Busienei & 3 others (Suing on Behalf of Themselves and Others) v Ngetich & 3 others (Environment & Land Case E044 of 2021) [2025] KEELC 1044 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1044 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE E044 OF 2021

EO OBAGA, J

MARCH 6, 2025

BETWEEN

WILSON M. BUSIENEI ..... 1ST PLAINTIFF

KIPTOO ARAP KOECH ..... 2ND PLAINTIFF

KIMELI ARAP BWALEI ..... 3RD PLAINTIFF

EDWARD KIPLIMO ROTICH ..... 4TH PLAINTIFF

SUING ON BEHALF OF THEMSELVES AND OTHERS

AND

PETER BOISIO NGETICH ..... 1ST DEFENDANT

JOSEPH ARAP CHERUIYOT ..... 2ND DEFENDANT

JOHN KIMELI ..... 3RD DEFENDANT

ALEXANDER AKWAEI TOO ..... 4TH DEFENDANT

JUDGMENT

Background and introduction

1. This is one of the sad cases which is an example of how delay in sorting out partnership properties, greed of some partners or their successors, the law and goveernment policies can inflict untold suffering to persons having interest in the land decades later. The root of this case can be traced to precolonial time when the suit properties namely LR 8822, 8637 and 6617 were registered in the name of John Joseph Hughes (Hughes). Hughes died and the properties were registered by way of transmission in the name of his wife Euginie Dorothy Hughes who died on 16th August, 1987.

2. The history of how the suit properties were in the process of changing hands from Hughes is not clear but from a consent letter from the Land Control Board dated 14th August, 1969, Hughes was in the process of transferring the three properties at a consideration of Kshs.150,000 to Nasar Singh Sura, Rasinder Singh Sura, Kimorong Arap Mibei, Joseph Arap Tuigeny, Jacob Cheruiyot and Kipngetich Tanui.

3. What is however clear and relevant in this case is the registration of Parcel 8822 and 6617 in the names of the 1st and 2nd Defendants together with Kimorong Mibei vide a vesting order dated 11th August, 1999 through Eldoret High Court Civil Suit No. 150 of 1999 (OS).

4. The original partners have all since died. This litigation is being conducted by the sons of the original partners. When Eldoret High Court Civil case No. 150 of 1999 (OS) was filed, the Plaintiffs who included Kimorong Mibei the only original partner surviving then did not disclose that there wrere other people residing on the suit properties who were entitled to a share of the same.

5. When the government acquired parcel 8822 and 6617, it is only the three Plaintiffs in Civil Suit No. 150 of 1999 (OS) who benefitted from the compensation as the record in the lands registry showed that the three each had ⅓ share of the properties. The vesting order was later set aside vide ruling of 18th April, 2018. When the Applicants who led to the setting aside of the vesting order were joined as Defendants, the Plaintiffs in Civil Suit 150 of 1999 (OS) withdrew the suit.

6. The Plaintiffs then moved to the Land Disputes Tribunal and filed Arbitration case No. 30 of 2001 against Kimorong Mibei, Peter Ngetich and Joseph Cheruiyot. In the year 2012, Kibai Arap Busienei & 2 others on behalf of 16 others filed a suit against Peter Boisio Ngetich & 2 others in Eldoret High Court Civil Case No. 12 of 2002. This suit was struck out following preliminary objection which was raised by the Defendants. Upon conclusion of the dipsute before the tribunal, the elders ruled that the Plaintiffs as well as the Defendants were entitled to a share of the suit properties. The verdict of the Tribunal was adopted as the judgment of the court on 18th June, 2002 vide Eldoret Chief Magistrates court Award No. 61 of 2002. The Plaintiffs filed an application seeking to have the subdivisions carried out after 2002 declared illegal, null and void and the same to be cancelled together with any deed plans. This application was allowed on 15th November, 2007.

7. The Defendants were dissatisfied with the ruling of 15th November, 2007. They preferred an appeal to the High Court vide Civil Appeal No. 160 of 2007 (Joseph Cheruiyot & 2 others -vs- Wilson Busienei & 19 others). They applied for stay of execution of the orders of 15th November, 2007 but the application was dismissed with costs. They filed Civil Appeal against the ruling of 15th November, 2011. This appeal was dismissed on 28th February, 2013.

