



**Murkomen & 2 others v Kipkoech & 19 others (Environment & Land  
Case 25 of 2022) [2023] KEELC 17095 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17095 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 25 OF 2022  
L WAITHAKA, J  
MAY 2, 2023  
(FORMERLY ELDORET ELC CASE NO. 115 OF 2018)**

**BETWEEN**

**JACOB KIPROP MURKOMEN ..... 1<sup>ST</sup> PLAINTIFF  
MARTIN CHESIR A YEGO ..... 2<sup>ND</sup> PLAINTIFF  
PIUS CHESEREK KIROP ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**WILSON KOMEN KIPKOECH & 19 OTHERS ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated October 15, 2018 and filed on October 16, 2018 the plaintiffs herein instituted this suit seeking judgment against the defendants for:-
  - a. A declaration that the subdivision of Elgeyo Marakwet/Maina /1008 (the suit property) by the Elgeyo Marakwet Land Adjudication Board is illegal;
  - b. An order that they (the plaintiffs) are entitled to a share of the suit property as beneficiaries of the late Kisang Chesum;
  - c. An order that the defendants are holding the suit property in trust of them (the plaintiffs) and all the beneficiaries of the late Kisang Chesum;
  - d. An order directing the Land Registrar Elgeyo Marakwet, to cancel all the titles in the names of the defendants;
  - e. Costs
  - f. Any other relief this honourable court may deem fit and just to grant.



2. The plaintiffs' case is premised on the grounds that the suit property, measuring 5.5 hectares belonged to Kisang Chesum (deceased); that they are great grandchildren of the deceased hence entitled to a share of the suit property; that the defendants caused the suit property to be subdivided into 25 parcels in disregard of their interest in the suit property.
3. The defendants filed a joint statement of defence, dated July 19, 2019 denying the plaintiffs' contention that the suit property belonged to Kisang Chesum. The defendants have averred that the suit property belonged to Chemorion Clan, which the plaintiffs have no connection with, and that the 1st defendant was registered as proprietor of the suit property in trust of the clan (Chemorion Clan).
4. Terming the plaintiffs strangers to the suit property, the defendants have stated that the suit property was subdivided into 20 parcels as per the number of the members of the clan. The defendants have further averred that the plaintiffs lack *locus standi* to institute and prosecute this suit.
5. The plaintiffs filed a reply to defence, dated August 23, 2019 reiterating the contents of their plaint.
6. When the case came up for hearing, the 2<sup>nd</sup> plaintiff, Martin Yego, who testified as PW 1 relied on his statement dated October 15, 2018 after it was adopted as his evidence in chief.
7. He informed the court that the defendants are members of Chemorion family and that he is from Sunok family. Chemorion and Sunok were brothers, sons of Kisang. He produced the minutes of Land Adjudication Section dated June 8, 2016 as Pexbt 1; certificate of search and green card in respect of the property as Pexbt 2 and 3 respectively. He also produced the demand letter dated September 27, 2018 as Pexbt 4.
8. In cross examination, he stated that he has not been staying in the suit property but he has been cultivating it. The defendants are the ones in occupation of the suit property.
9. The foregoing is the evidence produced in this suit as the defendants' case was closed without calling any evidence.

### **Analysis and Determination**

10. From the pleadings filed in this case and the evidence, the sole issue for the court's determination is found to be whether the plaintiffs made up a case for being granted the orders sought.
11. As pointed out herein above the plaintiffs' case is premised on the contention that the suit property belonged to Kisang Chesum before it was registered in the name of the 1<sup>st</sup> defendant; that the registered proprietor of the suit property, Wilson Komen Kipkoech, holds the suit property in trust for them and other beneficiaries of Kisang Chesum, (deceased).
12. Whilst the plaintiffs pleaded that the suit property belonged to Kisang Chesum before it was registered in the name of the 1<sup>st</sup> defendant, they never led any evidence capable of proving that the suit property belonged to the said Kisang Chesum. They also failed to adduce any evidence capable of proving that the 1<sup>st</sup> defendant's registration as the proprietor of the suit property is or was subject of any trust in their favour.
13. Trust being a matter of fact, it behooved the plaintiffs to not only plead it but also prove it by way of evidence. In that regard see the case of *Salesio M'itonga V M'ithara & 3 Others* (2015) eKLR where the Court of Appeal stated:-

“It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki –Vs- Gichuki –Civil Appeal No 21 of 1981, this Court held that a party relying on the existence



of a trust must prove through evidence the existence of a trust ... In this case, the appellant filed suit claiming existence of a trust therefore, the burden of proof lay with him to prove the existence of the same.... We concur with the following findings by the High Court:-

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. .... Mere utilization of the land is not proof of the existence of a trust.”

14. In the circumstances of this case, the plaintiffs’ did not discharge the burden imposed on them of proving that registration of the 1st defendant as the proprietor of the suit property was subject of any trust in their favour.
15. Another reason as to why the plaintiffs’ suit should fail is that their case against the 1<sup>st</sup> defendant abated one year after the 1st defendant passed on, during the pendency of the suit, without substitution. It is noted, that there are no titles issued against the other defendants on which the plaintiffs’ claim can hinge.
16. The upshot of the foregoing is that the plaintiffs’ suit has no merit and is for dismissal. Consequently, I dismiss it with costs to the defendants.
17. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 2<sup>ND</sup> DAY OF MAY, 2023.**

**L. N. WAITHAKA**

**JUDGE**

Judgment delivered virtually in the presence of:-

Mr. Wambua Kigamwa holding brief for Mr. Mathai for the Plaintiff.

Ms. Kesei holding brief for Mr. Kamau for the Defendants.

Court Asst.: Christine Towett

