



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 107 OF 2014

WILLIAM KANGOGO NYONGI.....PLAINTIFF

VERSUS

WILFRED KIPROTICH CHEBII.....DEFENDANT

JUDGMENT

1. **William Kangogo Nyongi**, the Plaintiff, commenced this suit through the Plaint dated 2nd April, 2014, as amended on 16th December, 2015 and further amended on the 19th October, 2018 against **Wilfred Kiprotich Chebii**, sued in his own capacity and as the administrator of the estate of the late **Chebii Kipser**, the Defendant, seeking for permanent injunction in respect of land parcel **Sergoit/Elgeyo Border Block 1 (Beliomo)/46** and declaration that he is entitled to one half of the said land as co-registered proprietor. He also prays for the land to be partitioned and one half be transferred to him plus costs. The Plaintiff avers that he is a co-registered owner of land parcel Sergoit/Elgeyo Border Block 1 (Beliomo)/46, suit land. That the Defendant, who has been appointed the administrator of the estate of the late Chebii Kipser, had on or about 28th March, 2014 forcefully ejected the persons he had contracted to plough the land and thereafter threatened physical violence against him and his family members if they cultivated the land. That the Defendant's acts amount to evicting the Plaintiff from the land by denying him access to the suit land and he has suffered loss and damages.

2. The claim is opposed by the Defendant through his Defence and counterclaim dated the 21st May, 2014 and amended on the 8th December, 2015. The Defendant has denied forcefully ejecting and or denying the Plaintiff access to cultivate his portion of the land. He avers that he has had quiet possession, occupation and or enjoyment of part of the suit land. That the whole suit land belongs to his late father Chebii Kipser, who acquired it from Irong Farmers Co-operative Society. The Defendant therefore prays for permanent injunction restraining the Plaintiff from **"entering, trespassing or interfering, using, disturbing quiet possession and or use by the Defendant and beneficiaries of deceased of the parcel in question"** and costs.

3. The Plaintiff opposed the Defendant's counterclaim through the Reply to the Defence and Defence to the Counterclaim dated 29th May, 2014. He avers that the suit land is jointly registered in the names of the late Chebii Kipser and himself. That he has been in possession of the suit land from the time of purchase and had elected a semi-permanent house, planted trees and has farmed on it for over 25 years.

4. The Plaintiff testified as **PW1** and the Defendant as **DW1**. It is the Plaintiff's testimony that the Defendant's late father named Chebii Kipser, and himself bought the suit land jointly. That each had contributed Kshs.3,600 to make Kshs.7,200 which was paid to the Society that was acquiring land from a white man. That the Society issued receipts for the money paid in the name of the Defendant's father. That the land they bought was registered in their joint names, and title deed issued in 1985. He produced a copy of the certificate of official Search for Sergoit/Elgeyo Border Block 1/(Beliomo)/46 as exhibit. That after purchasing the land, they each took possession of their half share. That the Defendant and his brother Peter have been using their father's share, while his son has been using his portion. That when the title deed was issued, the late Chebii Kipser handed it to him and he kept it. That after the death of Chebii Kipser in 1988, the Defendant asked him for the title deed to make a copy in 1989 but never returned it to him. That there was no dispute over the use of the land until 2011 when the Defendant started claiming that the land was bought by his late father alone and the Plaintiff should vacate from the portion he was using prompting the filing of this suit. During cross examination, PW1 confirmed that he paid for the land in 1972 by giving Shs.2000 and the balance of Shs.1,600 in instalments later to the Defendant's late father. That the portions each has been using were measured without involving surveyors and his portion was about ten **(10)** and not eight **(8)** acres.

5. The Defendant testified that he has a limited grant in respect of the estate of his late father Chebii Kipser, who was the registered proprietor of the suit land with the Plaintiff. He produced receipts dated between 22nd September, 1964 to 2nd May, 1973 totalling Shs.5,020. That according to him, the Plaintiff did not contribute in the purchase of the suit land, and his name should be removed from the register and he be evicted from the land. During cross examination, DW1 testified that though the title to the suit land was issued on 13th August, 1985 in the joint names of his father and the Plaintiff, his father died on the 5th November, 1988 without challenging the Plaintiff's registration with the land. That he and his elder brother took the first steps to reclaim the land in 2014. That the Plaintiff has been using a portion of about nine **(9)** acres of the suit land from about 1990. That he has been using a portion of about 14 acres of the suit land from

6. That after close of the parties' cases, directions on filing and exchanging submissions were given. The learned Counsel for the Plaintiff filed their submissions dated the 22nd May, 2020 on the 14th December, 2020 but none has been traced for the Defendant.

