



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 30 OF 2014**

**ISAAC NGEYWO.....PLAINTIFF**

**VERSUS**

**JAMES TUKER SIMATWA.....DEFENDANT**

**JUDGMENT**

**THE CLAIM**

1. The plaintiff's case is that his father, now deceased, and the defendant intended to exchange plots but the exchange plan never materialized because the plot the defendant was offering turned out to be a cattle dip. The defendant also changed his mind later after the demise of the plaintiff's father and falsely claimed that the deceased's plot was sold to him. It is said that the agreement that the defendant relies on is a forged document. The defendant then took possession of the plot. The provincial administration has attempted to intervene and they ruled in favour of the plaintiff but the defendant has adamantly refused to give up possession. The plaintiff has therefore come to this court claiming that the defendant is a trespasser who should be evicted from the suit land.

2. On the basis of the above allegations the plaintiff filed a plaint dated 7/2/2014 and filed on 14/2/2014, the plaintiff seeks judgment against the defendant for:-

**(a) An order declaring that the plaintiff is the legal owner of plot No. 111 turned to 114 Kitalale Settlement Scheme and that the defendant and those claiming under him do move out of the suit plot and failing which they be evicted forthwith.**

**(b) Costs.**

**(c) Any other relief this honourable court may deems just and fit to grant.**

**THE DEFENCE**

3. The defendant filed his defence on 8/5/2015. His defence is that he denies any fraudulent act on his part and avers that his possession of the suit land is lawful. He terms the plaintiff's claim as lacking any basis in law.

**THE PLAINTIFF'S EVIDENCE**

4. **PW1, Isaac Ngeywo**, the plaintiff, testified on 10/2/2020. His evidence is that in 1994 his father **Cheberit Chepchos** (now deceased) had been allocated **Plot No. 111** in Kitalale Settlement Scheme which is a scheme under the government; that the plaintiff's father informed him that he had been involved in a land exchange arrangement with the defendant; that the plaintiff went to the suit land and there he found the defendant who claimed to have bought the land hence a report was made to the Chief; that the dispute was resolved in favour of the plaintiff but the defendant declined to vacate the suit land; that the alleged agreement said to have been between the defendant and the plaintiff's father is a forged document; that the defendant alleged that the plaintiff's father had been allocated some land at Kwa Saikwo (which in this court's view is the same as Cheposan Farm) but when the defendant and the plaintiff among others went to that farm no such land could be traced hence this suit. He alleged that the defendant was in possession of the original letter of allotment issued to his deceased father.

5. **PW2, Kwemoi Simatwa Chepchos** testified on the same date as **PW1**. He adopted his statement dated 7/2/2014 as his evidence-in-chief. His testimony was that the deceased is his brother and hence the plaintiff his nephew; that the deceased owned **Plot No. 111** in the Kitalale Settlement Scheme which later was renamed **Plot No. 114**; that the agreement relied on by the defendant to claim that the land was sold to him by the deceased is forged; that the dispute went to the Chief's office, Kinyoro where the land was awarded to the plaintiff; that the deceased had never informed him that he had sold the land; that the defendant had stated earlier that he had exchanged the land with some land at Saikwo's but the alleged land could not be traced in that farm.

6. **PW3, Peter Kiptamba Chepchos**, testified on 17/2/2020. He adopted his statement dated 7/2/2014 as his evidence-in-chief. His evidence is that the deceased is his brother; that the suit land belonged to him; that the defendant lives on the suit land having entered into occupation illegally and remained thereon by use of force; that the dispute was dealt with by the Chief's office and that the alleged sale agreement has apparent errors. He stated that after alleging purchase the defendant turned around and stated that there had been an exchange with land at Saikwo's but that land was never traced. He stated that the original allotment letter was later found with the defendant. He alleged fraud against the defendant.

