



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE 88 OF 1998

**THE MANAGEMENT COMMITTEE OF BAHARINI PRIMARY SCHOOL
Alias KAPKOROS PRIMARY SCHOOL.....1ST PLAINTIFF**

NATHANIEL KIPNGETICH CHEPKEINY.....2ND PLAINTIFF

ESTHER JEPKOECH KIBET.....3RD PLAINTIFF

MAGRINA JEPKOECH CHEMWEMO.....4TH PLAINTIFF

WILFRED BETT BOIT.....5TH PLAINTIFF

PAUL CHEMITEI.....6TH PLAINTIFF

VERSUS

JOHN CHEMWENO.....DEFENDANT

JUDGMENT

Through a Complaint dated 27th May 1998 and Amended on 19th October 2006 the Plaintiffs sued the Defendant for the following reliefs:

- a) **The recovery of land parcel number MOIBEB/MOIBEN BLOCK 3 (KAPSILIOT) 299 from and the cancellation/nullification of title of land in the name of the Defendant.**
- b) **A declaration that land parcel number MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT) 299 and 314 initially, before the fraudulent and unlawful acquisition, were one parcel of land and reserved/registered in the name of the Plaintiff at the first registration.**
- c) **An eviction of the Defendant from land parcel number MOIBEB/MOIBEN BLOCK 3 (KAPSILIOT) 299.**
- d) **An injunction to permanently restrain the Defendant by himself, his agents or servants or whosoever from entering into remaining in or dealing in whatsoever manner with land parcel number MOIBEB/MOIBEN BLOCK 3 (KAPSILIOT) 299.**
- e) **Costs of and incidental to this suit together with interest thereon at court rates.**
- f) **Any other or further relief this Honourable Court deems fit to grant in favour of the Plaintiffs.**

The Plaintiffs averred that the Defendant fraudulently and unlawfully acquired and deprived the 1st Plaintiff of the land parcel and the particulars of fraud on the part of the Defendant were pleaded in paragraph 5 of the Plaint. It was averred that the Defendant misrepresented that he was first registered owner and that he did not disclose the first registered owner.

The Defendant was served and filed a defence dated 15th June 198 and an amended defence dated 8th December 2006. and denied that the acquisition of the land parcel was unlawful. He averred that the Plaintiff had not joined necessary parties to the suit and further averred that by virtue of sections 27 and 28 of the Registered Land Act he had an indefeasible title. The Defendant also pleaded limitation of actions.

Hearing commenced on 29th June 2004 before Justice Dulu. Nathaniel Kipngetich Chepkeiny was sworn in as PW1. He stated that he was a former Chairman of Baharini Primary School also known as Kapkoros Primary School. He was just a parent then and the other Plaintiffs were also parents. They sued the Defendant because he grabbed the school plot No. 299. They got the number of the plot of when the land for Kasiliot Ranch Ltd was subdivided. The ranch was a company. The company had directors and John Cheserem was one of them. The plot that was given to the school was between 25 and 30 acres. Right now the school plot was in the name of the Defendant and he gave them plot number 314. The Defendant grabbed part of the plot. The school was built in the year 1985. The parents and school members did not give away the school land. The Defendant got his own parcel of land from the ranch like other members. It was through ballot voting on 23.7.83. n After the voting seven plots remained vacant but plot 299 was not one of them. When vacant plots was allocated Defendant was given plot 10 and 11. Some people later pursued plot 10 and 11 and they were allocated. When the Defendant lost the two plots he now came to the school. There was a Farm Committee that was responsible for allocating farms. Currently the school is on plot 314 and 299. He stated that they have come to court to seek help to get back the grabbed land. They tried to involve the D.O. but they were unsuccessful.

