

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
Civil Suit 32 of 2003

MATHEW KIPNGENO ARAP CHELULE PLAINTIFF

VERSUS

STEPHEN LOGOS1ST DEFENDANT

BOMET DISTRICT LAND REGISTRAR.....2ND DEFENDANT

JUDGMENT

The Plaintiff, Mathew Kipngeno Arap Chelule, sued the Defendants, Stephen Logos and the Bomet District Land Registrar seeking the following orders of this Court:

- (i) An order cancelling the Registry Maps known as sheet No. 7 and 8 Registration Section Kericho/Ndarawetta and a further order that parcel No. *Kericho/Ndarawetta/226* and *Kericho/Ndarawetta/239* be resurveyed so as to determine the true position of the road access on the ground.
- (ii) An order of the Court restituting 2.7 acres of land to the Plaintiff from the 1st Defendant plus *mesne* profits.
- (iii) Costs of the suit.

The Defendants were duly served with the summons to enter appearance together with copies of the Plaint. The 1st Defendant entered appearance but did not file a defence. The 2nd Defendant though served, did not enter an appearance. Interlocutory judgment was duly entered and the case fixed for formal proof on the 25th of October 2004. This Court having been satisfied that the 1st Defendant was duly served with the hearing Notice for the said date, ordered the Plaintiff to proceed with the case, the absence of the 1st Defendant notwithstanding.

The Plaintiff called two witnesses. PW 1, the Plaintiff himself, testified that parcels *No. Kericho/Ndarawetta/226* and *Kericho/Ndarawetta/239* were adjoining to each other. Parcel *No. Kericho/Ndarawetta/239* is owned by the Plaintiff. It measures 5.4 Hectares. A certificate of official search for the said parcel of land was produced as Plaintiff's Exhibit No. 1. Parcel *No. Kericho/Ndarawetta/239* is registered in the name of the 1st Defendant. It measures 3.2 Hectares. The certificate of search of the said parcel of land was produced as Plaintiff's Exhibit No.2. PW 1 testified that there was another parcel of land known as *Kericho/Ndarawetta/228* which is registered in the name of Kibet Bii. The Plaintiff testified that he purchased his said parcel of land in 1967. However, when he checked the registered indented map of Ndarawetta area, he realised that it did not represent the true position on the ground. According to the Plaintiff the said area map was redrawn resulting in the road passing through *Plots No. Kericho/Ndarawetta/226* and *Kericho/Ndarawetta/236* being shifted. The Plaintiff testified that the road was shifted to pass through his parcel of land instead of passing through its correct position on the ground. The Plaintiff produced the map of the Ndarawetta area as Plaintiff's Exhibit No. 3 to prove that the position on the map was different from the correct position on the ground. The Plaintiff testified that if the position on the map was to be considered, the said road would encroach on his parcel of land. He further testified that in 1999, he paid Kshs.8200/- (*Receipt produced as Plaintiff's Exhibit No.4*) for the said parcel of land to be resurveyed and the correct position of the road be reflected on the ground. The Plaintiff testified that the 2nd Defendant and the District Surveyor did nothing forcing the Plaintiff to file the current suit. The Plaintiff prayed for the said amount of

Kshs.8200/- paid to be refunded. He further testified that when the case was handled by the Land Disputes Tribunal, the Elders ordered the road to be re-routed to its correct position on the ground. The Elders award was produced as Plaintiff's Exhibit No. 5. The Plaintiff testified that prior to filing suit he had issued the Statutory Notice to the Attorney General on behalf of the 2nd Defendant. The Statutory Notice and the certificate of Postage was produced as Plaintiff's Exhibit No. 6(a) and (b).

PW 2 Kibet Arap Bii testified that he was a neighbour of the Plaintiff at Ndarawetta. He owned parcel No. *Kericho/Ndarawetta/228*. He testified that he was one of the Elders who heard the dispute involving the Plaintiff and the 1st Defendant. PW 2 further testified that when he purchased his said parcel of land from one Kiplagat Arap Soi, the road used to pass between parcels No. *Kericho/Ndarawetta/226* and *Kericho/Ndarawetta/239*. It was his testimony that the position of the road as shown in the map was wrong as it did not reflect the true position of the road on the ground.

I have considered the evidence adduced on behalf of the Plaintiff in this case. The issue for determination by this Court is whether the plaintiff has established that the road which passes between parcels No. *Kericho/Ndarawetta/226* and *Kericho/Ndarawetta/239* ought to be re-routed. According to the Plaintiff, the road between Parcels No. *Kericho/Ndarawetta/226* and *Kericho/Ndarawetta/239* was shifted in 1984 resulting in the Plaintiff losing 2.7 acres of land to the 1st Defendant. It was his testimony that all his efforts to have the said road re-routed so as to reflect the correct position on the ground have been frustrated by the 2nd Defendant and the District Land Registrar. The Plaintiff testified that the dispute involving the said parcel of land was heard and determined by the Land Disputes Tribunal in his favour. The Plaintiff called PW 2, the owner of parcel No. *Kericho/Ndarawetta/228*, who testified on his behalf. It was his testimony that the map did not reflect the correct position on the ground. He further testified that the position of the road on the ground ought to be changed to reflect its correct position. I have read the pleadings filed by the Plaintiff in this case. I have also evaluated the evidence adduced on his behalf during the hearing of this case. In my view, the real issue in controversy is the determination of the correct acreage of parcels No. *Kericho/Ndarawetta/226* and *Kericho/Ndarawetta/239* so as to determine where the road shall be positioned on the ground. According to the certificates of search which were produced by the Plaintiff as Exhibit No. 1 and 2, Parcel No. *Kericho/Ndarawetta/239* owned by the Plaintiff measures 5.4 Hectares whilst Parcel No. *Kericho/Ndarawetta/226* owned by the 1st Defendant measures 3.2 Hectares. To resolve the dispute as relates to the correct position of the road, the two parcels of land ought to be resurveyed to determine the correct acreage of the Parcels of land owned by the Plaintiff and the 1st Defendant respectively. In the premises therefore, I do find that, on a balance of probabilities, the Plaintiff has established his case against the Defendants. I therefore enter judgment for the plaintiff and against the Defendants jointly and severally as hereunder:

- (i) The 2nd Defendant is hereby ordered (*with the assistance of the District Surveyor, Bomet*) to resurvey Parcels No. *Kericho/Ndarawetta/226* and *Kericho/Ndarawetta/239* to determine the correct acreage of the two Parcels of land.
- (ii) The 2nd Defendant is further ordered, upon determining the acreage of the said two Parcels of land (*with the assistance of the District Surveyor*), to re-route the Public road between the two parcels of land to reflect its true position on the ground.
- (iii) The costs for the said resurvey shall be borne by the Plaintiff and the 1st Defendant. In the event that the 1st Defendant shall fail to pay his share of the costs, the Plaintiff shall pay the same and recover it as part of the costs of this suit.
- (iv) The sum of Kshs.8200/- already paid by the Plaintiff as survey fees shall constitute part of his contribution to the costs of the said resurvey.
- (v) The Plaintiff shall have the costs of the suit.

DATED at KERICHO this 10th day of December, 2004.

L. KIMARU

JUDGE