



**Keino v Chebongei (Environment & Land Case 1 of 2022)  
[2022] KEELC 15317 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15317 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 1 OF 2022  
L WAITHAKA, J  
DECEMBER 8, 2022  
FORMERLY ELDORET ELC CAUSE NO 16 OF 2021 (O.S)**

**BETWEEN**

**DORCAS JEBET KEINO ..... APPLICANT**

**AND**

**JOSPHAT KIMUTAI CHEBONGEI ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Dorcas Jebet Keino (applicant) took up the summons dated June 21, 2021 for determination of the question as to whether registration of Josphat Kimutai Chebongei (respondent) as the proprietor of LR No Cherangany/Kondabulet/55 (suit property) is subject to a trust in her favour and in favour of her four sisters; determination as to whether the pleaded trust, if found to exist should be terminated and the suit property distributed between herself and her four sisters among other questions.
2. The application is supported by the affidavit of the applicant sworn on June 21, 2021 in which the applicant has inter alia deponed that the respondent is her step-brother; that the suit property belonged to her father before it was registered in the name of the respondent; that her father had three houses; that the respondent belongs to her father's 2<sup>nd</sup> house while she is from the 3<sup>rd</sup> house and that the 3<sup>rd</sup> house, in which she belongs, was not blessed with a son.
3. The applicant has further deponed that because her house did not have a son, her mother faced hostility from her father making to her to go back to her parents; that the suit property belonged to her mother's house and that the respondent caused himself to be registered as the proprietor of the suit property without knowledge or consent of their father.
4. The applicant has further deponed that sometime in 1993 or thereabout, they discovered that the respondent had registered himself as the proprietor of the suit property; that upon learning that



the respondent had registered himself as the proprietor of the suit property, their father cursed the respondent.

5. The applicant has further deponed that the respondent apologized to his father and offered to buy the suit property at Kshs 169,000/=; that an agreement was executed between them, which agreement the respondent refused to honour leading to filing of this suit.
6. The respondent, through the replying affidavit he swore on February 25, 2022, admitted that the applicant is his step-sister but contended that the property did not belong to his father; that the suit property was allocated to him; that the applicant and her mother never occupied the suit land but lived in LR No Chebiemit Kimnai/443 which belonged to their father; that he was living in the suit property before the applicant and her mother left for Nandi; that his father only owned LR No Chebiemit Kimnai/443.
7. Claiming that the application has been brought in bad faith, the respondent contended that his father could not allocate the suit property to the applicant because it belongs to him and he does not have any other parcel of land.

### **Directions**

8. On March 22, 2022, directions were given to the effect that the originating summons be converted to a plaint, the replying affidavit to a defence and the matter be heard orally.

### **Evidence**

#### **Plaintiff's case.**

9. When the matter came up for hearing, the plaintiff who testified as PW1, led evidence which can be summarized as follows:-
  - i. That the defendant and she are members of the family of Chebongei Kech (deceased);
  - ii. That Chebongei Kech had three wives, namely Sakomo Chebongei (1<sup>st</sup> wife), Kabon Chebongei (2<sup>nd</sup> wife) and Tapsalngot Chebongee (3<sup>rd</sup> wife);
  - iii. That the defendant is a son of the 2<sup>nd</sup> wife while she is a daughter of the 3<sup>rd</sup> wife;
  - iv. That her father had three parcels of land;
  - v. That parcel number Cherangany/Kandabulet/55 (suit property) belonged to their mother;
  - vi. That her mother (deceased) and she lived in the suit property before she went back to her parents;
  - vii. That in a meeting convened by their father sometime in 1993, they discovered that the suit property was registered in the name of the defendant;
  - viii. That their father was angered by the discovery;
  - ix. That the defendant offered to pay Kshs 169,000/- to her house in order to retain the land leading to execution of an agreement for sale of the land between them and the defendant Pexbt 4(a) and (4b);
  - x. That the defendant failed to honour the agreement leading to filing of the instant suit.