On cross examination he stated that when case was filed he was the chairman. But he is now a parent. He did not have a document to show that school plot was no. 299. He stated that however that number was given before title was issued. He was shown a copy of the title and he stated that the Defendant obtained it through theft. That the plot for the school was set aside as one of the public utility plots. It was around 1987 that came to know about plot number 314. They went to the D.O in 1988. They did not go with the directors of the ranch. He was shown a letter dated 30.6.88 and stated that the list given in the D.O's letter was not known to him. That the Defendant has put a fence on the land. He came with the surveyor before fencing. They went to the D.O's office to complain but he did not stop the Defendant. They did not put caution on the land.

In re-examination he stated that during balloting plot 299 was there but plot 314 was not there. When the plot was subdivided the school did not know. They still do not have title for the plot 314. They went to lands office and were given a map that is when they saw plot 314.

PW 2 was Magrina Jepkoech. She stated that she knows Baharini Primary School. She is a member of the School Committee. They have sued the Defendant due to the school land. When balloting took place the plot was balloted as public utility plot. After balloting a farm committee was formed to deal with plots that had remained vacant. Almost ten plots remained vacant. In total there are four primary schools, Kapkoros, Kamnasu, Kapsiliot, Konyalim and Kapkoros also called Baharini. She did not know how the land for Kapkoros was allocated to the Defendant. The D.O. could not resolve the matter and advised court action. On cross-examination she stated that it is the directors who decided on public utility plots. She was not aware whether the directors met. Cheserem was given 17 acres near the school. The school was given 25 acres. She did not know that the school had a title for 13 acres. She thought that Cheserem grabbed the plot, because he did not tell them he was taking the plot. He put up a wooden structure without a roof. He did not bring cows to the plot. She denied that they sat down as a school committee and gave part of the land to Cheserem. She stated that the school has now remained with only 8 acres.

PW3 was Esther Chepkoech Kibet. She was one of School Committee members. They have sued the Defendant. Kapkoros was given between 25-30 acres. The school does not have the land given. It was

subdivided. John Cheserem took part of the land. She did not know who gave him the land. There was no committee meeting that gave him the land. She requested court to reinstate the 18 acres to the school. She confirmed that the directors of the ranch are the ones that allocated land to the school. The manager of the ranch Joshua Chebobei was the one allocating land to schools and individuals. The original ballot number for the school was 299. Number 314 came after subdivision.

PW4 was Paul Ayabei Chemitei. He stated that he was a parent and committee member of the school. The school was allocated 29 acres. The Defendant took 18 acres and the school remained with about 10 to 11 acres. He did not know how the Defendant took the land. There was a meeting that was called to consider giving part of the school land to the Defendant. It was called by D.O. He did not attend. The D.O and the directors went ahead and gave land to the Defendant. It was not right. The school land is not adequate and the land that was given to the Defendant should be returned. Plot 299 was given to the school but in the list it is in the name of Cheserem. When the school was given plot 314 they went to the Chief in 1986 At the meeting they opposed the allocation of the plot of to the Defendant.

PW5 was Philip Kiton. He was present when land was allocated. The acreage of each school was to be 25 acres or more. Baharini School has 11 to 12 acres only. He said he was not aware of the meeting of 13.12.85 at D.O.'s office and the meeting of 14.12.85 which is said to have given out land to the Defendant. He did not know how the school land was given out. He did not attend meeting where D.O. resolved the land dispute.

When the case was pending Justice Dulu was transferred and on 15th March 2006 the parties agreed that they should proceed from where Justice Dulu had left. The proceedings from 26.6.2004 were to be typed.

PW6 was Stephen Chepkonga Murgomen. He stated that in 1986 he was a teacher employed by PTA at Baharini primary school. He stated that plot number 299 belongs to the school but is in the name of the Defendant. Plot 314 is in the name of Baharini.

PW7 was Tula Kimatui. He stated that when they were constructing the school the Defendant came and subdivided the land. He saw him with surveyors.