8. The appeal which was filed in Civil Appeal No. 160 of 2007 was transferred to the Environment and Land Court where it was registered at Civil Appeal No. 6 of 2017. The appeal was heard and it was dismissed with costs on 9th February, 2018. The court directed that the decree of the lower court had to be executed to the letter.

9. Aware that the lower court had no jurisdiction to cancel titles, the Plaintiffs were forced to file this suit so as to achieve the execution of the decree which arose from the Tribunal verdict which was adopted as judgment of the court. This is because the Defendants kept on subdividing the suit properties. The matter was complicated by acquisition of part of the properties by the government which inevitably led to subdivision of the parcels.

10. On 14th July, 2021 the Plaintiffs filed a notice of motion dated 5th July, 2021 in which they pleaded with the court to allow them to continue this suit on behalf of the Estates of 18 beneficiaries as per

the details supplied in the application. The application was allowed on 26th July, 2021 but there was no amendment to the plaint to name the Estates as Plaintiffs.

Plaintiff's Case

11. The Plaintiffs' suit was presented by PW1 Wilson Malakwen Busienei who stated that they were proceeding with this case on their own behalf and on behalf of the Estates of 19 beneficiaries. He testified that they filed a case before the Tribunal. The Tribunal ruled that the suit properties were to be distributed according to the contributions of the shareholders. They started the process of executing the decree which had been extracted from the Chief Magistrates Court upon adoption of the verdict of the Tribunal as a judgment of the court. The lower court had declared the subdivisions which were carried out after 2002 as null and void. The court proceeded to cancel the titles in respect of the subdivisions. When they went to have the cancelled titles replaced, they were informed that that was not possible as the lower court had no jurisdiction to cancel titles.

12. He stated that the original land was 445 acres but the government acquired portions of it and the compensation was given to the Defendants. The Defendants sold 10 acres to the Municipal Council of Eldoret who paid Kshs.3,750,000. The Plaintiff learnt of the compensation after the Defendants had utilized all the monies. The Plaintiffs then filed Eldoret HCCC No. 12 of 2002 seeking to compel the Defendants to account for the money paid in compensation. This case was struck out on a technicality through a ruling declared on 18th October, 2003.

13. He stated that there were about 15 titles issued in 2006. The titles were issued in favour of two families comprising of the Defendants. He stated that the 1st and 3rd Defendants are brothers. They are children of Kipngetich Tanui who was one of the original partners. The 2nd and 4th Defendants are sons of Joseph Tuigeny who was also one of the originl partners.

14. He further stated that the 2nd and 4th Defendants stay with them at the suit properties. The 1st Defendant lives at Moiben whereas the 3rd Defendant resides in Nandi. He states that those who obtained titles in 2006 obtained them illegally as the land did not belong to their fathers. He stated that the suit properties were purchased from a white settler through Sangalo group and that he did not know how the suit properties were transferred into the name of the six parties who included two Asians.

15. The witness further stated that the Defendants were included in the list of beneficiaries from the Tribunal verdict. The dispute before the Tribunal was for 95 acres but that they have since learnt that there were additional acres which the court should order that they be distributed amongst the Plaintiffs and the 18 families of the deceased shareholders. He stated that the Defendants should not benefit from the sharing in the decree as they have already benefitted from sale of 84 acres to Kenya Pipeline and 10 acres to the Municipal Council of Eldoret.

Defendants' Case

16. DW1 Joseph Arap Cheruiyot testified that parcel Nos. 8637, 8822 and 6617 whose total acreage was 477 belonged to John Joseph Hughes. A consent to transfer was granted transferring the three parcels to six parties. He stated that the six parties were not associated with Sangalo Estates. The suit properties were purchased for Kshs.150,000. Parcel 8637 ws 372 acres, parcel 8822 was 95 acres and parcel No. 6617 was 10 acres. He stated that he is son of Joseph Tuigeny and the 4th Defendant is his brother.

17. The 1st Defendant is son to Kipngetich Tanui and the 3rd Defendant is his brother. DW1's father died on 2nd November, 1969. Kimorong Mibei was brother to Joseph Tuigeny. Kimorong Mibei died on

9th August, 2005. This witness testified that he was party to the Tribunal proceedings. He stated that it is only Kimorong Mibei who was in the letter of consent but was not before the Tribnal. He testified that he does not agree with the verdict of the tribunal.

