



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Civil Case 56 of 2003**

**KIPTOO ARAP CHIRCHIR :::PLAINTIFF.**

**VERSUS**

**BOAZ KIBOI**

**WILLIAM KIPKEMBOI KIBEREN**

**PAUL**

**MUGUN:::  
DEFENDANT.**

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

The plaintiff, **Kiptoo Arap Chirchir**, has filed this suit against Boaz Kiboi (first defendant), **William Kipkemboi Kiberen** (second defendant) and **Paul Mugun** (third defendant) praying for a declaration that he is the rightful owner of 10.3 acres of land known as Kapkoi West farm and that the defendants are trespassers thereon and ought to be evicted therefrom and be permanently restrained from interfering with the said 10.3 acres. Further, the plaintiff prays for general damages for trespass and mesne profits in addition to costs of the suit.

In the plaint dated 8th August, 2003, the plaintiff avers that he has at all material times been the owner of the suit property measuring 10.3 acres and hence entitled to possession thereof. That, in the past six years or so, the defendants entered upon the suit property without his consent and took possession thereof thereby depriving him of the use and enjoyment of the property and occasioning him loss and damage.

It is the plaintiff's contention that the defendants entry into the suit property was unlawful and their continued possession is without colour of right or lawful excuse. Therefore, the plaintiff prays for judgment against the defendants.

In his testimony before the court, the plaintiff said that Kapkoi West farm measured 2,123 acres and that he purchased twenty (20) acres of the farm and was yet to clear payment for an extra 10.3 acres. He completed payment for 20.7 acres in 1989 and was to pay the balance for 10 acres which he later did.

The plaintiff testified that the farm previously belonged to a white man called Michael West and that he purchased part thereof as a member of a group comprising forty two (42) members in 1965. the group did not have sufficient funds to purchase the farm so they had to borrow from the Agriculture Finance Corporation (AFC). Each member of the group was entitled to a minimum share of 30 acres but the plaintiff was given 43.4 acres which he paid for in cash and through proceeds from milk sales.

The plaintiff went on to testify that a surveyor was engaged to survey and sub-divide the farm and that he

(plaintiff) signed for 20.2 acres at the Land Control Board. He later paid Ksh. 5,000/= for an extra 10 acres as each acre went for Ksh. 500/=. The payment receipt was however not accepted by the farm treasurer.

The plaintiff testified that he signed and paid for 22 acres and had 10 acres which had not been paid for. He occupied about 31 acres but the surveyor hived off 10.3 acres which were eventually sold to the three defendants prompting the filing of a complaint by himself before the land tribunal.

A past chairman of Kapkoi West Farm, **Kipkurgat Arap Koskei (PW2)**, testified that the plaintiff was given 22 acres which he occupied in 1975 and which he signed for at the Land Control Board in 1999 and as such, no further payment could be effected since there remained no more land for disposal.

A manager with AFC, **Augustine Koror (PW3)**, produced the receipt respecting payment of Ksh. 5000/= by the plaintiff.

In a statement of defence dated 1st September, 2003, the defendants contend that Kapkoi West Farm comprising land petitions Nos. 6431, 5713 and 8416 was occupied on temporary basis by its members pending survey to determine exact entitlements of each member once the requisite consent of the Land Control Board was obtained. Later, the acreage entitlement of the plaintiff was confirmed at 20.2 acres which he signed for and on which basis necessary consent for sub-division was sought and granted on 14th December, 1989 without any appeal being preferred.

The defendants further contend that the plaintiff's entitlement of 20.2 acres was final and conclusive and that when the actual survey was effected on the ground, the plaintiff was found to be occupying 10.3 acres, over and above his lawful entitlement of 20.2 acres. Consequently, the extra acreage was awarded to the defendants who had less acreage than their actual entitlement per the area list and the Land Control Consent.

The defendants deny that the 10.3 acres belonged to the plaintiff and pray for the dismissal of this suit. In his evidence in court, the first defendant, **Boaz Kiboi (DW1)**, indicated that the farm was allocated in accordance with the shares paid for by each member and that he received 14 acres but while occupying the land on temporary basis, he had 11 acres thereby representing a shortfall of 3 acres while the second defendant had a shortfall of 3.3 acres and the third defendant had a shortfall of 4 acres. Among the three defendants, there was a total shortfall of 10.3 acres.

