



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC. NO. 51 of 2013**

**MAGDALINE ALPHONCE CHEPOSOWOR.....PLAINTIFF**

**VERSUS**

- 1. CHEPOSUPKO LONYARENG**
- 2. DANIEL LONYARENG**
- 3. JACOB LONYARENG**
- 4. KANGOLE SIMON LONYARENG**
- 5. JONATHAN LONYARENG**
- 6. PTIYOS LONYARENG..... DEFENDANTS**

**AND**

- 1. MARTHA SIATUKEI JAMES**
- 2. CLEMENTINA CHEPKEYEH LONYARENG**
- 3. JOSPHINA JULIUS NAPANYANG**
- 4. KAPENGURIA TEACHERS HOUSING  
COOPERATIVE SOCIETY.....INTERESTED PARTIES**

**JUDGMENT**

1. By an amended plaint dated 18<sup>th</sup> August 2017 and filed on 22<sup>nd</sup> August 2017, the Plaintiff claims to be the legal owner of PARCEL NUMBER WEST POKOT/CHEPARERIA/2304 and WEST POKOT/CHEPARERIA/2307. The plaintiff states that she gave licence and/or permitted the defendants to stay on her parcel of land but when the plaintiff demanded that they move out, the defendants refused or neglected to do so. the plaintiff avers that the defendants have denied her peaceful possession of the land and the plaintiff's constitutional right to own property. That despite demand and notice of intention to sue, the defendants have refused failed and/or neglected to vacate the said parcel of land.

2. The plaintiff's claim against the defendants is for judgment as follows:

*a. A declaration that the parcel of land known as WEST POKOT/CHEPARERIA/2307 and 2304 belongs to the plaintiff absolutely with indefeasible rights.*

*b. That an order of eviction be issued against the defendants by themselves, their servants or agents from the parcel of land known as WEST POKOT/CHEPARERIA/2307 and 2304.*

*c. Costs of this suit*

*d. Interest at court rates.*

*e. Any other relief this Honourable Court may deem fit to grant.*

3. In her evidence, the plaintiff stated that the 1<sup>st</sup> defendant is her step-mother while the 2<sup>nd</sup> to 6<sup>th</sup> defendants are the 1<sup>st</sup> defendant's sons, and therefore the plaintiff's step-brothers. The plaintiff stated that she is the registered owner of the SUIT PARCELS OF LAND WEST POKOT/CHEPARERIA/2304 and 2307. The plaintiff produced the title deeds in her name as p.exhibits 1 and 2. The plaintiff testified that the two parcels of land were transferred to her on behalf of herself and sisters by her late mother, Chepochewew Lonyareng Long'ortudo. That the land was initially known as PARCEL NUMBER WEST POKOT/CHEPARERIA/346 in the name of their late father Lonyareng Longartudo before it was subdivided. It was the testimony of the plaintiff that before her father passed on, he had transferred the land to the plaintiff's mother who was issued with a title deed. The plaintiff produced the transfer (p.exhibit No. 4(a), the application for consent to the Land Control Board (P.exhibit 4 (b), and the letter of consent to transfer parcel No.346 (p.exhibit 4(c). It was the plaintiff's evidence that her late mother obtained title before her demise and transferred the land to her. The plaintiff produced the transfer, application for consent to the Land Control and letter of consent in respect of parcel No.2304 as P.exhibits 5(a), (b) and (c) respectively. She stated that the same process was done in respect of parcel No.2307 and produced the application to Land Control Board, Letter of Consent and Transfer as P.exhibit 6 (a), (b) and (c) respectively.

4. The plaintiff stated that after she had obtained the title deeds for the suit properties, a dispute arose. That the defendants came from their land and invaded the suit parcels of land. It was the plaintiff's testimony that her late father had two wives and two parcels of land. Her mother who is the first wife was only blessed with daughters. According to the plaintiff, LAND PARCEL NO. WEST POKOT/CHEPARERIA/346 (which was later subdivided into WEST POKOT/CHEPARERIA/2304-2308) belonged to the plaintiff's mother while LAND PARCEL NO. WEST POKOT/CHEPARERIA/727 which is still in the name of Lonyareng Longortudo (deceased), belonged to the 1<sup>st</sup> defendant and her children. The plaintiff produced the certificate of official search for PARCEL NO. WEST POKOT/CHAPARERIA/727 in the name of Lonyareng Longortudo as p.exhibit 7. According to the plaintiff each house had settled on their respective parcel of land, the same having been shown by the deceased but that the defendants invaded the suit properties prompting the plaintiff to instruct her advocates to issue demand letters (p.exhibits 8 (a) and (b) and later filed the suit. The plaintiff stated that she did not need to file succession proceedings to acquire the land because the transfers were done when the deceased were still alive. It was her testimony that the land in Simat, PARCEL WEST POKOT/CHEPARERIA/727 is the one that requires succession proceedings, but added that she had no claim over it.