18. On 19th May, 1978 the government through Gazette Notice No. 1458 and 1459 published intention to acquire parcel No. 8837 measuring 372 acres. On 4th February, 1980 the government through Gazette Notice No. 345 reduced the land it had intended to acquire in 1978 by 236 acres. The government expressed intention to take 136 acres. On 12th February, 1988 the government through Gazette Notices 520 and 521, the government expressed its intention to acquire 84 acrs out o parcel 8637.

19. On 23rd November, 2001 the Municipal Council of Eldoret acquired 3.08 hectares out of 8822 and 0.96 hectares from 6617. This was through Gazette Notice Nos. 7916 and 7917. The Defendants state that the acquisition which touched the three parcels were the intiatives of the government and the Municipal Council of Eldoret. It was not their initiative.

20. UG Quarry had filed Nakuru HCCC No. 100 of 2000 on behalf of the two Asian partners. Compensation was given to UG Quarry on behalf of the two Asian partners. The witness testified that the total acreages which was to be given to the beneficiaries was 105 acres. Already Parcel 8822/2 had been reduced by 7 acres and there is no way the decree of the Tribunal would have been satisifed.

21. The Defendants stated that they obtained a vesting order in Eldoret HCCC No. 150 of 1999 (OS). They proceeded to subdivide parcel 8822/2 based on the vesting order. They carried out succession in respect of the Estate of their late fathers. In 2006 they obtained a number of subdivisions in the name of Kimorong Mibei, Peter Boisio and Joseph Cheruiyot. The registration was made in the names of the three to hold the same in trust of the families of the deceased owners. They tried to set aide the decision of the Tribunal but they were not successful.

Submissions by the Parties

Plaintiffs' submissions

22. The Plaintiffs filed submissions dated 10th September, 2024. The opening remarks in the submissions summarises what the pendency of this case has done to the parties. The Plaintiffs states as follows:

> " If there is a case that has caused injsutice to so many people, it must be this one. Almost 20 people have died waiting for justice to be done. Why would this happen, surely, over just a piece of land where people have lived all their lives? Most of them (like the Biblical Abraham, who died before he saw the fulfilment of God's promises of the coming Messiah) died before they encountered the hoped-for enduring justice, but they certainly died in the hope that one day justice would be realised. Today, we hope that day has arrived. The Plaintiffs hope that this Honourable Court will be the one to finally sort out an injustice that has spanned over 5 decades, causing untold suffering in the process."

23. The Plaintiffs submitted that the decree arising from the subject properties was made in December, 2002. The Defendants did not challenge it by going to the Provincial Appeals Committee. They filed Judicial Review Proceedings which they later withdrew. Some of the Defendants filed Nairobi HCCC No. 77 of 2007 seeking to nullify the decree but the case was thrown out. In Civil Appeal No. 179 of 2011, the Court of Appeal noted that the decree has never been set aside and it remains in force and should be executed in accordance with its terms.

24. The Plaintiffs submitted that adoption of an award from a Tribunal makes it enforceable like any decree. They relied on Section 7 (2) of the Land Disputes Tribunal Act (Now repealed) which states as follows:

> " The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*".

Reliance was also placed on the case of Alfred Sagero Omweri -vs- Kennedy Omweri Ondieki (2015) eKLR and Joseph Nderitu Wamathai -vs- Joseph Ndungu Njoroge & 2 others (2007) eKLR.

25. The Plaintiffs further submitted that the subdivisions which were done after the decree were irregualr or should be cancelled. They submitted that evidence adduced showed that all the subdivisions in issue were carried out between 2003 and 2006.

26. The Plaintiffs also submit that the vesting order which the Defendants are relying on was set aside and the Defendant therefore wanted to mislead the court that the vesting order was still in force. A copy of the decision in which the vesting order was set aside was provided to the court through this submissions.

27. The Plaintiffs submitted that though the decree from the Tribunal talks of 95 acres, the Plaintiffs have discovered that the land could be more hence the call for this court to pronounce itself on the additional acres so as not to leave any gap in the execution of the decree.