The first defendant testified that the Land Control Board gave consent for sub-division on 20th January, 1990 and it was resolved in a meeting of all members that those with larger entitlements will have them reduced and those with less entitlements would have them increased. Since the plaintiff occupied 30.5 acres yet he had paid for 20.2 acres, the excess portion was to be reduced during the survey. The first defendant testified that the extra 10.3 acres were taken away from the plaintiff and shared between the three defendants in accordance with their respective shortfalls. They did not therefore enter the land unlawfully as alleged by the plaintiff.

From all the foregoing averments and testimonies of the plaintiff and the defendants through the first defendant, the basic issue which presents itself for determination is whether the three defendants are in occupation and/or possession of 10.3 acres of land belonging to the plaintiff being part of his entitled in the properly known as Kapkoi West Farm.

It is evident that Kapkoi West Farm was an expansive portion of land which was offered for sale by its original owner and a group of people accepted the offer. The group constituted itself as a membership group. Its members were allowed to buy shares which represented their individual entitlements of the portions they each occupied. A list of the members and their respective entitlement was produced herein (i.e. the first document in the defendants' list of documents filed herein on 20th March, 2006.) The list shows that the group consisted of about one hundred and ninety eight (198) members including a church.

The plaintiff and the three defendants are reflected in the list and so are their respective entitlements of

the material portion of land. Thus, the plaintiff was entitled to 20.2 acres, the first defendant 13.6 acres, the second defendant 15.5 acres and the third defendant 28.3 acres.

The plaintiff did not dispute the list. He conceded that by the time the group proceeded to the land Board in 1989 to seek necessary consent for sub-division the group consisted of about 197 members. He said that the group initially in 1965 consisted of only forty two (42) members. He confirmed that the consent of the Land Board was obtained on 14th December, 1989. Most significantly, the plaintiff confirmed that the list showed that his entitlement of 20.2 acres which he signed for. He said that he paid money for 30 acres. He also said that he was given 43.4 acres and again said that he had 40.2 acres of which 12 acres were taken away as loan repayment leaving him with a balance of 28 acres. He also said that he paid Ksh. 5000/= for 10 acres.

It is clear from the foregoing contradictions and inconsistency relating to the plaintiff's entitlement of the material portion of land that the plaintiff was not candid regarding his actual entitlement of the land which as demonstrated in the aforementioned list and confirmed by himself, his witness (PW2) and the defendants was 20.2 acres.

The AFC Manager (PW3) confirmed that a sum of Ksh. 5,000/= was received from the plaintiff but was later cancelled and used to pay his personal account. The effect of the manager's evidence was to show that the Ksh. 5000/= received from the plaintiff was not for the purchase of 10 acres of the material property as alleged by himself.

In any event, it has been shown that by the time the Ksh. 5000/= was paid and a receipt issued i.e. 2nd June, 1998, the material portion of land had already been distributed to all the members such that there was no extra land available for further allocation. This fact was confirmed by the past chairman of the material group (i.e. PW2) as well as the first defendant.

The list referred herein as the area list is a credible document in as much as it has not been disproved and/or invalidated by any other documentary evidence. It serves the purpose of establishing on a balance of probabilities that the plaintiff's entitlement of the material portion of land was 20.2 acres and not 30.5 acres or thereabout as alleged by the plaintiff. It has been shown that although a member may have been in occupation of more acres than his actual entitlement, the record was set straight during the survey exercise such that each member occupied his actual and lawful entitlement. The plaintiff therefore remained with his actual entitlement of 20.2 acres and the extra 10.3 acres he previously occupied was distributed among the defendants to compensate for their respective shortfalls in their actual and lawful entitlements. In the circumstances, they could not be treated as illegal occupants of or trespassers in the said 10.3 acres. By the same token the plaintiff cannot be said to be the rightful owner of the said 10.3 acres.

In sum, the present claim by the plaintiff against the defendants is without merit. He is not entitled to the orders sought in this suit which must and is hereby dismissed with costs to the defendants.

**[Delivered and signed this 31st day of October, 2012.]**

**[In the presence of Mr. Kiarie for plaintiff and Mr. Yano for defendant.]**

**J.R. KARANJA.**

**JUDGE.**