PW 8 was Jonathan Koech. He was the Secretary to the School Management Committee. He joined the school in 2003. Parcel of land number 299 is in the of John Chemweno Cheserem. He produced Green card for plot no 314 as P Ex 1. Green card for plot No. 299 as P Ex 2. Letter dated 30th June 1988 from D.O. Moiben to D.C. Uasin Gishu as P Ex 3. Letter dated 28th October 1988 from the school on encroachment as P Ex. 4. Letter dated 14.04.98 memorandum and list of parents marked as P Ex 5 (a), (b) and (c). Licence for meeting for 4th August 1984 dated 26th July 1984 produced as P Ex. 6. On cross-examination he stated that P ex 3 refers to minutes of meeting of AGM of 14.12.85. It was a decision of AGM and not of the D.O. alone. The school started in 1987. It was in existence in 1984. He was not aware whether the company was dissolved or not. Titles were issued by the Commissioner of Lands. The Plaintiff closed their case.

The Defence case opened and the Defendant was sworn in as DW1. He stated that the school started in 1986. He helped in building. He has a his farm next to the school. He knew Kapsilot Ranch Limited. It was a registered company. Registered on 26th April 1972. They were 300 members. They bought land together from a European, Kapsilot Estate. They used the name Kapsilot Ranch Ltd. The farm was for ranching. The other directors were the late Joshua Isiyoi Chebobei (chairman), David Chelimo (secretary), and himself as treasurer. The land was 11,500 acres. They got surveyors called Olweny Associates. He surveyed and subdivided the land. The directors and assisting members set aside public utilities, shools, churches, dams, dispensaries, roads etc. This was from 1982 onwards. The price of each acre was shs. 200/= . They put ballot papers in boxes. They put them in groups of 12 acres, 10 acres, 18 acres etc. He got plot 250 measuring 120 acres. He has title to the said lot. He was taken to the land and he saw that it was rocky and stones. He found it rocky and not good. The people affected were:

1. Chebi Chebobei

2. Charles Chebet
3. Daniel Serem
4. Paul Cheruiyot
5. Robert Kipkorir
6. Gerald Kimuron
7. John Cheserem (himself)

Out of the seven he was the only one who did not get vacant plot in replacement. In the course of the hearing the Plaintiff filed an application to Amend the Plaintiff. The application was allowed by consent. When the hearing continued DW1 stated that he bought shares worth Kshs, 20,000. He got land full of rocks and stones. He was removed from that area and given another land. There was a general meeting that resolved that he should be moved. The general meeting was on 14th December 1985. He referred to minute No. 73/85 (f). This was the decision of the Committee. The others also got alternatives. Nobody objected. General meeting decided. The school started complaining in 1988. All the directors of the company were present. The minutes were decided by all committee members. Minutes were produced as D Ex. 4.

Kapsiliot Ranch Ltd was wound up. He does not remember the date. This was in 1995. He referred to register and stated that plot no. 299 is his. The school plot is 314. He has the original title. He produced search as PD Ex. 1. The register was produced as D Ex 10. Memorandum & Articles of Association as D Ex. 2. Letter from D.O. dated 30th June 1988 produced as D Ex. 3. Green card for plot 299 was produced as D Ex. 5. Notice of meeting to be held on 21st February 1981 produced as D Ex. 9. He stated that he got the land lawfully. It is not true that he used his position as director. He could have gotten a better place if had done so. He stated that the Plaintiffs did not sue the other directors. They came for him. He does not understand why? He does not want his land cancelled. He entered the land in 1985. The claim was made ten years later. He asked that it be dismissed with costs.

On cross examination he admitted that plot 299 and 314 were one parcel before. It had 25 cares like all schools in the area. The decision to allocate him land from school land was made by directors and committee members of the company. Public utility plots had been identified and set aside. He did not attend the deliberations of the directors when they considered issue. He was asked to walk out. The list was prepared after they got the plots. He stated that at the meeting of school committee on 13th December 1985 he was given 13 cares and the school remained with 12 acres. The committee members were for the farm and not the school committee.