7. The following are the issues for the Court's determination;

(a) **Whether the Plaintiff's registration with the suit land was through fraud or misrepresentation.**

(b) **Whether the suit land was owned jointly or in common.**

(c) **Who pays the costs of the main suit and counterclaim?**

8. The Court has carefully considered the pleadings by both parties, testimonies tendered, the submissions by the learned Counsel, the superior courts' decisions cited thereon and come to the following determinations;

(a) That from the testimonies tendered, especially the copies of the certificates of official Search and land certificate for Sergoit/Elgeyo Border Block 1/(Beliomo)/46, the suit land, the same was registered first on the 13th August, 1985 and on the same date transferred to the names of Chebii Kipser and William Kangogo Nyongi. That as no entitlement shares are indicated against the two names, they own the said land jointly. That the superior court decisions, and the provision of **Sections 101, 102 and 103 of the repealed Registered Land Act Chapter 300 of Laws of Kenya**, which was the statute in operation when the suit land was registered, leaves no doubt that where one joint proprietor dies, the property does not form part of that proprietor's estate but passes to the surviving joint proprietor or proprietors. That were the court to find that the suit land herein was indeed registered in the name of the late father of the Defendant and that of the Plaintiff as joint proprietors, then it would follow that Plaintiff is entitled to the whole parcel. The Court nevertheless notes that he is only seeking for a half share.

(b) That from the Plaintiff's pleadings and the testimony in Court, the late Chebii Kipser and himself contributed equally towards the purchase of the suit land. That they were each entitled to half share and were using specific portions of the land, which for all intents and purposes, they deemed theirs to the exclusion of the other. That the Defendant has also through his testimony confirmed that the Plaintiff has been using a portion of the suit land to the exclusion of that used by his father, the late Chebii Kipser. That the foregoing evidence on how the suit land was acquired through equal contributions of the purchase price, the exclusive use of the specific portions of the land by each side, leads the court to conclude that the parties' intention was to acquire the land as tenants in common each with a 50% interest over the whole. The Court agrees with the finding of *Munyao, J* in ***Moses Bii Vs Kericho District Land Registrar & Another [2015] eKLR*** on the presumption of tenancy in common. That position is however contested by the Defendant who seeks to have the Plaintiff's name removed from the title, and to be evicted from the portion he uses, on the land even though his late father never disputed the Plaintiff's registration with and use of the land in his lifetime.

(c) That for the Defendant to succeed in his claim against the Plaintiff on fraud and misrepresentation, he needed to tender proof in view of the provision of **Section 26 of the Land Registration Act** that obligates this court to take the Plaintiff as an absolute and indefeasible owner of the 50% of the suit land, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate of title. That indeed, the Defendant would only succeed in challenging the Plaintiff's title if he establishes fraud or misrepresentation to which the Plaintiff was a party to, or show that the certificate of title to the suit land was acquired illegally, unprocedurally or through corrupt scheme. That as the late Chebii Kipser did not in his lifetime challenge the Plaintiff's registration with the suit land, or in any other way show his displeasure to the Plaintiff's use of the land, and in the absence of any evidence being tendered by the Defendant to suggest that the Plaintiff fraudulently or through misrepresentation obtained registration with or inclusion on the certificate of title, then the Court finds the Defendant has failed to discharge his legal duty of proof under **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya**. That there is also no evidence that the Plaintiff illegally had without following the due process, or in corrupt scheme with another, or others involved in the registration of the certificate of title, got himself so registered. That several superior courts' decisions including the Court of Appeal in ***Kinyanjui Kamau Vs George Kamau [2015] eKLR*** have pronounced themselves on the level of prove of fraud allegation. The Court in the above case stated as follows:-

"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo Vs Ndolo (2008) 1KLR (G & F) 742 wherein the Court stated that; ***"...We start by saying that it was the respondent who was alleging that the Will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."*** ***"In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."*** That in the instant case, other than what the Defendant averred in his pleadings on fraud and misrepresentation, there was no attempt made to avail any evidence towards proving the same and or the Plaintiff's involvement in the alleged fraudulent transactions.

(d) That further to the finding above that the late Chebii Kipser died without challenging the Plaintiff's interest on the suit land, it is noticeable that the Defendant's counterclaim was filed on the 21st May, 2014 challenging the Plaintiff's registration with the land. The title to the suit land was issued on the 13th August, 1985 and by the time the Defendant's counterclaim was filed a period of about twenty-nine (29) years had lapsed. That **Section 7 of the Limitation of Actions Act Chapter 22 of Laws of Kenya** limits for action for recovery of land to be before the end of twelve (12) years. The Defendant's counterclaim against the Plaintiff is therefore statute barred and no attempt to seek leave under **Section 26 of the said Act** was made prior to the filing of the claim.

(e) That as the Plaintiff has shown that it is the Defendant's acts of denying him access to his portion of the suit land that prompted this suit, then the Plaintiff is entitled to costs of the suit and counterclaim as under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, costs follow the event.

9. That from the foregoing, the Court finds and orders as follows;

(a) That the Plaintiff has proved his claim against the Defendant on a balance of probabilities and judgment is hereby entered in his favour in terms of prayers **(a)**, **(b)** and **(c)** of the further amended plaint dated the 19th October, 2018.

(b) That the Defendant has failed to prove his counterclaim against the Plaintiff and the same is dismissed with costs.

Orders accordingly.

DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 24TH DAY OF MARCH, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendant: Absent.

Counsel: Mr. Tororei for Plaintiff.

Court Assistant: Christine

and the Judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.