28. The Plaintiffs submitted that there was no evidence adduced to show that the government went beyond the intention to acquire land and had the land transferred to it.

Defendants' Submissions

29. The Defendants submitted that the 1st Plaintiff did not have the competency to file the suit. They submitted that whereas the 1st Plaintiff had authority to plead on behalf of the 2nd to 4th Plaintiffs, he did not have authority to plead on behalf of those the court allowed to come into the suit vide application dated 5th July, 2021. They submitted that though the Plaintiffs were granted leave to proceed on behalf of the others, there was no amendment to the Plaint to name them as Plaintiffs. The Defendants further submitted that the Plaintiffs did not have letters of administration to enable them sue on behalf of the Estate of the deceased persons.

30. The Defendants further submitted that the Defendants had no capacity to be sued as they had no letters of administration in respect of the estates of their deceased fathers.

31. The Defendants submitted that the government and the estate of Kimorong Mibei should have been joined in this case as parties. They submitted that as at the time the decree subject of execution was issued, the government had acquired about 80% of the three parcels.

32. The Defendants submitted that there is evidence that the government acquired 7 acres from LR 8822 in the year 2001. The government went ahead to subdivide the suit land into LR No. 8822/1, 2 and 3 between 2002 and 2004 by which time the Plaintiff had a decree of the lower court.

33. The Defendants further submitted that the subdivision was lawfully done pursuant to confirmed grants in Eldoret HCC P&A Nos. 24 and 29 of 1988. The Defendants submit that any order touching on LR 8822/1 and 8822/3 will adversely affect the government and any order touching on subtitles arising from LR 8822/2 will affect the estate of Kimorong Mibei who is not a party to this suit. Reliance

was placed on the case of Julius Kibiego -vs- Angeline Korir & another (2012) eKLR where it was held that an order even if by consent cannot bind an individual who is not party to the suit.

34. The Defendants submitted that the Tribunal had no jurisdiction to determine ownership of land.

35. The Defendants submitted that there was no evidence adduced to show that there were more acres than 95 which were the subject of the Tribunal award. They submitted that if the Plaintiffs want to execute, then they must execute the decree as it is.

36. It was submitted that the subdivision of the suit property was lawful on account of the vesting order in Eldoret HCCC No. 150 of 1999 (OS) and certficate of confirmation in Eldoret HC P/A 24 and 29 of 1988. The other reason is that three initial owners withdrew interest in the remaining land in 1988 when they were paid Kshs.10,875,000/= for acquisition of portion 8637 and 6617. As a result of this the 1st Defendant on behalf of Kipngetich ArapTanui, Kimorong Mibei, deceased and 2nd Defendant on behalf of Joseph Tuigeny became exclusive owners of LR Nos. 8822 and 6617 (portion).

37. On the vesting order the Defendants submit that this court had declined to allow adduction of more evidence when the case had not closed. They therefore submit that it amounts to contempt of court when the Plaintiffs are trying to give evidence through submissions.

38. The Defendants submit that the decree arising from the Tribunal is not enforceable because not all the original partners or shareholders are sued in this case. The estate of Kimorong Mibei is not sued.

39. The Defendants submit that the decree cannot be executed as it is silent on how it will be distributed on LR. Nos. 8822, 6617 and 8637.

40. Finally the Defendants submit that the decree should be implemented without any variation.

Analysis and Determination

41. I have carefully considered the Plaintiffs' evidence, the evidence by the Defendant, the submissions by the parties as well as the authorities cited. The issues which emerge for determination are as follows:

    1. Whether the subdivisions which were carried out by the Defendants as from 18th June, 2002 onwards were done lawfully.

    2. Whether the decree arising from Eldoret Chief Magistrates Court award No. 61 of 2002 is executable.

    3. If the answer to issue number (2) above is affirmative, what are the acres to which the decree should be executed.

    4. Was it necessary to name the government or the Estate of Kimorong Mibei in these proceedings.

    5. Was it necessary for the Plaintiffs to have letters of administration in respect of the Estate of their fathers before filing of this case.

    6. Related to issue number 5 above, was it necessary for the Defendants to be sued in their capacity as legal representatives of their fathers Estates.

