



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 202 OF 2015**

**KIBWELI CHEMJOR.....PLAINTIFF**

**VERSUS**

**ROTICH CHEMJOR.....1<sup>ST</sup> DEFENDANT**

**VERONICA TERIGI LUKORITO.....2<sup>ND</sup> DEFENDANT**

**REBECCA CHERONO ROTICH.....3<sup>RD</sup> DEFENDANT**

**NAKURU DISTRICT LANDS REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

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

1. The plaintiff, Kibweli Chemjor, a brother to the 1<sup>st</sup> defendant and uncle to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are the children of the 1<sup>st</sup> defendant filed the initial plaint dated 16<sup>th</sup> July 2015 which was subsequently amended on 14<sup>th</sup> October 2015 to enjoin the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to whom the 1<sup>st</sup> defendant had transferred the land title **Rongai Lengenet Block 3/200** (“the suit property”). By the amended plaint the plaintiff averred he was the beneficial owner of the suit property and further alleged the defendants had fraudulently procured registration of the land into their names. He sought an order annulling the title registered in the 2<sup>nd</sup> and 3<sup>rd</sup> defendants names and an order for transfer of the land to his name and permanent injunction against the defendants. The plaintiff’s interlocutory application for injunction filed contemporaneously with the plaint was dismissed by the court on the basis that the plaintiff had not demonstrated he had a *prima facie* case with probability of success.

2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a statement of defence and counterclaim dated 17<sup>th</sup> March 2017. The defendants denied all the averments made by the plaintiff in the plaint. The defendants averred that the suit property belonged to the 1<sup>st</sup> defendant being the land entitlement he was entitled to as a member of Kilombe Sasurwa Kapsatek Farm Co. Ltd where the plaintiff was equally a member. The defendants averred that after the dissolution of the company, the members were allocated land commensurate with their contributions. The plaintiff got land parcel **Rongai/Lengenet block 3/80** measuring 8.42 Ha while the 1<sup>st</sup> defendant got land parcel **Rongai/Lengenet Block 3/200** measuring 4.44Ha. The 1<sup>st</sup> defendant and his family migrated to Kitale after he got land there and left the plaintiff to look after his land in Rongai but the plaintiff around 2014 started staking ownership claims to the 1<sup>st</sup> defendant’s parcel of land. The 1<sup>st</sup> defendant in February 2015 transferred the suit property to his children, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant’s jointly. The defendants vide the counter claim prays for an order that the plaintiff yields vacant possession of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants; permanent injunction; compensation for misappropriated livestock; and the costs of the suit.

3. The plaintiff’s Advocates M/s Ndeda & Associates advocates were granted leave to cease to act for the plaintiff on 20<sup>th</sup> March 2019 following their application dated 21<sup>st</sup> July 2017. The plaintiff appointed the firm of Naomi Murithi & Company Advocates who filed a Notice of appointment on 11<sup>th</sup> May 2019 and on the same date the said advocates also filed a Notice of withdrawal of the suit wholly against the defendants. The court on 12<sup>th</sup> November, 2019, when the suit had been fixed for hearing and all the parties were represented by their respective counsel, made the following order:-

“ the plaintiff having filed a Notice of withdrawal of the suit against the defendants, the plaintiff’s suit is accordingly marked as withdrawn with costs to the defendants. As the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have a counterclaim against the plaintiff, the hearing of the counterclaim is adjourned and is fixed for hearing by way of formal proof on 26<sup>th</sup> February 2020.”

4. On 26<sup>th</sup> February 2020 the counter claim was prosecuted and the 2<sup>nd</sup> defendant testified as the sole witness on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 2<sup>nd</sup> defendant adopted her witness statement as her evidence in chief. She clarified that her father (1<sup>st</sup> defendant) with his brothers who included the plaintiff were members of Kiplombe Sasurwa Kapsatek Farm Co. Ltd, a land buying Company, and were each allocated land by the company equivalent to their shares. The other brother sold his land but the plaintiff and the 1<sup>st</sup> defendant retained their land and were each issued title to their respective parcels of land. She stated her father's land parcel was **LR Rongai/Lengenet block 3/200** and he was issued with a title on 7<sup>th</sup> November, 1989 as per the copy exhibited in the defendant's bundle of documents.

