



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL SUIT NO. 113 OF 1992**

**CHEPKINO KIBURET ..... PLAINTIFF**

**VERSUS**

**NELSON CHEPNGOTIE & 3 OTHERS .....DEFENDANTS**

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

The plaintiff Chepkino Kiburet filed this case against the defendants Nelson Chepng'otie, Kiplagat Torgoch, Kipsugut Chepkok and Kiplagat Samoel. In his amended plaint he avered that in 1965 the plaintiff bought shares in Sergoit rock farm LR No. 7212/2 for Kenya shillings 2,900.00. He plaintiff paid the said money and he was entitled to a total of 46 acres. On or about 1988 to 1989 or there about during subdivisions of the said farm the defendant jointly unlawfully and without just cause rejected the plaintiffs receipt of Kshs.900/= nine hundred paid on 23rd May, 1965 and which entitled the plaintiff to 14 acres over and above the 32 acres already allocated to him that on or about 3rd March, 1993 during the pendency of this suit the defendants acceded to part of the plaintiffs claim by allocating him six more acres out of the plaintiffs claim of fourteen 14 acres. Title number Sergoit/Koiwoptao Block 7 (sergoit Rock 110 has since been issued to the plaintiff over the six acres, that pursuant to paragraph 8B above the defendants have continued to appropriate the remaining 8 acres, that the plaintiff is entitled to. He plaintiff therefore seeks a declaration of court both against the first, 2nd, 3rd and 4th defendants jointly and severally for an order that the plaintiff is entitled to an additional eight (8) acre comprised in LR no. 7212/2 sergoit rock farm over and above the plaintiff initially allocated 32 acres and the further 6 acres allocated to him recently, he also seeks an order that the said 8 acres comprised in the suit land aforesaid to be transferred and registered in the name of the plaintiff over and above the plaintiffs 32 and 6 acres herein above mentioned by the defendants either jointly or severally executes the relevant transfer documents failing which this court may execute the same in lieu of the defendants. In the alternative the plaintiff prays for an order directing the defendants either jointly and or severally to pay to the plaintiff the value of the balance of (8) eight acres now due and owing from the defendants to the plaintiff at the rate of Kshs.70,000.00 per acre, a permanent injunction restraining the defendant from interfering with the plaintiffs quiet enjoyment and possession of his land, costs of the suit inclusive of the costs of the six (6) acres allocated during the pendency of this suit, further or other reliefs of court.

The defendants also put in an amended defence and the averments are that they deny that the 3rd defendant is a director of sergoit rock farm as alleged in paragraph 4 of the plaint, denied that the plaintiff bought shares in sergoit rock farm in 1965 worth 2,900.00 as alleged in paragraph 6 of the plaint and they put the plaintiff to strict proof thereof, that members of sergoit farm paid no more than 2,000/= each for their shares with the exception only of one Henry Kolangel who was allowed to pay 3,000/=, that the plaintiff paid 2,000/= only for his shares like the other members and that of the said sum of 2,000/= credited to the plaintiff Kshs.1,000/= was received by the directors from one J. P. Tooley in 1963 and the other sum of Kshs.1,000.00 was paid by the plaintiff in instalments directly to the farm directors in the same year, deny that any further sum of Kshs.900/= was received by the Directors from the plaintiff and they put the plaintiff to strict proof thereof, deny that the plaintiff is entitled to an additional 14 acres

bringing the total of 46 acres as alleged and they put the plaintiff to strict proof they deny having acceded to the plaintiffs claim during the pendency of the suit and deny having voluntarily given the plaintiff 6 acres but state that the plaintiff by use of trickery and coercion obtained 6 acres which formed part of the land allocated to the school and that the same should revert to the school, that members of sergoit rock farm collected money for survey work and in 1990 called in a surveyor who carried out survey and subdivision of the farm and gave the plaintiff his correct acreage of 32 acres in accordance with his share contribution and the plaintiff made no complaint as to the said acreage, they admit that they rejected a receipt by the plaintiff for Kshs.900.00 as the same was produced by the plaintiff in 1991 after the survey and subdivision of the farm had been completed and they deny the authenticity of the said receipt, deny that the plaintiff is entitled to 8 acres as alleged in paragraph 9 B and further state that the plaintiff should in fact surrender the acres which formed part of the school lands, that if the plaintiff paid the alleged sum of Kshs.900.00 to the J. P. Tooley as shown in the receipt which is expressly denied then the said sum was not for the purchase of the said sergoit rock farm and the said money was never received by the defendant for that purpose, that the plaintiff is not entitled to a declaration that he is the owner of 14 acres over and above the acres allocated to him and they state that the plaintiff has been given his correct acreage, that he plaintiff is not entitled to the declaratory orders sought nor is the plaintiff entitled to 8 acres or its value at the rate of Kshs.70,000.00 per acre, denied paragraph 10A, 11A, 11B and 12A.