DW 2 was Joseph Chepkiyegen Kipkeu. He was former shareholder of Kapsiliot Ranch Limited. He corroborated the evidence of DW1. He further stated that he was in the meeting of 14.12.85. He stated that it was resolved that Cheserem be given 13 acres out of plot 299. Plot 299 had not been occupied. Plot 299 was 25 acres so the 12 acres became plot 314. The public utility became Kapkoros Primary school. He chaired the meeting that gave Cheserem the 13 cares out of plot no. 299. He contended that the case was defective. It should have been against the directors of the company and Commissioner of Lands who issued the title. Case brought after ten years when company had been wound up. Boundaries for plot no. 299 had not been tampered with. On cross examination he stated that Cheserem did not ballot for plot 299. It was given to him. He maintained that plot 299 had not been reserved for school but for unspecified public purpose.

DW 3 was Richard Kimutai Suter. He stated that he was elected Chairman of Committee dealing with complaints of members who got rocky and hilly parts of the ranch. He was elected by AGM. Cheserem plot was sloppy and rocky almost 100%. As a committee they resolved to give Cheserem 13 cares out of 25 acre of plot 299 that had been reserved for unspecified utility purpose. There was no school at the

time. It came later after the settlement. On cross examination he stated that he did not go to D.O. Moiben office for meeting. Everybody with bad plots retained their portions. No one surrendered the bad plots.

After close of defence case the parties agreed to file written submissions. Thereafter the matter was fixed for judgment on 13th May 2009. I regret the delay in delivering the judgment. The delay was occasioned by factors beyond my control.

I have considered the written submissions of the parties and the evidence on record. The following issues arise for determination

- (1) Whether the Defendant obtained land parcel No. Moiben/Moiben Block 3 (Kapsiliot) /299 fraudulently or unlawfully.
- (2) Whether the registration of the land in favour of the Defendant can be challenged.
- (3) Whether the Plaintiff has sued all necessary parties.
- (4) Whether the Plaintiff is entitled to the reliefs sought.
- (5) Who should bear costs of this suit?

In support of its case the Plaintiffs called a total of eight witnesses. The case of the Plaintiff is that plot No. 299 was reserved for Kapkoros Primary School. It measured approximately 25 acres. The plot was not allocated to the Defendant. That unknown to them the Defendant acquired part of the school plot. That there was no resolution of the school committee authorizing the allocation to the Defendant of part of the school plot. That the land left for the school was not adequate and it was therefore necessary for the Defendant to return the land. The school presently is located on plot number 314 measuring approximately 12 acres. None of the Plaintiff's witnesses could tell how the Defendant acquired plot no. 299. They alleged that it was land grabbing. The Defendant on the other hand maintains that he did not grab any land. The land he has was allocated to him by the directors of Kapsiliot Ranch Limited at a general meeting. That after balloting members who got rocky land lodged complaints. That some of the members got the vacant plots that had not been allocated. The Defendant did not receive any land. That at a general meeting of the company on 14/12/1985 it was resolved that he been given 13 acres out of plot 299. He called a witness DW2 who confirmed that he chaired the meeting of the company where it was resolved that the Defendant be allocated 13 acres out of plot 299 that had been reserved for unspecified purposes. DW3 also confirmed that the Defendant got bad land and that as Chair of the Farm Committee he was aware of the resolution to allocate the Defendant 13 acres of the plot 299 that had been reserved for unspecified public purpose.

What I gather from the evidence is that the responsibility of allocating land was on the board of directors of Kapsiliot Ranch Ltd. The Defendant was a member of the board. During deliberations to consider his case of whether he should get another plot he did not participate in the meeting. The Defendant relied on P Ex. 3 which was a letter dated 30th June 1988 written by District Officer Moiben to the District Commissioner Uasin Gishu. The letter is material to the resolution of this dispute. I will therefore set it out *in extenso*:

“The District Commissioner

***Uasin Gishu District
P.O. Box 30
Eldoret***

***DISPUTE BETWEEN KAPKOROS PRIMARY SCHOOL COMMITTEE AND DIRECTORS
KASILIOT FARM***

I arbitrated over the issue of acreage given to Kapkoros School by the directors.