5. The 2<sup>nd</sup> defendant explained that her father moved from Rongai and settled in Kitale after he got land there and that he left his brother, the plaintiff, to look after his land and some livestock that he had. The 2<sup>nd</sup> defendant testified that although the plaintiff resides on his own parcel of land which is close to the 1<sup>st</sup> defendant's land he was utilizing the 1<sup>st</sup> defendant's land for grazing and was carrying on subsistence farming. The plaintiff also had constructed a temporary structure on the land and had brought a third party to reside on the land. The witness stated in 2014 they wanted to assume possession of the suit property but the plaintiff resisted and he started making ownership claims and that prompted the 1<sup>st</sup> defendant to transfer the property to her and the 3<sup>rd</sup> defendant (sister) as the 1<sup>st</sup> defendant was getting elderly and he wanted them to look after and to safeguard the property. The witness relied on the bundle of documents as per the list of documents dated 17<sup>th</sup> March 2017. The documents were admitted in evidence as exhibits DEX 1-9. The defendants prayed for orders as pleaded in the counterclaim.

6. There is no dispute that the 1<sup>st</sup> defendant was a member of a land buying company, Kilombe Sasurwa Kapsatek Farm Co Ltd, and by virtue of his share contribution was allocated land in respect of which he was issued title **LR No. Rongai/Lengenet block 3/200**. It is the defendants evidence that the 1<sup>st</sup> defendant left this land under the care of his brother, who is the plaintiff herein. The plaintiff later on or about 2014/2015 started laying claim to the suit land which prompted the 1<sup>st</sup> defendant who was advancing in age to transfer the property to his children, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff presumably in a bid to push his claim of ownership to the land went ahead to construct a temporary structure on the suit property in 2014/2015 and invited a 3<sup>rd</sup> party to stay on the property. The plaintiff as indicated earlier in this judgment withdrew his suit against all the defendants. The plaintiff did not file any defence to the counterclaim which means the defendants averments were not controverted. The evidence adduced by the 2<sup>nd</sup> defendant was not rebutted and the court is obligated to accept the same as correct and truthful.

7. The court has evaluated the evidence adduced by the 2<sup>nd</sup> defendant and the documents tendered in support of the defendants counter claim and is satisfied that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the registered owners of land parcel title Number **Rongai/Lengenet block 3/200** measuring 4.44 hectares. The defendants produced in evidence a copy of title Deed dated 17<sup>th</sup> February 2015 and a copy of certificate of official search dated 11<sup>th</sup> May 2016 which affirm that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were registered as joint proprietors of the suit property on 17<sup>th</sup> February 2015. The plaintiff is registered as the proprietor of land parcel Title Number **Rongai/Lengenet Block 3/80**. There are no encumbrances registered against Title Number **Rongai/Lengenet Block 3/200** held by 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff has no identifiable interest in the suit property.

8. Under Section 24 (a) of the Land Registration Act 2012 a registered proprietor of land is vested with absolute rights of ownership which can only be challenged and /or defeated under the limited provisions of Section 26 (1) (a) & (b) of the Land Registration Act 2012. The title of a proprietor may only be challenged :-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section 24(a) of the Act provides:-

“ Subject to this Act-

- a. *the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;*

Section 25 (1) (a) & (b) of the Act is the following terms:-

Rights of a proprietor

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(1) (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by [section 28](#) not to require noting on the register, unless the contrary is expressed in the register.

9. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants being the registered proprietors of the suit property, their rights of ownership are absolute and have not been challenged as provided under section 26 (1) (a) & (b) of the Land Registration Act 2012. As owners of the suit property they are entitled to enjoy the rights of ownership without any hindrance from anybody. They are entitled to have exclusive rights of use and possession. On the evidence adduced the court is satisfied the plaintiff has had unauthorized use and possession of the suit land. Even though he may have had permission to occupy and use the land initially, that permission was withdrawn as evidenced by the various meetings aimed at resolving the ownership wrangle between the plaintiff and the 1<sup>st</sup> defendant. The plaintiff having withdrawn his claim, it is deemed the ownership of the suit property is now not contested. The plaintiff has no justifiable reason to occupy and/or remain in possession of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants land and he should therefore vacate from the land unconditionally.

10. The defendants in the counterclaim have prayed to be compensated for some livestock, cattle and goats which they claim were misappropriated by the plaintiff. The court is not satisfied this claim was proved to the required standard and disallows the claim. It is unclear in what manner the livestock was distributed after the death of the plaintiff's and 1<sup>st</sup> defendant's mother as it is pleaded the livestock allegedly was left by the mother in 1986 for her children. The court finds this claim farfetched and declines to grant the same.

11. The upshot is that I find and hold the defendants counterclaim as relates to the plaintiffs unlawful occupation of the suit property proved on a balance of probabilities and I enter judgment in favour of the defendant in terms of prayers 2 and 3 of the counterclaim. The costs of the counterclaim are awarded to the defendants.

12. Orders accordingly .

**Judgment dated signed and delivered virtually at Nakuru this 25<sup>th</sup> day of February 2021.**

**J M MUTUNGI**

**JUDGE**