5. When cross-examined by Mr. Kiarie, learned counsel for the defendants, the plaintiff stated that there are many houses on PARCEL NO.WEST POKOT/CHEPARERIA/346 including that of her sister Josephine Julius Lobanyang, Daniel, Jonathan, Jacob as well as the 1<sup>st</sup> defendant. That her late father also lived on that land in the same house with the plaintiff's mother. That the land was subdivided by her late father before he died and was given to the plaintiff's mother who in turn transferred it to the plaintiff. She stated that she was not aware if the land had been subdivided into four parcels on 13/1/1996. That she did not know the date when her father died but stated he was buried on the same land together with her late mother who died soon after the demise of the plaintiff's father. The Plaintiff admitted selling plot no.2304 to the 4<sup>th</sup> Interested Party but the transaction was stopped by the court. The plaintiff stated that the land was transferred to her mother on 30/1/2009 while the death certificate showed her father died on 14/8/2007, about two years earlier. She denied committing any fraud.

6. When cross-examined by Mr. Analo, learned counsel for the 4<sup>th</sup> interested party, the plaintiff stated that she sold 1.5 acres on 27/6/2012 to the 4<sup>th</sup> interested Party for the sum of Kshs.1.7 million which she confirmed she received. That by then, the title was already in her name.

7. When cross-examined by Ms. Bartilol, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested Parties, the plaintiff stated that her father had two wives and each wife had her own land and that they were living in their respective parcels of land. That before her mother died, she transferred the land to the plaintiff and her sisters. She denied obtaining the titles fraudulently.

8. During re-examination by Ms. Chebet learned counsel for the plaintiff, the plaintiff stated that the defendants invaded the suit land after the demise of their father and alleged that women had no right to inherit land. She stated that the subdivision was done from the title which was in her mother's name.

9. Tolelanyang Katingole testified as PW2 and stated that he was a village elder. That he knew the deceased Lonyareng Longortudo had two wives who lived in separate parcels of land with their children. He stated that the defendants invaded the suit land after the demise of the deceased.

10. PW3 Pkech Loriwo gave evidence which was more or less the same as that of PW2.

11. The defendants in opposing the suit filed their amended defence and counter-claim dated 29<sup>th</sup> August 2017. The gist of the defendants' case as pleaded is that the registration of the plaintiff as proprietor of land comprised in TITLE NO. WEST POKOT/CHEPARERIA/2304 and 2307 was obtained fraudulently. They denied ever being licencees of the plaintiff. They state that the land comprised in PARCEL NOS. WEST POKOT/CHEPARERIA/2304 – 2308 were all subdivided from PARCEL NO. WEST POKOT/CHEPARERIA/346 which was on 1.7.1998 registered in the name of Lonyareng Longortudo who died on 14/8/2007. That the deceased had during his lifetime temporarily subdivided his land among his two houses and son James Lonyareng who was born of wedlock and that at all material times, each house lived and built houses in the portion allocated to them by the deceased. That after the death of Lonyareng Longortudo, no succession proceedings have been undertaken by the family. That it has since transpired that on 17/7/2009, the 1<sup>st</sup> widow, Chepochewew Lonyareng had the land known as TITLE NO. WEST POKOT/CHEPARERIA/346 transferred to herself. It is the defendant's case that the said transfer was fraudulent and have pleaded the particulars of fraud. It is further the defendants case that the subdivision of TITLE NO. WEST POKOT/CHEPARERIA/346 on 30/6/11 to create new parcel Nos. 2304 -2308 and which were transferred by Chepochewew Lonyareng to the Plaintiff and others was also fraudulent. The defendants state that no good titles could be passed to the plaintiff and the other persons since Chepochewew Lonyareng had no good title herself.

12. In their counter-claim, the defendants want the transfer of WEST POKOT/CHEPARERIA/346 to Chepochewew Lonyareng on 17.7.2009 cancelled together with the subsequent subdivision, transfer and registration of parcel nos.2304-2308 to the plaintiff, the 1<sup>st</sup> interested Party, the 2<sup>nd</sup> Interested party and the 3<sup>rd</sup> Interested Party, so that the land reverts to Parcel No.346 in the name of Lonyareng Longortudo. The defendants pray for the dismissal of the plaintiff's case and an order for the rectification of the registers for PARCEL NO.WEST POKOT/CHEPARERIA/2304-2308 by cancelling the registration of the five titles and further ordering that TITLE NO.WEST POKOT/CHEPARERIA/346 be restored in the name of Lonyareng Longortudo.