7. **PW4, Francis Kipteka Tendet**, testified on 7/2/2020. He testified that he was the chief of Kinyoro; that he dealt with a case between the two parties herein; that the alleged sale agreement (**P. Exhibit 1**) had been produced before him; that the deceased is said to have sold the land for **Kshs. 90,000** and received **Kshs. 70,000/=**; that he noted that the deceased had not signed the agreement; that though the defendant alleged that the sale agreement had been made at the chief's office Kinyoro, its copy could not be found there; that the defendant was unable to avail his witnesses to the sale; that it was decided that the defendant should go and settle on the land at Saikwo which he had alleged to have exchanged with the plaintiff and that the deceased's children should take up possession of the suit land; that at that point the defendant stated that he had purchased the suit land.

8. Upon cross-examination the witness stated that there was evidence that the deceased had lived at Saikwo's for many years; that when a meeting was held at Saikwo's, it was admitted by the Saikwos that they knew of the allegations about the deceased having land on the farm.

9. Upon re-examination the witness stated that at the meeting at Saikwo's no land belonging to the deceased was shown to him and others and that one of the purported witnesses in the defendant's sale agreement denied having signed the same; he stated that the deceased had lived as a squatter for a long time on the Saikwo land as Saikwo's worker.

10. That marked the close of the plaintiff's case.

### **THE DEFENDANT'S EVIDENCE**

11. **DW1, James Tukur Simatwa**, the defendant herein, testified on 17/2/2020. He adopted his written statement dated 8/5/2014. His evidence is that he came to know the plaintiff's father through the alleged transaction over the suit land; that the agreement of 24/10/96 was written by the Chief by the name Henry Ndiema; that the seller and one Grace Saikwo who was his employer attended at the execution of the said agreement; that he paid **Kshs. 70,000/=** and was handed the allotment letter by the deceased; that when asked why he was selling land the deceased stated that he had been given land at Saikwo's; that Grace confirmed that the deceased lived at Saikwo's; that he paid the balance of **Kshs. 20,000/=** on 17/5/1997; that he took possession of the land immediately upon purchase and cleared it; that he was not involved in the deceased's engagement with Grace; that **P. Exhibit 2** is not giving the correct position; that the crowd at the meeting held to resolve the dispute was rowdy and Grace Saikwo was the deceased's witness during the execution of the agreement.

12. **DW2, Henry K. Ndiema**, testified on 20/2/2020. He adopted his witness statement recorded on 8/5/2014 as his evidence-in-chief. His evidence is that he is an administration police officer stationed at Kitalale; that he does not know the plaintiff but he knows the defendant; that between 1996 - 2001 he was Chief over Kinyoro Location; that he wrote down the agreement dated (**P. Exhibit 1**); that the deceased gave the defendant the allotment letter after the agreement was written; that the deceased stated that he would not live on the lower side but would go and purchase land at Saikwo's; that by 2001 the defendant was living on the suit land and no dispute had been lodged; that **DW2** left a copy of the agreement in one of the files containing land documents, whose reference number he gave, at the chief's office upon departure; that the agreement was part of his handing over report; that **PW4** succeeded him and has never called him to inquire about the agreement.

13. **DW3, Joseph Kutuny** testified on 17/2/2020. He adopted his statement dated 8/5/2014 as his evidence-in-chief. His evidence is that he knew the deceased and the defendant; that the deceased sold the suit land to the defendant and **DW3** was a witness to the payment of the last instalment of the purchase price of **Kshs. 20,000/=** on 15/7/1997. He testified that he handed over the money to the deceased on behalf of the defendant and the deceased received it.

14. **DW4, Bramwel Chonde Simatwa** also testified on 17/2/2020. He adopted his statement dated 8/5/2014 as his evidence-in-chief. His evidence is that on 26/10/1996 he, his brother and the defendant went to the Chief, Kinyoro location (**DW2**) and discussed the sale transaction between the defendant and the deceased and an agreement was then prepared for the sale of the suit land. According to him it is **DW2** who wrote down the agreement (**P. Exhibit 1**) and the deceased signed it.

