



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**Civil Suit 7 of 2005**

**PHILEMON KIPKOSGEI BITOK .....**  
**PLAINTIFF**

**VERSUS**

**DAVID KIRWA BITOK .....**  
**DEFENDANT**

**JUDGMENT**

Philemon Kipkosgei Bitok and David Kirwa Bitok, who are stepbrothers, are sons of the late Peter Ndege Bitok, who died on 12/2/1999.

Prior to his death, he lived at Sosiani in Turbo.

Philemon Kipkosgei, who I shall now refer to as Kipkosgei, has instituted this suit against his step brother David Kirwa Bitok (hereinafter called Kirwa), in which he claims that Kirwa has encroached on land known as Turbo East/Luseru Block 2 (Lower Sosiani) 7 (sic), (“subject property”), which land he claims to be the registered owner of.

He simultaneously sought and obtained a temporary order to restrain Kirwa from interfering with the subject land in any way. The two were later to record a consent order in which inter alia, Kirwa was allowed access and occupation of his dwelling houses on the subject land.

Be that as it may, Kirwa who has filed a defence and a counterclaim avers that he is the one who is entitled to the subject property, and he therefore seeks a declaration to that effect. He also avers that Kipkosgei obtained proprietorship of the subject land fraudulently. He seeks an order for the correction of the Title Deed to the subject land, and for a permanent injunction to restrain the latter from interfering with his ownership at all, all of which issues, Kipkosgei denies.

As I discern it, the main issues which arise in this suit, and which I shall now set out to determine are as follows:

Ø Does the subject property form part of the Estate of their deceased father?

Ø Was the registration of Kipkosgei as the proprietor of the subject property valid, can it be upheld in law and does it confer an indefeasible title to him?

- Ø Has the allegation of fraud against the Kipkosgei been proven?
- Ø Does Kipkosgei hold the subject property in trust for the other beneficiaries of his late father's Estate.
- Ø Who is the rightful owner of the subject property?
- Ø Has each party been able to prove its case to the expected standards?

I have taken the evidence by both parties into account and it is clear, that the controversy revolves around the subject property in Turbo originally registered as LR. 11032.

According to Eliud Kipkoech Saina (DW5), the said land was originally acquired by a partnership of four people namely, Job Kimutai Saina, Peter Ndege Bitok, Stanley Kimisik Ruto who are all deceased, and Gilbert Kipkoech Sum, after which the four subdivided it amongst themselves. Thereafter, in 1993, each carried out subdivisions on his individual portion to suit his own needs, which resulted in a total of 21 parcels. Saina who was the secretary to the partnership then, testified that he maintained the partnership records.

It was his testimony that the late Ndege subdivided his portion into three parcels, which were entered in the partnership register (exhibit D1), as numbers, 6, 7 and 10. Job Kimutai Saina's portion resulted into 8 parcels namely numbers 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20, after subdivision. Gilbert Kipkoech Sum divided his portion into parcels numbers 4 and 5, while Stanley Ruto's were recorded as numbers 1 and 2. The remainder portion was maintained as common area.

After the completion of the exercise, the register was prepared in three copies, one of which was sent to the District Commissioner, while the other one was sent to the Land's office for reference during registration of the new Titles, while the third was retained by the partnership.

It is interesting to note, that the above evidence was corroborated by the fact that exhibit D1 clearly indicates that the late Ndege Bitok's share amounted to three parcels of land whose acreages were 70, 55.5 and 20 acres respectively. The authenticity of the Register (exhibit D1), which was not questioned at all, tends to show that each of the three parcels was jointly owned in equal shares by the late Ndege Bitok and Kipkosgei. In my opinion, this would mean that since the property was owned jointly by the two, had Ndege Bitok been alive by 17/3/2004 when the initial entry was made, it would have been a valid and conclusive entry. Unfortunately, that was not the case as he had died about five years, prior thereto. In my humble opinion, that entry on the register became the first registration against the Title as envisaged under the Registered Land Act Cap 300 of the Laws of Kenya ("the Act"), and all subsequent entries would not grant the 'proprietor/s' an indefeasible Title.

The legal position is clear in that a party cannot be registered as the owner of land posthumously. That entry could only be sustained, and only if Ndege's name was already in the Register by 12/2/1999 and not thereafter. The Land Registrar was therefore wrong when he made the subsequent entry in Kipkosgei's favour, as Kipkosgei cannot plead section 118 of the Act, which stipulates that "*If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register*", for the earlier registration in the joint names cannot lie, it having been improper. Any entry, which contravenes this requirement, can only be described as null and void. It is on record that Kipkosgei's advocates instigated the initial entry against the Title. In view of the fact that the law is clear, and since, though alleged fraud was not proven, I would give Kipkosgei the benefit of doubt and find that he acted under a misconception, and in which circumstances, being duly empowered by section 143 of the Act, which provided that ".....*the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake*", I do order that the Land Register be rectified by the deletion of the two contentious entries.

The issue that arises then, is what would be the fate of the parties hereto, especially in view of the fact

that the matter of the administration of their fathers Estate has yet to be resolved.

As I found earlier, the late Ndege and his son Kipkosgei were joint owners of the three parcels of land in equal shares, which convinces me that Kipkosgei has proved on a balance of probability that he owns only half a share of the subject land and his suit against Kirwa succeeds in that respect.

My order for the rectification of the register by cancellation of the entry of 15/3/2004, will also affect all subsequent entries. I do order that Kipkosgei be recognized as the owner of a half share of Turbo East/Leseru Block 2 (Lower Sosiani) which he owns in his own right and which portion shall not form part of his late fathers Estate. I do also order that as the family awaits the Confirmation of the Grant and subsequent distribution of the Estate, Kipkosgei do occupy the aforementioned portion of the subject land, and on the same token, Kirwa is hereby restrained by way of a permanent injunction from interfering in any manner with Kipkosgei's portion of the subject land. The other members of Ndege's family, including Kirwa may occupy the rest of the farm on a temporary basis, pending the confirmation of the Grant of Letters of Administration to their father's Estate, and subsequent distribution.

Kipkosgei should not be shut out as a beneficiary of his father's Estate, which therefore means that he should also be considered when the Estate matures for distribution.

Kirwa on the other hand has not been able to prove the allegations of fraud nor was he able to prove his counterclaim against Kipkosgei and the said counterclaim is dismissed with costs. Otherwise, and except for the order on costs for the counterclaim, I have considered the fact that the parties are brothers and I feel that it is only fair that each bears his own costs.

Dated and delivered at Eldoret this 3<sup>rd</sup> day of March 2006.

**JEANNE GACHECHE**

**JUDGE**

Delivered in the presence of: