



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC PETITION NO. 22 OF 2019

SAMUEL CHERUIYOT & ANOTHER (Suing in his own and as an administrator of the Estate of Esther Cheruiyot.....1ST PETITIONER

ABRAHAM KOSGEI KEBENEI (Suing in his own capacity and as a beneficiary of the late Esther Cheruiyot).....2ND PETITIONER

VERSUS

A.I.C AINABKOI BRANCH CHURCH.....1ST RESPONDENT

A.I.C DRY'S GIRLS SECONDARY SCHOOL.....2ND RESPONDENT

LAND REGISTRAR, UASIN GISHU COUNTY.....3RD RESPONDENT

NATIONAL LAND COMMISSION.....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

UASIN GISHU COUNTY LAND ADJUDICATION

AND SETTLEMENT OFFICE.....6TH RESPONDENT

SETTLEMENT FUND TRUSTEES.....7TH RESPONDENT

THE BOARD OF TRUSTEE AFRICAN INLAND CHURCH.....8TH RESPONDENT

JUDGEMENT:

1. By an amended petition dated 1ST October, 2020, the Petitioners sought the following reliefs;

a) A Declaration that the Respondents conduct and actions jointly and severally contravene the Constitution and or infringe upon the Petitioners fundamental rights and freedom guaranteed under the Constitution of Kenya, 2010 in particular right town property.

b) A Declaration that the petitioners are the beneficial owners of that parcel of land known as Plot No. 8 Ainabkoi Settlement Scheme measuring 55.7 acres and the same is private land.

c) A Declaration that the Respondents actions jointly or severally in purporting to transfer and sub divide the suit land to UASIN GISHU/AINABKOI WEST 171 and UASIN GISHU/AINABKOI WEST 172 and transfer of resultant title deeds to the 1ST and 2ND Respondents 8TH Respondent in UASIN GISHU/AINABKOI WEST 171 is unconstitutional and adverse to the interest of the petitioners and the same violated the proprietary rights of the Petitioners under Article 40 of the Constitution of Kenya, 2010.

d) A Declaration that the Land Registrar Uasin Gishu County cancel any titles issued and delete in the register the names of the 8TH

Respondent 1st and 2nd Respondents as the owners of UASIN GISHU/AINABKOI WEST 171 which was subdivided illegally from the plot No. 8 Ainabkoi Settlement Scheme.

e) General damages for violation of the petitioners rights.

f) Mesne profits on loss of user and wrongful occupation of the suit land.

g) Costs and interests of this petition.

h) Any other relief that this Honorable Court may deem fit and just to grant in the interest of justice.

2. The 1st Petitioner is the administrator of the Estate of Esther Cheruiyot (Deceased) who died in 1982. The 2nd Petitioner is a beneficiary of the Estate of the Deceased. The Deceased was wife to Cheruiyot Kebenei (Kebenei) who died in 1972. In or around 7th January, 1965, Kebenei wrote a letter to the Settlement Office in Nakuru and indicated his intention of purchasing plot No. 8 at Ainabkoi Settlement Scheme measuring about 22.5 hectares which is about 55.7 acres.

3. On 15th February, 1965, a Senior Settlement Officer from Nakuru wrote to Kebenei and confirmed to him that he had received his letter of 7th January, 1965 in which he had expressed interest in purchasing plot 8. The Settlement Officer promised to come back to him once the fate of plot 8 had been settled and the excision of the portion due to the A. I. Mission finalized. The Settlement Officer intimated to Kebenei that plot 8 was likely to be offered and settled as an individual plot.

4. It would appear that Kebenei went to the Settlement office where he attempted to make payment towards purchase of Plot 8 but his request was declined. A loans officer then wrote a letter dated 28th April, 1965 addressed to the Senior Settlement Officer, Nakuru. The Senior Settlement Officer Nakuru, then wrote a letter dated 3rd May, 1965 addressed to the Director of Settlement in Nairobi in which he informed the Director that plot 8 had been subdivided into two portions. 20.1 acres had been reserved for A. I Mission Secondary (Dry School) and 35.6 acres was yet to be settled. The settlement officer proceeded to calculate the charge for the remainder of plot 8.

5. Though the Petitioners have not provided any evidence of when Kebenei started paying for the remainder of plot 8, it is clear that payment must have started after 3rd May, 1965. When Kebenei died the Deceased took out grant of letters of administration in respect of the Estate of Kebenei. The Deceased continued to pay the money due to the Settlement Fund Trustee until her demise. On 14th September, 1993 the Deceased's administrator was given a discharge confirming that the amount due to the Settlement Fund Trustee had been repaid in full.