    7. Whether this suit is res judicata.

    8. Who should bear costs of this suit.

1. Whether the subdivisions which were carried out by the Defendants as form 18th June, 2002 onwards were done lawfully.

42. It is important to note at the outset that this suit was filed solely for the purpose of perfecting the decree of the court which arose from the adoption of the Award in Eldoret Chief Magistrate Award No. 61 of 2002. The adoption was on 18th June, 2002. Before the execution of the decree could commence, the 1st and 2nd Defendants together with Kimorong Mibei filed Judicial Review proceedings in Eldoret HC Miscellaneous court Application Number 193 of 2003. They obtained stay of execution of the tribunal verdict. The Judicial Review application was withdrwan on 14th November, 2006.

43. The withdrawal of the Judicial Review proceedings was done a day after the Defendants together with Kimorong Mibei had obtained a number of titles arising from subdivision of LR. No. 8822/2 registered in their names. Aware of what the Defendants had done contrary to the decree, the Plaintiff filed an application before the Chief Magistrates Court in which they sought orders for declaration that any subdivisions carried out subsequent to the date of decree were null and void. They also called for cancellaton of titles given pursuant to the illegal subdivision.

44. In a ruling delivered on 15th November, 2007 the court declared the subdivisions null and void and proceeded to cancel the titles arising therefrom as well as the deed plans. The 1st and 2nd Defendants and Kimorong Mibei filed an appeal to the High Court against the ruling of 15th November, 2007. The appeal was dismissed vide ruling of 14th April, 2011. An appeal to the Court of Appeal against the ruling of 14th April, 2011 was dismissed on 28th February, 2013.

45. The appeal which had been filed in the High Court as 160 of 2007 was transferred to the Environment and Land Court where it became Appeal No. 6 of 2017. The appeal was fully heard and was dismissed on 9th February, 2018. The Plaintiffs' attempts to have titles in replacement of the cancelled ones was not successful as they were told that the lower court had no jurisdiction to cancel titles.

46. The Defendants claim that the subdivisions were done based on a vesting order which arose out of Eldoret HCC No. 150 of 1999 (OS). This vesting order was given on 11th August, 1999. The originating summons was against the Estate of the late John Joseph Hughes. The Estate of Hughes was being administered by the wife Euginie Dorothy Hughes who died on 16th August, 1987. The 1st and 2nd Defendants and Kimorong Mibei did not disclose to court that the administratrix of Hughe's Estate had died before the filing of the suit. The suit having been filed against a dead person, the same was a nullity and nothing lawful could come out of it.

47. Infact in a ruling delivered on 18th April, 2018, the court nullified the vesting order which was obtained fraudulently without disclosing that there were other persons on the land. When the court directed the Applicants to be joined as Defendants in the originating summons, the Defendants conviniently withdrew the case. There was a submisison that the Plaintiffs were giving evidence at submissisons stage. This was in reference to my ruling which delined to allow adduction of more evidence to show that the vesting order had been set aside. The court declined to allow the application because the advocate involved in the application was the one involved in the case where the vesting order featured prominently and could not be heard to say that he was not aware of the fate of the vesting order. However, this notwithstanding, this court cannot allow one to benefit from an illegality when the illegality has been brought to the attention of the court.

48. The Defendants also tried to justify the subdivisions on grounds that they did so based on confirmed grants which they obtained in Eldoret HC P&A Nos. 24 and 29 of 1988. Eldoret HC P&A Nos 24 of 1988 was in respect of the Estate of Joseph Tuigeny who is the father of the 2nd and 4th Defendants.

A confirmed grant was issued on 9th August, 1989 to the 2nd Defendant. None of the suit properties were listed as belonging to the Estate of Joseph Tuigeny.

49. Eldoret HC P&A No. 29 of 1988 was in respect of the Estate of Kipngetich Arap Tanui who is the father of the 1st and 3rd Defendants. A confirmed grant was issued on 22nd My, 1990 to the 1st Defendant and 3 others. All the three suit properties that is 6617, 8637 and 8822 were listed as properties o the Estate of Kipngetich Arap Tanui.