Issue in dispute—Kapkoros pr. school was allocated 25 acres. But due to problem over people with rocky plots. It was decided that a committee of the farm should meet and resolve the problems.

The problem was difficult to solve. The directors then consulted the administration for the help to solve the dispute.

The District Officer, Moiben Mr. Owaga and Chief Jackson Samoei heard the problem from the farm committee. Resolution to solve problem was reached by the Administration and Committee. There were 25 committee members. This was on 13/12/85.

On 14/12/85 the D.O. called General Meeting on the farm, to read the resolution. And all were agreed upon by all members.

It was agreed in hat General Meeting that the school area be reduced to 12 acres to give room for members who had rocky plots. Mr. John Cheserem was given 13 acres which is in dispute.

My observation and award

Since the decision to reduce the school compound was agreed by all members in General Meeting by Minute No. 73 of 1985 of which the D.O. was the Chairman, it is evident that the reduction was done legally and in normal process. Nobody objected by them for members to vote and decided. I observed that some issue in the same meeting was voted on by members to decide but about the reduction of school compound was agreed upon by all.

For any further dispute, please refer to the Minutes of committee and Administration of 13/12/85 and General Meeting minuite of 14/12/85 min 73 of 1985.

I therefore dismiss school committee allegation that the school areas was reduced illegally by the committee.

(S.N. JAIRO)

District officer

MOIBEN

c.c. The Director

Kapsiliot Farm (Att Cllr. Joshua Chebobei)

P.O. CHEBIEMIT

**The Chairman
Kapkoros Primary School
Kapsiliot**

The Chief

Meibeki Location

The Assistant Chief

Meibeki Sub-location”

This letter provides sufficient corroboration to the assertion by the Defendant and his witnesses that the

decision to give him 13 acres out of plot 299 was agreed upon by all concerned. The letter was copied to the Chairman Kapkoros Primary school. The school responded to the letter through a letter dated 28th October 1988 produced as P Ex. 4. It was titled "APPEAL AGAINST D.O.'S LETTER NO. ED.12/4/VOL. 1/79 OF 30.6.1988". It was not an appeal by the school but by the parents of the school. The letter is relevant as it centers on most of the issues raised in this suit. It states:

"The grounds on which we appeal against D,O,'S judgment, ref. above are:-

In his judgment the D.O. says the problem was difficult to solve. This is not absolutely true. The said committee had already solved the problem by (a) giving John Cheserem (director) 2 plots (No.s 10 x 11) out of vacant plots passed for compensation of rocky plots. This was endorsed in general meeting of 4.8.84 (Agenda No. 6 attached permit)

Moving the member in question from his original plot of 120 acres to a new plot (formerly forest) of 253 acres.

Bwana D.C., the resolution reached on 13.12.85 by D.O. Moiben and 25 committee members has a lot to be desired. What caused this committee to change that endorsement given in A.G.M. on 4.8.84?

Actually, this committee was to work on 7 vacant plots – not any occupied land like public utility plots (schools). Bwana D.C. it is strange that this idea was conceived and carried out far away from this school. No parent was present as representative.

Bwana D.C. The D.O. has observed that the decision to reduce school compound (from 25 to 12 acres) was agreed upon by all members in a general meeting by minute No. 73 of 1985. This is not true.

Mr Willy Keino (Member) raised an objection in that meeting, but this was not registered in farm minute book.

The said meeting was not a general meeting normal process of convening general meeting was not followed i.e. by Radio announcement, permit from D.C. etc. this was a meeting for solving problem of rocky plots and squatters – It was attended by only 98 people out of 300 members.