6. After the confirmation in respect of the Estate of the Deceased, the administrator shared plot 8 as though Kebenei had purchased the entire 55.7 acres. The 1st Petitioner contends that when he went to process title for plot No. 8, from the 3rd Respondent, he was informed that the said plot had been subdivided into Uasin Gishu/Anaibkoi West 171 and Uasin Gishu/Ainabkoi West 172. Uasin Gishu/Ainabkoi 171 measuring 20.1 acres had been given to the 1st and 2nd Respondents and Uasin Gishu /Ainabkoi West 172 had remained with Kebenei family.

7. The Petitioners contend that the Subdivision of plot No. 8 was done fraudulently without any consent from the family of Kebenei. The family of Kebenei later subdivided Uasin Gishu/Ainabkoi West 172 which gave rise to Uasin Gishu/Ainabkoi West 183, 184 and 185. The Petitioners further contend that as they were following up on the matter, they were informed that investigations were to be carried out and a report given but further follow-up has shown that the 1st and 2nd Respondents have already amalgamated plot 6 with Uasin Gishu/Ainabkoi West 171 which has given rise to plot No. 211.

8. The Petitioners therefore contend that the 20.1 acres which were excised from plot 8 and which is now part of the land registered in the name of the 8th Respondent was done fraudulently and the said excision should be cancelled.

9. The 8th Respondent on behalf of the 1st and 2nd Respondents opposed the Petitioners' petition through a replying affidavit sworn on 18th June, 2021. The 1st, 2nd and 8th Respondents state that in the 1960's they received 36 acres of land from a donation given by Mrs Drys as a tithe. They then proceeded to process title for the land which was known as LR No. 11376. Soon after independence, the Government erroneously excised part of this land which was given to third parties.

10. When the government realized that the land held by the 1st and 2nd Respondents had title, it was decided that the 1st and 2nd Respondent's be compensated by being given 20.1 acres from an adjacent land which had not been allocated. The vacant land was plot 8 which was subdivided into two portions that is Uasin Gishu/Ainabkoi West 171 measuring 20.1 acres and Uasin Gishu/Ainabkoi West 172 measuring 35.6 acres which was sold to Kebenei.

11. The 1st and 2nd Respondents then applied for amalgamation of the two parcels which were registered in the name of the 8th Respondent as trustee for 1st and 2nd Respondents. The 1st and 2nd Respondents argue that the correspondence which were exchanged between the Settlement Office and Kebenei were clear that Kebenei was to pay for the remainder of plot 8 after 20.1 acres had been excised for the benefit of the 1st and 2nd Respondents.

12. The 1st and 2nd and 8th Respondent's deny any allegations of fraud attributed to them arguing that they legally obtained title to the land they are occupying and that it was not possible for Kebenei to pay for 55 acres when it is clear that he was to pay for the remainder of plot 8 after the 20.1 acres had been excised from the land. The 1st, 2nd and 8th Respondents further argue that there was no need for consent of the family of Kebenei to be granted in respect of land which belonged to the Government. The 1st, 2nd and 8th Respondents further argue that

the family of Kebenei were granted discharge in the year 2000 whereas plot 8 was subdivided way back in 1973 as per the green cards.

13. The 3rd, 5th and 7th Respondent's opposed the Petitioners' petition based on a replying affidavit sworn on 15th February, 2021. The 3rd, 5th and 7th Respondents denied all allegations attributed to them and stated that the petitioners have not stated in what manner their constitutional rights were violated.

14. The parties herein were directed to file written submissions in respect of the petition. The Petitioners filed their submissions on 12th May, 2021. The 3rd, 5th and 6th Respondents filed their submissions on 24th February, 2022. The 1st, 2nd and 8th Respondent's filed their submissions on 18th June, 2011.

15. I have considered the submissions filed by the Petitioners as well as those filed by the 1st, 2nd, 3rd, 5th, 7th and 8th Respondents. The only issue for determination in this Petition is whether the Constitutional rights of the Petitioner under Article 40 of the Constitution were violated by the Respondents and if so, whether the Petitioners are entitled to the reliefs sought in the petition.

16. Article 40(1) (a) and (b) provides as follows:-

1. subject to article 65, every person has the right, either individually or in association with others, to acquire and own property...

a) of any description; and

b) in any part of Kenya.

17. Article 40 (3) (a) and (b) (i) and (ii) provides as follows:-

3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation

a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that...

i) requires prompt payment in full, of just compensation to the person; and

ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law.

18. It is the Petitioners' contention that Kebenei acquired the entire interest in plot 8 which was 55.7 acres. The Petitioners further contend that in spite of their family paying for the entire parcel, 20.1 acres were fraudulently excised and given to the 1st and 2nd Respondent. This land is now registered under the name of the 8th Respondent on behalf of the 1st and 2nd Respondents.