15. At that stage the defendant's case was marked closed.

### **SUBMISSIONS**

16. Submissions were filed on behalf of the plaintiff on 12/3/2021. The defendant's submissions was filed on 8/4/2021.

### **DETERMINATION**

#### **Issues for determination**

17. I have considered the pleadings the evidence and the submissions filed. The main issues for determination in this matter are:

*a. Whether Cheberit Chepcho entered into any transaction, whether a sale or an exchange, with the defendant over the suit property.*

*b. Whether the defendant is guilty of any fraud;*

*c. Whether the plaintiff should be declared the legal owner of the suit land and if the defendant should be ordered to vacate and in default be evicted therefrom;*

*d. What Orders should issue as to costs?*

18. The issues are addressed as hereunder:-

**a. Whether Cheberit Chepcho entered into any transaction, whether a sale or an exchange, with the defendant over the suit property**

19. In this suit, the details of the alleged land exchange are scanty. The allegation that there was an exchange is posited by the plaintiff who relies only on his late father's alleged word that there was such an exchange and the same strongly refuted by the defendant.

20. There is therefore only the plaintiff's word for the allegation that his father alleged that there was an exchange of land between him and the defendant.

21. The plaintiff has stated in his plaint that the defendant persuaded his father into exchanging the suit land for the defendant's land at Cheposan Farm. The plaintiff's evidence did not correspond with the statements in the plaint.

22. The plaint stated that "*the plaintiff was shown a cattle dip hence the exchange did not materialize.*" No evidence was called showing that either the plaintiff or his father was shown a cattle dip on Cheposan Farm as the land that the defendant had intended to exchange with the deceased.

23. I have examined the record of the dispute before the Chief and found no recorded averment by the defendant that he had exchanged land with the deceased. In fact that record speaks of a payment of the balance of **Kshs. 20,000/=** to the deceased and seems to support the sale theory. The exchange theory begins and ends in the plaintiff's evidence.

24. Nevertheless the plaintiff maintained in his evidence that the defendant later changed his version of events after the plaintiff's father died, and claimed that the land was sold to him by the deceased. However, the plaintiff does not state the date on which his father allegedly informed him of an exchange of land transaction. It appears he was aged **10** by the time his father died. The plaintiff does not also account for the fact that his father appears not to have lodged any complaint against the defendant when he was alive. It is the plaintiff and the deceased's brothers who appear to have prompted the claim against the defendant and it is clear that the dispute began after the plaintiff's father died, otherwise records from the Chief's office would have shown that the deceased had lodged a complaint against the defendant. The only evidence the deceased's brothers could say in this case was that the deceased had never informed them of the sale of any land to the defendant or to anyone else. I do not consider that to be sufficient evidence to show that the deceased could not have sold his land to the defendant. It remains a mystery why, if the transaction entered into was an exchange agreement that fell through, the plaintiff's father never initiated a claim against the defendant when he was alive. Besides, the alleged exchange agreement itself was not tendered in evidence by the plaintiff. What remains clear from the plaintiff's evidence is that his father had acknowledged that some kind of transaction took the suit land from his possession and into the defendant's possession. There is no proof therefore that the defendant and the deceased were ever involved in any land exchange transaction as alleged by the plaintiff.

25. That brings this court to the next step of analyzing the alleged sale of the land to the defendant. The sale agreement, a handwritten document dated **24/10/1996** was produced as **D. Exhibit 1. DW2** acknowledged to having written down this crude agreement which begins with the Swahili words: "*kwa atakayehusika*" which translated into English language means "*to whom it may concern.*" It bears the stamp of the Chief's office Kinyoro Location and the Chief's signature. Two witnesses, Bramwel Simotwo and Grace Saikwo have signed it. A signature said to be the deceased's is affixed next to his name. Overleaf is an endorsement dated **15/7/1997** stating that the defendant has paid the deceased the balance of **Kshs. 20,000/=**. It is attested to by two witnesses identified simply as Joseph Kutuny (who is **DW3**) and Peter Saikwo.