13. David Pnangat Lonyareng who is the 2<sup>nd</sup> defendant testified as DW1 and adopted his witness statement filed on 6<sup>th</sup> June 2018 as his evidence –in-chief. He stated that his father, Lonyareng Longortudo died on 4/8/2007 at Ortum Mission Hospital. He produced the Certificate of Death as D.exhibit 1. He confirmed that his father had two wives, the 1<sup>st</sup> wife being Chepochewew Lonyareng who is the mother to the plaintiff, and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties, as well one Florence Kupai. The 1<sup>st</sup> Defendant is the mother of the 2<sup>nd</sup> to 6<sup>th</sup> defendants. The deceased also had a son by the name James Lonyareng who was born out of wedlock and who lives in PARCEL NO.WEST POKOT/CHEPARERIA/346. DW1 stated that according to the abstract of title (green card) for PARCEL NO. WEST POKOT/CHEPARERIA/346, which he produced as D.exhibit 2, the title was opened on 1/7/1998 and measures 8.37 hectares and the land was transferred to Chepochewew Lonyareng on 17/7/2009 whereas the deceased, Lonyareng Longortudo died on 14/8/2007. That the title was closed on 30.6.2011 upon subdivision into five portions to wit, Nos. 2304, 2305, 2306, 2307 and 2308. DW1 produced the Green Card as D. exhibit 2 and stated the parcel No. 2304 was transferred to the plaintiff, No. 2305 to the 1<sup>st</sup> Interested Party, No.2306 went to the 2<sup>nd</sup> Interested Party, 2307 to the plaintiff and 2308 to the 3<sup>rd</sup> Interested Party. He produced the Green Cards for the said parcels as D.exhibits 3, 4, 5, 6 and 7 respectively.

14. DW1 stated that his father had another land being PARCEL NO. WEST POKOT/CHEPARERIA/727 measuring 26.56 hectares. It was also registered on 1<sup>st</sup> July 1998 in name of Lonyareng Longortudo and is still in that name. He stated that he was born in Tukumwok on 21/8/1985 and that his mother was staying in plot no.346 together with the 1<sup>st</sup> defendant, and James. That plot no. 727 which is in Simat is in a hilly area and was used for grazing with a small area that is arable. He stated that he has his home in plot no.346 where he lives with his family. That they were shown their respective portions by their deceased father on 1/3/1996. That his mother died in the year 2010 and was buried next to her husband's grave. The witness stated that they have been living on the land as children of the deceased and did not require the license or permission of the plaintiff. DW1 maintained that after the death of their father on 14/8/2007, no Succession proceedings have been take out. That on 29/1/2007, Chepochewew Lonyareng had no title as the same was still in the deceased's name and that it was not possible for the deceased to transfer the land in January 2009, adding that the purported transfer is not genuine. It was his testimony that the plaintiff obtained title in her name fraudulently and urged the court to cancel the said titles.

15. When cross-examined by Ms. Chebet, for the plaintiff and Mr. Khisa for Interested parties DW1 stated that their deceased father had two parcels, Nos. 346 and 727 with the latter being bigger in size. He stated that the plaintiff's mother had a house in plot no.727 and that currently, none of the plaintiff's sisters stays in plot no.727. He admitted some of his brothers stay in that land in Simat.

16. DW2, Wilson Lokoret adopted his witness statement dated 5/6/2018 and testified that he knew the deceased who had two parcels of land. That on 13/1/1996, the deceased invited him to his home and in the presence of 16 other people, subdivided his land into 4 portions for his 1<sup>st</sup> wife, and 2<sup>nd</sup> wife (2<sup>nd</sup> defendant), James Siatukei and left the fourth portion for himself. That upon his death in August 2007, the deceased was buried on the portion he had retained for himself. That the deceased's 1<sup>st</sup> wife is also deceased and was buried next to her husband's grave. He produced a sketch of the alleged subdivision as D.exhibit 4.

17. DW3, Michael Yoponyang stated that he lived in the deceased's home between 1978 and 1989. That in 1996, he was invited by the deceased when he undertook a subdivision of his land into 4 portions. He repeated what DW2 stated.

18. In their defence, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties contended that the subdivision of PLOT NO.WEST POKOT/CHEPARERIA/346 and the transfer of the resultant plots to them was proper and further that PARCEL NO. WEST POKOT/CHEPARERIA/727 belonged to the 2<sup>nd</sup> house which comprise the defendants. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties called 3 witnesses, Josephina Julius Napanyang, Benjamin L. Lotেকেlee and Philip Magal Kassorich whose evidence was similar to that of the plaintiff and her witnesses.