19. It was incumbent upon the Petitioners to provide evidence that Kebenei, the Deceased and the 1st Petitioner actually paid for the entire plot 8. The law of evidence is clear that he who alleges must prove. In paragraph 13 and 14 of Halsbury's Law of England 4th edition Vol. 17 states as follows:-

".....establishing the facts and contention which will support a party's case,...remains constant throughout a trial It is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he fails to establish those facts to the required standard or proof, he will lose."

20. The Petitioners did not adduce any single receipt as proof of what was paid towards the purchase of plot 8. The correspondence which the Petitioners have annexed to the petition particularly letter dated 15th February, 1965 and the one dated 3rd May, 1965 clearly show that what Kebenei was to purchase was residue of plot 8 as already 20.1 acres had been excised for the benefit of A. I Mission which is now known as African Inland Church.

21. As at 1973 plot 8 had been subdivided into two portions as clearly shown in the letter dated 3rd May, 1965. When the subdivision was done, the land was the property of the Government through the Settlement Fund Trustee. The Settlement Fund Trustee was under no obligation to seek consent from the family of Kebenei in order to carry out the subdivision. As early as 3rd May, 1965, it had been decided that 20.1 acres was to go to A. I Mission. This letter of 3rd May, 1965 was categorical that 35.6 acres out of plot 8 were yet to be settled. It is therefore clear that Kebenei started paying for 35.6 acres which had not been settled after May, 1965.

22. In absence of any evidence that the decision to give A. I Mission 20.1 acres which decision was made in 1965 was rescinded, there is no basis upon which the Petitioners can claim that Kebenei paid for the entire 55.7 acres.

23. The complaint by the 1st Petitioner which led to the Government to try to ascertain what Kebenei purchased was without basis. The Committee which attempted to resolve the dispute failed to consider the correspondence written in 1965 which showed that 20.1 acres had

been earmarked for A. I Mission and what was subject to purchase by Kebenei was remainder of plot 8 which was 35.6 acres as clearly shown in letter dated 3rd May 1965.

24. The final report by the Uasin Gishu County Land Adjudication and Settlement Officer made assumptions which are not supported by the documents which were available as early as 1965. Whereas this officer who went to the ground was informed that the Kebenei family was given 36 acres, he decided to ignore this and came up with four reasons which were all wrong as they were not based on correspondence written in the 1960's which clearly show the size of the land Kebenei purchased.

25. For instance, ground 4 in his report dated 23rd May, 2019 he uses the confirmed grant in respect of the Estate of the Deceased where the plot in issue was shared amongst three beneficiaries of the Estate of the Deceased.

26. The land was shared in the ratio of 19, 18 and 18 acres making a total of 55 acres. The confirmed grant was given in 1997. As at the time this grant was being confirmed, plot No. 8 was not in existence as it had been subdivided in 1973. The Kebenei family were given title for LR No Uasin Gishu/Ainabkoi West 172 on 14th December, 2000. The Africa Inland Church were given their title in respect of LR No. Uasin Gishu /Ainabkoi West 171 on 25th October, 1996. The 1st Petitioner filed for grant of letters of administration in 1996. There is therefore no way plot 8 which was non-existent would have formed part of the Estate of the Deceased. The officer was therefore wrong in using this certificate of confirmation as justification that the Kebenei family were entitled to 55 acres.

27. The officer again used mutation forms which were used to subdivide plot 8 into two portions as justification that the Kebenei family were entitled to 55 acres. This officer was wrong because these mutation forms were prepared pursuant to the position held in 1965 that A. I Mission were entitled to 20.1 acres and what was available to Kebenei family was 35.6 acres. Had this officer seen the letter of 3rd May, 1965, he would not have made such unsupported assumptions.

28. Equally, the area list and the mathematical formula used by the officer to make an assumption that the Kebenei family was entitled to 55 acres was wrong. These assumptions were made in ignorance of the letters which were written in 1965 which were perfected in 1973 when plot 8 was subdivided into two portions one which went to A. I Mission and the other to Kebenei.

29. From the analysis hereinabove it is clear that the 20.1 acres were not taken from Kebenei. Kebenei was only entitled to 35.6 acres. This being the case, I find that the Constitutional rights of the Petitioners under Article 40 of the Constitution were not violated. It therefore follows that none of the reliefs in the petition can be granted. The petition herein lacks merit. The same is hereby dismissed with costs to the 1st, 2nd, 3rd, 5th, 7th and 8th Respondents.

Dated, Signed and Delivered at Eldoret on this 3rd Day of March, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Ms. Nyaribo for Petitioner.

Court Assistant –Albert

E. OBAGA

JUDGE

3RD MARCH, 2022