26. No evidence was adduced by the plaintiff to establish that the signature of the named seller in **P. Exhibit 1** did not belong to the deceased. This court is persuaded on a balance of probabilities that the agreement was signed by the deceased. The agreement states that the defendant was to hold the allotment letter issued to the plaintiff over the suit land. It acknowledges receipt by the deceased of **Kshs. 90,000/=** as part consideration for the land subject matter of the contract. I find that the agreement complies with **Section 3(3) of the Law of Contract Act** and is valid.

27. It is clear from the pleadings and the evidence in this case that the defendant took possession of the land and has been in such possession over a long period.

28. **P. Exhibit 1** being the sole documentary evidence of the transaction between the two, this court is persuaded that the transaction between Cheberit Chepchos and the defendant was a land sale agreement, and that the same is valid.

**(b) Whether the Defendant is guilty of any fraud**

29. Some transaction having been admitted to have occurred between the deceased and the defendant, and the only evidence of such transaction being **P. Exhibit 1**, it was incumbent upon the plaintiff to establish as claimed in the plaint that the agreement was procured by way of fraud. The plaintiff is the deceased's son. Two of his witnesses are his uncles, brothers to the deceased. The last witness is the chief who succeeded **DW2** in office and had not dealt with the agreement and who failed to produce the file record that could show whether or not

an agreement was deposited therein by **DW2**. I find the plaintiff's evidence to be not independent and quite weak.

30. **DW2** has admitted to having written down the agreement while he was a Chief. No evidence was produced to show that it is not the signature of the deceased that appears against his name which is on **D. Exhibit 1**. I have no reason to disbelieve **DW1**, a public officer bestowed with much trust, when he states that the deceased sold his land to the defendant and stated when asked that he would buy other land at Saikwo's. **DW2** made great effort to produce the handing over report made when he was leaving the Chief's office, Kinyoro. A second witness, Bramwel testified on oath to having been present at the execution of the land sale agreement (**P. Exhibit 1**).

31. If the agreement had not been genuine, there would have been recorded complaints at the Chiefs or with the police on the part of the deceased against the defendant. There were none. However, no evidence was called from the District Land Settlement Office to establish that a forged agreement had been presented to that office by the defendant as pleaded. There was also no evidence of the report to the police of the loss of the original allotment letter issued to the deceased, or a criminal case against the deceased with regard to stealing the said document.

32. The deceased died on **21/7/1997**, one year after the agreement and **6** days after the date he is said to have received the balance of the purchase price. The first record of any dispute between the plaintiff and the defendant over the suit land is the Chief's minutes and award dated **6/3/2012** and that is **15** years after the deceased's demise. It does not reflect well for the plaintiff's case that his claim was brought **15** long years after the deceased's demise, yet as he claims, by the date of the deceased's death he had already been allegedly informed of some "failed transaction" between the deceased and the defendant.

33. In the light of the foregoing analysis, I do not find that the plaintiff has established that the defendant is guilty of any fraud.

**(c) Whether the plaintiff should be declared the legal owner of the suit land and if the defendant should be ordered to vacate and in default be evicted therefrom;**

34. In view of the analysis and findings on **issues (a) and (b)** contained herein above, the plaintiff has failed to establish his claim against the defendant on a balance of probabilities; consequently, I find that there is no basis upon which I can declare the plaintiff the legal owner of the suit land or order an eviction of the defendant therefrom.

**(d) What Orders should issue as to costs?**

35. I find that the plaintiff initiated this claim without any sufficient evidence and he has now failed to prove his allegations. He should bear the costs of the suit.

36. For avoidance of doubt the final orders of this court in this suit are as follows:

**a. The plaintiff has failed to establish his claim against the defendant on a balance of probabilities and the instant suit is therefore dismissed.**

**b. The plaintiff shall bear the costs of the instant suit.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 27TH DAY OF MAY, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**