19. The 4<sup>th</sup> Interested Party contended that it is the registered owner of PARCEL NO. WEST POKOT/CHEPARERIA/2304 measuring 1.5 acres having lawfully and procedurally purchased the same from the plaintiff vide an agreement of sale dated 27/6/2012. Jonathan Ripko testified on behalf of the 4<sup>th</sup> Interested Party and stated that the 4<sup>th</sup> Interested Party bought the plot for Kshs.1,700,000/= and produced the agreement and acknowledgment of payment as exhibits. That plot No.2304 was subdivided into two plots Nos. 2468 and 2469, with the 4<sup>th</sup> Interested Party acquiring the latter upon transfer. He also produced the mutation form and stated that after transfer they paid stamp duty on 14/1/14. They could not get title because there were restrictions and could not get possession due to hostilities.

20. The parties filed written submissions which elaborate on their evidence. They are submitted on what each party thought were the issues that call for determination. The Plaintiff filed her submissions on 23<sup>rd</sup> September, 2019, the defendants filed theirs on 7<sup>th</sup> October, 2019 while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties filed theirs also on 7<sup>th</sup> October 2019.

21. I have considered the pleadings, the evidence adduced and the submissions by the parties. It is not in dispute that the plaintiff, the defendants and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties are one family. The 1<sup>st</sup> defendant and the late Chepochewew Lonyareng are wives of the late Lonyareng Longortudo. It is also not in dispute that the late Lonyareng Longortudo had two parcels of Land, namely (i) West Pokot/chepareria/346 which after subdivision led to PARCEL NUMBERS WEST POKOT/CHEPARERIA/2304-2308 and (ii) WEST POKOT/CHEPARERIA/727. It is also common ground that the late Chepochewew Lonyareng sired girls only namely, Magdaline Alphonce Cheposowor (the plaintiff herein), Martha Siatukei James (the 1<sup>st</sup> Interested Party), Clementina Chepkeyeh Lonyareng (the 2<sup>nd</sup> Interested Party) and Josphina Julius Napanyang (3<sup>rd</sup> Interested Party). The evidence show that late Lonyareng Longortudo died on 14/08/2007. It is apparent that before his demise, the two houses lived in harmony. However, upon his demise land dispute arose in respect of land PARCEL

NO. WEST POKOT/CHEPARERIA/346 (before subdivision). According to the plaintiff, the defendants left their LAND WEST POKOT/CHEPARERIA/727 and forcefully invaded into portions LAND PARCEL NO. WEST POKOT/CHEPARERIA/346 which the plaintiff and the 1<sup>st</sup>-3<sup>rd</sup> Interested Parties considered to be theirs. In my considered view, the issues that present themselves for determination are:

i. Whether the transfer of LAND PARCEL NO. WEST POKOT/CHEPARERIA/346 from Lonyareng Longartudo to Chepochewew Lonyareng was valid.

ii. Whether the plaintiff and the 1<sup>st</sup>-3<sup>rd</sup> Interested Parties acquired a valid title to the suit land from their mother the late Chepochewew Lonyareng.

iii. What would be the appropriate orders to make in this case?

22. As already stated, it is not in dispute that the late Lonyareng Longartudo was the registered proprietor of the property known as WEST POKOT/CHEPARERIA/346 before it was transferred to Chepochewew Lonyareng. As rightly submitted by the defendants, the question begging for an answer is whether the transfer to Chepochewew Lonyareng was perfected by Lonyareng Longartudo. The transfer form which was produced as p.exhibit 4(a) is dated 30/1/2009. According to the transfer form, the transferor, Lonyareng Longartudo appeared before an advocate and thumbprinted the form on 30/1/2009, the same date the transferee, Chepochewew Lonyareng also thumbprinted. The said transfer was allegedly registered by the Land Registrar on 17<sup>th</sup> July 2009.

23. According to the Certificate of Death that was produced as D exhibit 1, the late Lonyareng Longartudo died on 14/8/2007. Was it then possible to appear before an advocate on 30/1/2009, a period of over one year and 4 ½ months after his death? The answer to this question is obviously a no. There was no way that Lonyareng Longartudo (deceased) could have presented himself together with Chepochewew Lonyareng before an advocates on 30/1/2009 to execute a transfer. In this regard, the court has no hesitation in finding that the transfer of PARCEL NO. WEST POKOT/CHEPARERIA/346 from the late Lonyareng Longartudo to Chepochewew Lonyareng on 30/1/2009 was not perfected by Lonyareng Longartudo. There is no way a deceased person could have executed a transfer when he was already dead. In my view, and as rightly submitted by the defendants, since the late Chepochewew Lonyareng was the beneficiary of the purported transfer, she knew the land was not being transferred to her by her deceased husband. She must have fraudulently transferred the land to herself.