50. The late Kimorong Arap Mibei died on 9th August, 2005. He was a brother to Joseph Tuigeny. He was not a beneficiary or dependant of the Estate of Kipngetich Arap Tanui who purported to be the owner of all the three suit properties. All the subdivisions from 8822/2 were done in 2006 and all resultant titles were issued on 13th November, 2006. As at this time, Kimorong Arap Mibei had died on 9th August, 2005. The government had acquired portions of the three properties. The Municipal Council of Eldoret had also acquired portions of the two properties. There is therefore no way the Estate of Kipngetich Arap Tanui would have claimed ownership of the three suit properties. The subdivision which occurred thereafter will not have been based on the confirmed grant which purported to include the suit properties as properties of the Estate which were available for distribution.

51. If indeed the three suit properties were lawfully belonging to the Estate of Kipngetich Tanui, then the 2nd and 4th Defendants would not have benefitted as they were neither beneficiaries nor dependants of the Estate of Kipngetich Arap Tanui. This is the same case with Kimorong Arap Mibei.

52. The Defendants also tried to justify the subdivision on the basis that some of the partners were paid compensation of Kshs.10,875,000/= and that they withdrew their interest in the remaining land. This in effect left the 1st Defendant on behalf of Kipngetich Arap Tanui, Kimorong Mibei deceased and 2nd Defendant on behalf of Joseph Tuigeny as exclusive owners of LR. 8822 and 6617 (portion).

53. This argument is not possible as the three named in paragraph *15* above were registered as owners of LR. 8822/2 on 22nd January, 2004. When the Municipal Council of Eldoret acquired 3.08 hectares out of 8822 and 0.92 hectares out of 6617 on 23rd November, 2001 the 1st and 2nd Defendants and Kimorong Mibei were indicated as owners of the two parcels. When the Municipal Council of Eldoret paid compensation of Kshs.3,571,200/= on 22nd July, 2002, each of the three received Kshs.1,190,400/=.

54. The basis of the Defendants argument is on letter dated 31st May, 1988. This letter could not vest 100 acres on the three when there is evidence that there were others on the suit land who came to the fore when the Tribunal case was filed. I therefore find that the subdivsion which were carried out after 18th June, 2002 were unlawfully done.

2. Whether the decree arising from Eldoret Chief Magistrates court Award No. 61 of 2002 is executable

55. The Defendants are arguing that the decree of the court cannot be executed without affecting the government and the Estate of Kimorong Mibei who are not parties to this suit. The Defendants are arguing that as the time the decree of the court was issued, the government had acquired about 80% of the suit properties.

56. There is no one who is interested in property which was acquired by the government and the Municipal Council of Eldoret. Where there is evidence that land was acquired and compensation paid, that portion will not be subject to execution. The acreage of acquired land is ascertainable. The balance is subject to execution in accordance to the shares which were identified by the Tribunal where receipts

were produced. The Defendants exhausted their objection to the decree of the lower court when their appeal was dismissed on 9th February, 2018.

57. The late Kimorong Mibei refused to sign his statement during the Tribunal hearing. He later together with the 1st and Defendants unlawfully had themselves registered as owners of parts of the suit properties. When these properties were acquired, Kimorong Mibei was compensated over Kenya shillings one million. This case can proceed without him being made a party. I therefore find that the decree which arose from the adoption in Award No. 61 of 2002 is executable.

3. If the answer to issue number (2) above is in the affirmative, what are the acres to which the decree should be executed.

58. According to the consent of 14th August, 1969, LR No. 8822 was 38.44 hectares which is equivalent to 95 acres. LR No. 8637 was 150.83 hectares which is equivalent to 372 acres. LR No. 6617 was 4.04 hectares which is equivalent to 10 acres.

59. On 19th May, 1978 the government expressed intention to acquire the whole of LR. 8637 vide Gazette Notice Number 1458 and 1459. In February, 1980 vide Gazette Notice number 345, the government withdrew Gazette Notice numbers 1458 and 1459. The intended acres to be acquired were revised to 236. This means land measuring 136 acres was left out of the intended acquisition. There is no evidence whether the 136 acres were finally acquired.

60. On 12th February, 1988 the government through Gazette Notice number 520 and 521 intended to acquire 84 acres out of 8637 (Block 11/25). There is no evidence whether these 84 acres were acquired and compensation paid. It is one thing to publish a notice of intention to acquire and it is another thing to acquire and settle the amount. For example in 1978, the government had published a notice of intention to acquire the whole of 8637. Almost two years later the Gazette Notices were withdrawn. At times there may be cases in court which increase the awards like in Nakuru HCCC No. 100 of 2000.