In consequence, thereof they prayed for the suit to be dismissed with costs.

Two witnesses gave evidence for the plaintiff being the plaintiff himself being Chepkino Kiburet and PW 2 Kobei Sirwanei. Also two witnesses gave evidence for the defence being Nelson Kipkirui Chepng'otie the first defendant and DW 2 Kipsugut Chepkok. The facts are brief and straight forward and they are to the effect that the disputants and others named in the 3rd party proceedings pooled their money together to buy rock farm. At first payments were being made through one Mrs. Tooley who was a land broker. It is the stand of the plaintiff that he made payment of a total of Kshs.2,900/= as shown by the receipts exhibit 1 and 2 dated 30.11.1964, 13.6.1965 and 23.5.65. It is his evidence that when senior Tooley died the money was taken by her son to DW 1. That it was him and another member who had paid in excess of 2,000/= with Kolongel paying 3,000/= while he plaintiff paid 2,900/=. They settled on the land and when surveyors came in 1988 he plaintiff said that he was entitled to more acreage but the defendants led by DW 1 rejected this receipt because they did not receive the 900/=. PW 1 said that his 3 herds of cattle were sold by Tooley and the proceeds were to go for the purchase of the land. When he was registered as having contributed only 2,000/= as shown on exhibit D3 he protested and showed the receipt for 900/=. But the farm officials rejected it. He PW 1 went to the son of Tooley who wrote exhibit 3 confirming that 900/= was received by his mother and duly receipted by the receipt exhibited after that confirmation the defendants still turned down the complaint of the plaintiff. It is on record that it is only him who was complaining. They were adamant and decided to go by the lists they had prepared being exhibit D2 and D4 whereby the plaintiff was shown to have contributed 2,000/= and he was entitled to 32.9 acres.

The plaintiff was not satisfied and that is why he came to court to file these proceedings in 1992. Before coming to court the farm committee had heard the dispute vide proceedings produced as exhibit 5. It is on record from those proceedings that DW 1 testified and he agreed that he had seen the receipt complained of earlier than 1988 before the surveyors came. Despite the protests DW 1 went by the rules they had set as shown in exhibit D 3.

PW 1 was not discouraged and so he filed these proceedings in court and during the pendency of these proceedings a time came for title deeds to be issued but the same could not be issued because of these proceedings. Instead of coming to court the parties went before assistant chief and signed exhibit 1 whereby the plaintiff was given 6 acres and titles were issued. The plaintiff ended with 2 titles no. sergoit/KolwopTao block 7/sergoit rock 110 comprising 2.200hectares or 6 acres and the earlier one sergoit/KolwopTao block 7(sergoit rock/59 comprising 12.31 hectares. After being given the 6 acres out of the 14 acres which he had claimed earlier on he came amended his plaint and now claims 8 acres as the balance.

The defence have resisted the claim because:-

(i) The money was allegedly paid to Tooley and he should follow Tooley.

(ii) He DW 1 only received 4,000/= from Tooley being 3,000/= for Kolongel and 1,000/= for the plaintiff but he agrees that there is no handing over document produced by him. Neither are there copies of receipt books used to issue the receipts.

(iii) That they have given out the land as each member has his own title deed and there is no more land to be given out.

(iv) He denied that the directors were given more land and that is why the plaintiff failed to get his total acreage.

(v) That the 6 acres they gave to the plaintiff were sliced off from the school land and were for purposes of facilitating the issuance of titles as the proceedings were holding the issuance of titles.

