of rectification, which is the sense in which it is often applied, is to correct an entry in a register, and this is different from making an entry recording a lawful transfer ordered by the court.

I concur in principle with the application of the doctrines of constructive, resulting or implied trusts in land. The Defendant got himself registered to the land with no basis at all. He deprived the heirs of heir lawful inheritance. Equity will not suffer a wrong to be without a remedy. It is against conscience for the Defendant to keep the benefit obtained unlawfully. Consequently, this court declares a constructive trust in favour of the plaintiffs.

The fifth issue concerned possession of the land by the plaintiffs. From 1974 the plaintiffs have been in possession. They disposed the Defendant. They have openly occupied the land. Though he plaintiffs did not commence this suit as an Originating Summons for adverse possession the court is nevertheless empowered to give orders of adverse possession. An originating summons can be converted into a plaint if the court so directs. I find that the plaintiffs have been in occupation from 1974 and have thus acquired title by adverse possession. However this should have been pleaded in the alternative to the trust. They cannot co-exist. Given that the suit was not commenced as an adverse possession claim and that no extract of title was produced before court it would not be safe to make any orders based on adverse possession. I say the despite my recollection that I have once given orders of adverse possession in the absence of certified copy of abstract of title in a unique set of facts and circumstances.

The sixth issue concerned trespass by the plaintiffs. I have already established that the Defendant was holding the legal title in trust for the plaintiffs. They cannot therefore be considered trespassers on their own land.

From the above analysis I find that the plaintiffs are entitled to the following reliefs and judgment is entered against the Defendant accordingly:

- a) A declaration that LR. No. Cherangany/Kapoherop/44 belongs to the 1st and 2nd plaintiff as beneficiaries under a constructive trust created by the registration of the Defendant as owner.
- b) An Order that the Defendant holds the said land subject to the rights of actual occupation, possession and use by the plaintiffs.
- c) THAT the Defendant holds the said land as trustee for the benefit of the plaintiffs.
- d) THAT the name of the Defendant be removed from the register and substituted with the names of the plaintiffs and the trust be determined.

e) Costs of this suit to be paid to the plaintiffs

It is so ordered.

Dated AND SIGNED at Nairobi this 22nd day of AUGUST 2012.

M.K. Ibrahim
Judge

DATED AND Delivered At Eldoret on This 26TH Day Of SEPTEMBER 2012.

ABIGAIL MSHILA
Judge

In the presence of: Birir for Defendant

N/A for Plaintiffs.

Birir: Request for stay of Execution of Judgment for 45 days to file Appeal.

Court: Stay Granted for 45 days.