24. Besides the transfer form allegedly signed by Lonyareng Longartudo (deceased) on 30/1/2009 when he was long dead, having died on 14/8/2007, I find that the other documents produced by the plaintiff in support of her case have discrepancies. For example the application to the Land Control Board produced as p.exhibit 4 (b) is not dated. The minutes of the Land Control Board, if they existed, were never availed. At least such minutes would have shown if the deceased transferor was present at the Land Control Board meeting. The absence of the minutes and the failure to call any witness who was present at the land control board meeting when the consent was allegedly give casts doubts on the validity of the consent produced as P.exhibit 4(c).

25. The other document produced by the plaintiff with serious flaws is the mutation form produced as P.exhibit 3. The persons interested and who presumably made the application for subdivision is indicated as Chepochewew Lonyareng. It is indicated in the said mutation form that they were to meet the surveyor at Chepareria on 4<sup>th</sup> May 2000. As at May 2000, the proprietor of the suit land, Lonyareng Longartudo was still alive, yet at the page 4 of the mutation form, the registered proprietor's name is given as Chepochewew Lonyareng. The district surveyor on 27.01.2007 certified that the survey work had been completed and requested the Land Registrar to register the mutation. Of course by 27.1.2007, the registered owner, the late Lonyareng Longartudo was still alive. He died on 14/8/2007.

26. The evidence on record indicates that the suit property was transferred on 17/7/2009 to Chepochewew Lonyareng who then used the mutation which she had fraudulently prepared when her husband was still alive and subdivided and transferred the resultant portions now known as LAND PARCEL NO. WEST POKOT/CHEPARERIA/2304-2308 to the plaintiff and the interested parties. By 17/7/2009, the registered owner of the suit land had died. He had not transferred the land either to Chepochewew Lonyareng or anyone else before his demise. It will therefore not be necessary to belabor the point that Chepochewew Lonyareng improperly and fraudulently transferred the land to herself and could not legally have transferred the subdivisions to the plaintiff and the interested parties. No doubt the plaintiff and the interested parties could not have legally acquired the suit property. Section 45 of the Law of Succession Act provides as follows:

i. *Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of the deceased person.*

ii. *Any person who contravenes the provisions of this section shall-*

a. *Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

b. *Be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."*

Section 55 of the Law of Succession Act stipulates that:

*"No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by Section 71.*

27. Having considered the evidence before me as well as the exhibits herein produced, it clearly emerges that Section 45 and 55 of the Law

of Succession Act were violated. As a matter of fact, no succession proceedings in respect of the estate of Lonyareng Longortudo (deceased) have been taken out and yet part of his property i.e. the suit property have been distributed. The transfers and registration in favour of Chepochewew Lonyareng and later the plaintiff and the interested parties over the suit property were carried out after the death of the registered proprietor of the suit land and before a grant of representation had been issued with the result that there was intermeddling with the deceased's estate.

**28.** In the present case, there is humble and credible evidence that the registration of Chepochewew Lonyareng on 17/7/2009 was procured by fraud. She had no title to pass on to the plaintiff and the interested parties. Their titles call for cancellation and the land restored to the late Lonyareng Longortudo and thereafter for the same to be distributed in accordance with the Law.

**29.** Section 26 of the Land Registration Act permits the challenge of title of a proprietor on ground of fraud or misrepresentation to which the person is proved to be a party and where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. In this case, I am satisfied that the title of the plaintiff and the interested parties in respect of the suit property were improperly procured and the same ought to be cancelled.

**30.** The upshot of this is that this court is not satisfied that the plaintiff has proved her case against the defendants on a balance of probabilities. The court is however, satisfied that the defendants have proved their counter claim on balance of probabilities. Accordingly, I enter judgment as follows:

**a. The Plaintiff's case is dismissed.**

**b. The defendants' counter-claim is allowed in terms of prayer (b) of the Amended Defence and Counter-claim dated 29<sup>th</sup> August 2017.**

**c. Costs of the suit are awarded to the defendants to be borne by the plaintiff.**

**DATED and SIGNED and at MOMBASA this 2<sup>nd</sup> day of March, 2020.**

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**C. YANO**

**JUDGE**

**Delivered at KITALE this 7<sup>th</sup> day of May 2020**

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**Mwangi Njoroge**

**JUDGE**