61. On 23rd November, 2001 the County Government published Gazette Notice number 7917 whereby it called out owners of 8822 and 6617 to go for inquiry as to compensation. There is a letter dated 22nd July, 2002 that the 1st and 2nd Defendants were paid compensation for land acquired out of 8822 and 6617. The total compensation was Kshs.3,571,200/=. This is because the three registered owners each owned ⅓ share of the proprties.

62. Whereas Gazette Notice Nos. 520 and 521 of 12th February, 1988 indicated that 84 acres were to be acquired from 8637 (Block 11/25) a letter dated 31st May, 1988 shows that 136 acres had been acquired from 8637 and 5 acres from 6617. This contradicts the publication in the Gazette Notices of 12th February, 1988.

63. It is clear that there is no clear evidence which can make one to conclude exactly as to the extent of the land which was never acquired. However it is clear that as at 22nd January, 2004 LR. No. 8822/2 which was 34.95 hectares which is equivalent to 86 acres was registered in the name of the 1st and 2nd Defendants and Kimorong Mibei. These are the acres which were unlawfully subdivided into several subdivisions on 13th November, 2006.

64. There is evidence that some Plaintiffs are occupying LR 8637. As there is no evidence that the government acquired the whole of it, I find that there is land remaining but the question is how much. There was also evidence that the Municipal Council did not take up the land it had acquired. This means that there are persons occupying it.

65. The Commissioner of Lands in his letter of 31st May, 1988 confirmed that there was a balance of 95 acres from 8822 and 5 acres from 6617. This makes a total of 100 acres which he said were to be shared among the 1st and 2nd Defendants together with Kimorong Mibei. This therefore means that there is 100 acres which is enough to satisfy the decree of the lower court arising from the Award from the Tribunal.

4. Was it necessary for the government or the Estate of Kimorong Mibei to be joined in these proceedings.

66. As I said herein above, this suit was filed solely for execution purposes. This is because the lower court had no jurisdiction to cancel titles and the Plaintiffs could not sit helplessly without a remedy. The Defendants have titles in their names which titles were as a result of unlawful subdivision. Kimorong Mibei refused to sign his statement before the Tribunal. He had a chance to participate but he decided not to. His presence at execution stage is therefore unnecessary. I have put it clearly that no one is interested in the land which the government acquired. If there was a lawful acquisition, the entities for which the land was acquired know the extent of their land. There was no need for the government to be joined in these proceedings.

5. Was it necessary for the Plaintiffs to have letters of administration in respect of the Estates of their fathers before filing of this case.

67. This suit was filed in furthereance of the execution of the decree of the lower court which adopted the verdict of the Tribunal. The issue of letters of administration never arose before the Tribunal. The Tribunal was aware that the orginal partners save for Kimorong Mibei had all died and those who were litigating were their sons. The law is clear that you do not require letters of administration even where the person who had started the case as for instance Kimorong Mibei has passed on. It is therefore clear that the Plaintiffs did not have to obtain letters of administration so as to sue for the estate of their father. However if letters of administration were required before bringing these execution proceedings, then the 4th Plaintiff obtained letters of administration in respect of the Estate of Kibai Busienei.

6. Related to issue number 5 above, was it necessary for the Defendants to be sued in their capacity as legal representatives of the Estates of their fathers

68. As I have found that the Plaintiffs did not have to get grant of letters of administration for the Estate of their fathers, the same applies to the Defendants who did not have to have letters before they could be sued in this execution proceedings.

7. Whether the suit is res judicata

69. The Defendants argued that this suit is res judicata. They argue that there was Eldoret HCCC No. 12 of 2002 which was filed and it was dismissed. The principle of Res Judicata is predicated on Section 7 of the *Civil Procedure Act* which states as follows:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
>
> Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

70. In the instant case, the Plaintiffs are seeking to execute a decree arising from a decision of the Tribunal. The case which was struck out though dealing with the same parcel of land was never heard on its merits. It was mainly struck out as the verifying affidavit stated that there were no other proceedings pending before court. It was also struck out because the Plaintiffs had not complied with Order 1 Rule 8 of the Civil Procedure Rules which require that leave to bring the suit in a representative capacity has to be obtained or authority to plead filed.