A total of 8 issues were agreed between the parties and this court will proceed to consider the same in the assessment of the evidence.

The evidence on the record shows that the plaintiff has proved that he paid 2,900/= to purchase shares in LR No. 7212/2 being 1,000/= paid to DW 1 and 1,900/= paid to Tooley. DW 2 confirmed that 3 heads of cattle of the plaintiff were sold to raise proceeds for the purchase of land. DW 1 acknowledges only 2,000/= and not 900/=. However it is the finding of this court that in the absence of the handing over note from Tooley when DW 1 received from him money for those who paid through Tooley and in the absence of production of receipt books against which money was received from share holders there is nothing to counter PW 1 evidence that 900/= was among the money handed over to DW 1 by Tooley. He PW 1s produced a letter from the son of Tooley confirming that the receipt of 900/= was genuine.

Issue no. 4 is answered in the affirmative as it is on record in proceedings produced by the defence that the plaintiff had even shown the receipt prior to 1988 and DW 1 rejected the same and only equalized him to the others and allocated him 32 acres. It was therefore wrong for the defence to reject that receipt. This court has no doubt that this was a genuine claim and that is why they later compensated him 6 acres.

DW 1 attempted to say that it was honoraria but he produced no rule of the company which empowered them to give out honoraria land. I have no doubt this was in recognition of the fact that the plaintiff had a genuine claim but since they had no spare land they had to slice off 6 acres from the school land and give him. This arrangement was done outside the court and so it was not in full and final settlement of the plaintiffs claim in court. It means that the plaintiff was entitled to amend the pleadings and pursue the balance. He inserted a claim for monetary value. This was proper as the court was informed that all land had been dished out and titles issued and the only way the plaintiff can be compensated is by way of monetary value of the land.

Regarding issue no. 6 and 7 it is the finding of this court that the plaintiffs claim is not frivolous misconceived and bad in law. But it is a valid and genuine claim and it ought to be allowed. It is correct that subdivision work is over and titles issued and that is why it was prudent for the plaintiff to put in a claim for the value of the land.

The only problem the court has as regards the value of the land is that no evidence was adduced as to when the land was valued. Whether the value applies to the time the suit was filed or the time the amendment was made and the basis of the same. The question is whether failure to adduce evidence on how the value was arrived at disentitles the plaintiff to the relief he is seeking or whether the matter is to be referred to the Deputy Registrar to call evidence on valuation of land in the area as at the time of filing of the suit, as at the time of the amendment and as at the time of trial before final judgement is given. The courts finding is that in the absence of evidence on valuation the court will make a reasonable assessment of the value of the land in order to finally determine the issue which I assess and fix at 40,000.00 per acre as at the time of filing of the suit. The court has chosen to fix the value of the land as at the time of filing

of the suit because it was not pleaded that the value per acre was to be the current market value as at the time of trial or judgement. The value of 8 acres will therefore work out to Kshs.360,000.00.

The defendants are the ones who are jointly and severally to pay this money to the plaintiff because they are the ones who necessitated the proceedings. The other farm members sought to be joined in the proceedings through the 3rd party proceedings had no say and hand in the matter and as the plaintiff put it they did not deny him the land and so they are exonerated from blame.

I therefore find that the plaintiff has formally proved his case on a balance of probability and he is entitled to judgement on the following terms.

1. An order be and is hereby made directing the defendants either jointly and or severally to pay to the plaintiff the monetary value of the balance of the eight (8) acres now due and owing from the defendants to the plaintiff at the assessed rate of Kshs.40,000.00 per acre as at the time of filing of the case making a total of Kshs.360,000.00 three hundred and sixty thousand only.

2. The said money will carry interest at court rates from the date of judgement till payment in full.

3. The prayer for an injuriction to issue against the defendants restraining them from interfering with the plaintiffs use of the land will not serve any purpose as the plaintiff already has 2 titles in his name and he has been compensated in monetary terms for the balance and so the prayer in paragraph 12A of the amended plaint is disallowed.

4. The plaintiff will have costs of the proceedings to be paid to him by the defendants jointly and or severally.

Dated, read and delivered at Eldoret this 21st day of February 2003.

**R. NAMBUYE**

**JUDGE.**