10. In cross-examination, PW1 informed the court that her mother and she left the suit property in 1966; that at that time, she was aged 14 years; that by the time they left the suit property for Nandi (her mother's home), their father had already given each house their portion; that land demarcation had not been done when they left; that the defendant got registered as owner of the suit property during land demarcation exercise which occurred between 1973 and 1974 and that their father did not know that the defendant registered himself as the owner of the suit property.
11. Based on the agreement for sale of the suit property signed between the defendant and herself, she stated that the defendant would not have signed the agreement if the land belonged to him.
12. Vincent Kipkorir Cheboi (PW2), told the court that he knows the parties to this dispute; they are his neighbours; that he was the area chief of Kondabulet where the suit property is situated and that the suit property belongs to the plaintiff's mother.
13. further informed the court that following a complaint brought to his office by the plaintiff sometime in 1993, he chaired the meeting of March 5, 1993 in relation to the suit property; that the meeting was attended by among others, the brothers of the plaintiff's father, Chelimo Katam and Chepkaitany Kibor; that the defendant, who attended the meeting, apologized for having registered the suit property in his name and offered to pay Kshs 169,000/= for the land to the plaintiff's family before March 15, 1994.
14. Maintaining that the suit property did not belong to the defendant, he contended that if it belonged to him, he would not have offered to buy it.
15. In cross examination, PW2, admitted that he authored the minutes of September 5, 1993 and explained that the plaintiff's father did not attend the meeting because he was old and sickly.
16. further informed the court that he convened the meeting of September 5, 1993 after the plaintiff complained to him; that the plaintiff's family held meetings in their families but he could not tell the dates; that in 1966, when the plaintiff and her mother left the suit property, demarcation had not been done and that during demarcation, the plaintiff's father was alive. However, he could not tell who was recorded as proprietor of the suit property (parcel No 55).
17. In re-examination, he stated that he was present during demarcation exercise but was not part of those who were recording owners of land.
18. He reiterated that in the meeting of March 15, 1993, the defendant apologized for registering the land in his name and offered to buy the suit property.
19. Mary Mutai (PW3) informed the court that the plaintiff is her elder sister while the defendant is her step-brother; that in 1993, their late father called them for a meeting in his home; that their father wanted to divide his land among his houses; that on the way to the meeting, they passed through Iten lands office and obtained a search for the suit property; that they discovered that the suit property was registered in the name of the defendant and that their father was very upset when they informed him of that fact.
20. PW3 further informed the court that they had a second meeting in the office of the chief which their father did not attend.
21. PW3 further informed the court that in the meeting held at home, the defendant asked for forgiveness in the presence of their father and the chief and offered to buy the suit property for Kshs 169,000/= but failed to honour his promise; that when they confronted the defendant to honour his part of the



- bargain, the defendant abused them and told them that women are not supposed to own land; that they held a second meeting at the chief's office which failed to yield any fruits leading to filing of this suit.
22. Like PW1 and PW2, PW3 stated that the suit property belongs to her late mother. She maintained that each house of their father was given their own land and that the defendant's land is in the parcel of land given to the 2<sup>nd</sup> house.
  23. In cross examination, PW3 stated that the first meeting was convened by their father in 1992; that the chief attended the 1<sup>st</sup> meeting. Terming the statement by PW2 that he did not attend the first meeting a lie, PW3 maintained that PW2 attended the first meeting.
  24. PW3 further stated that although they don't have ownership documents in respect of the suit property, they were born and raised there; that the defendant agreed to pay for the land even after it was registered in his name.
  25. PW3 was not able to tell why the defendant decided to register the land in his name.
  26. In re-examination, PW3 stated that their father learnt about the registration of the defendant as the proprietor of the suit property after they showed him the green card in respect of the suit property.
  27. Concerning the meetings they held, she stated that their father's brother, Chepkeitany Kiboi, was present in both meetings.
  28. According to PW3, the fact that the defendant agreed to pay for the suit property when it was registered in his name is proof that he is not the owner, otherwise he would not have agreed to pay them.

#### **Defence case**

29. The defendant who testified as DW1, departed from his pleadings and written statement that was admitted as his evidence in chief by stating that adjudication of the suit property was done in the presence of his father and PW2; that his father instructed the surveyor to register the suit property in his name; that the plaintiff and her family were living in a portion of the suit property that was later given to a school before they left in 1965; that the suit property was registered in his name with instructions from his father.
30. The defendant further led evidence to the effect that parcel number 443 that was registered in his father's name is occupied by members of his father's 1<sup>st</sup> house; that parcel number 37 is occupied by his late brother's children (members of his father's second house) and that he lives in the suit property with the widow of his 3<sup>rd</sup> brother.
31. DW1 further informed the court that his two sons and their families also live in the suit property; that he has no claim to parcel number 443 as it belongs to the first house of his father and that plot number 37 belongs to his father; that his father allowed his mother to live in plot No37 and she is buried there.
32. He testified that he moved to the suit property in 1965 and lived there with the plaintiff before the plaintiff's mother left in 1966.
33. He denied having knowledge of any meeting either at their home or chief's office concerning the suit property.
34. Concerning the signature in the agreement produced in evidence by the plaintiff, said to be his, he stated that it is not his and stated that he does not know whether the 3<sup>rd</sup> house of his father had any land.