Bwana D.C. on our appeal to your office, D.O. 1 (Mr Ratanya) wrote to D.O. Moiben asking him to investigate this matter. ON 5.10.88, D.O. Moiben (Mr. Amonde) held a meeting of all parents and Kasiliot farm directors in the school. We presented to him a memorandum (attached) containing all our grievances and arguments. He also heard from the farm directors.

Bwana D.C. in our memo, we registered our plea that we, parents of today are not looking into the school needs of today only. We made it clear that like all other schools in our Republic, this school is expected to expand to higher status and it will be unfortunate for us parents to be asked to buy land for expansion, while adequate land (25 acres) was set aside early enough.

Three other schools on the farm have their 25 acres intact..."

The meeting of 13/12/1985 took place as evidenced by the letter from the parents. The meeting also resolved that the school compound be reduced from 25 acres to 12 acres. The point of contention is that parents were not informed. That only 98 members attended out of a membership of 300. That one member raised an objection but it was recorded in the farm committee minutes. I am satisfied that the resolution was properly passed. The memorandum and articles of association of the company provided for a quorum of two members. In the letter P Ex. 4 it is stated that the meeting was attended by 98 members. It is therefore not true that the Defendant used his position as director to allocate himself plot no. 299. In 1984 the members met and resolved to compensate the Defendant by giving him vacant plots 10 & 11. But according to the evidence of the Plaintiffs and Defendant witnesses the plots was taken by other 2

members who also had problems of rocky land. The Defendant was thus left hanging. To resolve the issue of the Defendant the farm committee involved the provincial administration. D.O. Moiben presided over a meeting held on 13/12/85. The Defendant is not to blame for the allocation process. I do not find any illegality in the allocation process. There was due consultation only that the parents were not satisfied with the decision being of the view that land may be needed for future expansion.

The second issue is whether registration of the land in the name of the Defendant can be challenged. The Defendant contends that his registration was a first registration and therefore cannot be challenged under the provisions of Section 143 of the Registered Land Act. I have looked at the green card for plot no. 299 produced as D Ex. 5. It is clear that the Defendant was the first registered proprietor from the Government of Kenya. He was registered on 28.8. 87. The provisions of section 143 of the Registered Land Act bar this court from making any correction in respect of first registration. It therefore follows that even if the Plaintiffs had proved that the allocation in the name of the Defendant was wrongful or unlawful, the court would have been powerless to correct the name of the Defendant,

The third issue concerns the contention of the Defendant that the Plaintiffs have not sued all necessary parties. It was the view of the Defendant that the Plaintiffs ought to have sued the Commissioner of Lands as well as the directors of Kapsiliot Ranch Limited. I agree with the contention of the Defendant. The title was issued by the Commissioner of Lands and if it was alleged that the title was improperly acquired then the Commissioner of Lands would have been a necessary party to explain why title was issued to the Defendant for plot no. 299. Failure to do so weakened the merits of the Plaintiffs case. My attention has been drawn to the provisions of Order 1 rule 9 on misjoinder and nonjoinder of parties. I agree that non-joinder does not defeat a suit and the court is empowered to deal with the rights and interests of parties actually before it.

I have considered whether the Plaintiffs are entitled to the reliefs sought in light of the evidence adduced and the law applicable to the land in question. I find that the Plaintiffs are not entitled to the reliefs sought. The Plaintiff have failed to establish that the Defendant's title was fraudulently obtained. And even if the court was wrong on the first issue then the provisions of section 143 of the Registered Land Act bar the reliefs sought. On a balance of probabilities the Plaintiffs have failed to establish a case against the Defendant.

The net results is that the Plaintiffs' suit is dismissed with costs to the Defendant.

Dated AND signed at Nairobi on this 21st day of AUGUST 2012.

M. K. Ibrahim

Judge

DATED AND DELIVERED AT Eldoret on this 19th day of SEPTEMBER 2012.

F. AZANGALALA

Judge

In the presence of : Mr. Kiplimo holding brief for Mr.Omroto fo