71. For the principle of res judicata to be invoked, the court before which the issue is raised must be compelent to deal with the issues which are raised in the subsequent suit. As I have said before in this judgment, this suit was filed solely to aid in execution of the judgment of the lower court. The lower court had no jurisdiction to deal with the issues which were raised in HCCC No. 12 of 2002. It equally has no powers to deal with the issue of cancellation of title raised in this suit. This suit cannot therefore be said to be res judicata.

Disposition

72. From the above analysis, I find that the Plaintiffs have proved their case on a balance of probabilities. I grant the following reliefs:

    a. The subdivisions of land parcel known as 8822/2 situated in Eldoret town, resulting into titles registered as IR Numbers 10XXXX80, 10XXXX81, 10XXXX82, 10XXXX82, 10XXXX84, 10XXXX86, 10XXXX88, 10XXXX89, 10XXXX90 and any other titles resulting from land parcel numbers 8822, 8637 and 6617 effeced by the Defendants are hereby declared null and void and are hereby nullified.

    b. A declaration that land parcel known as 8822/2 nd any remainder of LR No. 8637 and 6617 all belong to person or beneficiaries as listed hereunder and should be registered as such;

        1. Alexander Akwaei Too 4.70 acres

        2. Peter Ngetich, John Kimeli & any other

           Dependant of Kipngetich Tanui (deceased) 2.80 acres

        3. Joseph Cheruiyot and any other dependant

           of Joseph Tuigeny (deceased) 4.70 acres

4. Estate of Cleti Kibor Arap Magen (Deceased) 8.90 acres
5. Estate of Kitili Arap Namgat (Deceased) 5.90 acres
6. Wilson M. Busienei 7.00 acres
7. Estate of Susana Chepkosgei (Deceased) 6.40 acres
8. Estate of Kipkemboi Arap Cheben (Deceased) 3.50 acres
9. Estate of Tabrantich Kiprotich (Deceased) 3.50 acres
10. Estate of Sura Bin Abdala (Deceased) 4.10 acres
11. Kimeli Arap Bwalei 2.30 acres
12. Estate of Kibitok Arap Saurei (Deceased) 3.00 acres
13. Kiptoo Arap Koech 1.40 acres
14. Estate of Kibirgen Arap Chepkwalei (Deceased) 1.40 acres
15. Estate of John Kipkemboi Karonei (Deceased) 5.90 acres
16. Estate of Kiptarus Arap Sabul (Deceased)(Children)2.80 acres
17. Edward Kiplimo Rotich 1.20 acres
18. Estate of Kiptony Arap Rugut (Deceased) 3.50 acres
19. Estate of Daudi Sitienei (Deceased) (Children) 3.50 acres
20. Estate of Chebwambok Rop (grandchildren) 9.40 acres
21. Estate of Kiprop Arap Rono (Deceased) 1.20 acres
22. Estate of Kiptoo Arap Magut (Deceased) 2.80 acres
23. Estate of Kibitok Mitei (Deceased) 0.25 acres
24. Estate of Ruth Cheserem (Deceased) 0.25 acres
25. Estate of Mitii Karanja (Deceased) (Daughter) 0.25 acres
26. Development 3.50 acres

    Public Utilities
27. Church/Nursery school 1.00 acre
28. Dam 1.50 acres
29. Cemetery 0.25 acres
30. Roads of access 3.00 acres

c. The portion of the suit properties that is excess of the listed properties in (b) above be allocated to the beneficiaries proportonately but the Defendants shall not benefit from any land found to be over and above that in (b) above.

d. The Defendants are restrained by way of permanent injunction from transferring, alienating, leasing, letting, charging, pledging as security, entering into, taking possession of, using, or in any other manner interferring with, land parcel 8822/2 or any portion remaining in 8637, 6617 after acquisition by the government and Municipal Council of Eldoret.

e. The Plaintiff shall have costs of this suit.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF MARCH, 2025.

In the presence of:

Mrs. Akinyi for Mr. Kuliba for Plaintiffs.

Mr. Kipnyekwei for Defendants.

Court assistant Steve Musyoki