## Submissions

35. At the close of hearing, parties to this case filed submissions which I have read and considered.

## Analysis And Determination

36. From the pleadings, evidence and the submissions the court finds the issues for the determination to be :-
- i. Whether the registration of the defendant as the proprietor of the suit property is subject to any trust in favour of the plaintiff's family?
  - ii. Subject to the outcome of prayer (i) above, whether the trust, if found to exist, should be determined;
  - iii. What orders should the court make?
37. In the submissions filed on behalf of the plaintiff, an overview of the cases urged by the parties is given and submitted that in the instant case, the plaintiff and her witnesses led evidence which confirmed ownership of the suit property by the parties' father. The totality of the evidence adduced in this case is said to have confirmed that the suit property belonged to the 3<sup>rd</sup> house of the plaintiff's father. In view of the foregoing, the suit property is said to be both ancestral land and trust land.
38. Although the plaintiff and her family are not in possession or occupation of the suit property, based on the case of *George Mbiti Kiebia & another v Isaya Theuri M'lintari & another* (2014) eKLR, it is submitted that proof of possession of land is not necessary to prove customary trust.
39. This court is urged to find and hold that the suit property is indeed ancestral land because it devolved from the parties' father hence expected to devolve to his children in similar manner in accordance with the concept of intergenerational trust.
40. The defendant is said to have failed to lay any evidence to show how he purchased and/or acquired the suit property. It is further submitted that the defendant departed from his pleadings concerning his acquisition of the property by stating that his father instructed the surveyor to register him as the owner of the suit property.
41. On whether the registration of the suit property in the name of the defendant is subject to any trust in favour of the plaintiff and her family, on behalf of the defendant reference is made to the cases of *Njenga Chogera v Maria Wanjira & 2 Others* (2005) e KLR; *Peter Ndungu Njenga v Sophia Watiri Ndungu* (2000) e KLR; *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* (2017) e KLR and the case of *Isack Kiebia M'inanga v Isaaya Theuri M'lintari & Another* SCOK Case No 10 of 2015, where principles that undergird a claim based on trust are discussed and submitted that the plaintiff did not discharge the legal duty placed on her of proving that the registration of the defendant as the proprietor of the suit property is subject of a trust in favour of her family
42. The plaintiff is said to have failed to prove that the suit property is customary land; failed to proof how the trust was created, the circumstances under which it was created and the common intention to its establishment and creation in her favour.

## Analysis And Determination

43. I have carefully read and considered the cases pleaded by the parties, the evidence and the submissions.



44. The totality of the evidence shows that the plaintiff and her mother lived in the suit property and that the suit property was family land before it was registered in the defendant's name.
45. Although the defendant, in his response to the plaintiff's claim pleaded that the plaintiff and her mother never lived in the suit property and that he was the original allottee of the suit property, in his evidence, he departed from his pleadings by acknowledging that the suit property belonged to his father, that the plaintiff and her mother lived in the suit property before it was registered in his name and that his registration as the proprietor of the suit property was effected on the instructions of his father.
46. From his conduct during hearing, the defendant struck the court as a dishonest witness. The plaintiff and her witnesses, on other hand, struck the court as honest and trustworthy witnesses. Despite there being a small inconsistency on the testimony of the applicant's witnesses concerning the participation of PW2 in the arbitration meetings held between the plaintiff's family and the defendant, I entertain no doubt that such meeting took place and that the defendant signed the agreement allegedly entered into between him and the family of the plaintiff, pexbt 4(a).
47. From the totality of the evidence adduced in this case, comprised in the oral statements of the plaintiff's witnesses, the documentary evidence produced by the plaintiff and the conduct of the defendant, I find and hold that registration of the defendant as the propriety of the suit property is subject to a trust in favour of the plaintiff and her family.
48. The upshot of the foregoing is that the plaintiff/applicant has made up a case for being granted sought, which I hereby grant her as prayed.

**DATED, SIGNED AND DELIVERED, AT ITEN THIS 8<sup>TH</sup> DAY OF DECEMBER, 2022.**

**L. N. WAITHAKA**

**JUDGE**

**Judgment delivered virtually in the presence of:**

Ms. Isiaho for the Applicant/Plaintiff

Ms. Kogo for the Respondent/Defendant

Christine Towett – Court Assistant.

