



**REPUBLIC OF KENYA**

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

**LAND SUIT E & L NO. 485 OF 2012**

**JOSEPH KIPKOECH LELEI.....PLAINTIFF**

**-VERSUS-**

**PAULINE JEPCHUMBA MAINA.....DEFENDANT**

**JUDGEMENT**

Joseph Kipkoech Leley (**hereinafter referred to as the Plaintiff**) has sued Pauline Jepchumba Maina (**hereinafter referred to as the defendant**) claiming that the Plaintiff is the registered owner of all that parcel of land known as MOI'S BRIDGE/ZIWA BLOCK 17 (CHEKATA SIKAONI) 231 measuring 3.888HA as the sole proprietor and the plaintiff has been in possession of the parcel of land since 1978.

The Plaintiff claims that on or about 9<sup>th</sup> February, 2009, the defendant either by herself or through agents and/or servants without any colour of right unlawfully and forcefully entered unto the plaintiff's said parcel of land and ploughed the whole parcel in preparation to plant crops thereon. The Plaintiff states that he is the absolute owner of the whole parcel of land and the defendant has no rights and/or claim legal or equitable at all over the parcel of land and the plaintiff states that the defendant is not entitled to the suit property.

The Plaintiff's claim against the defendant is for an order of permanent injunction restraining the defendant, her agents and/or servants from interfering with the plaintiff's possession, title and use of the said parcel of land.

The plaintiff prays for a declaration that the plaintiff is the absolute owner of that parcel of land known as Moi's Bridge/Ziwa Block 17 (Chekata Sikaoni)/231. He further prays for a permanent injunction restraining the defendant either by herself agents and/or servants from ploughing or entering onto, in any manner interfering with the plaintiff's possession, title and use of land parcel number Moi's Bridge/Ziwa Block 17 (Chekata Sikaoini)/231. Lastly, he prays for the costs of the suit.

The Defendant filed defence and counter-claim stating that if the Plaintiff got himself registered as the proprietor of parcel of land known as MOI'S BRIDGE/ZIWA BLOCK 17 (CHEKATA SIKAONI) 231 and MOI'S BRIDGE/ZIWA BLOCK 17 (CHEKATA SIKAONI) 230 as alleged, which is denied, then the same was obtained by fraud. The Particulars of Fraud by the Plaintiff are thus; fraudulently representing himself at the Land Registrar's office as the owner of the suit parcel, fraudulently failing to disclose to the registrar that the parcel of land belonged to Chepoo Bot Chepchumba, fraudulently obtaining title documents without the consent of the late Chepoo Bot Chepchumba, fraudulently dispossessing the Defendant her rightful ownership of the suit land. The Defendant prayed that the suit be dismissed with costs.

In the counter-claim, the defendant avers that she is the administratrix of the estate of the late Jerono Tabongoror Tebesa also known as Chepoo Bot Chepchumba of Kapkong. She further claims to be the widow of the late Jerono Tabargaror Tebesa having been married under the Nandi customary law whereas the Plaintiff is a nephew to the deceased. According to the defendant, the suit property belonged to the deceased between 1977 and 1978 and that the plaintiff fraudulently caused himself to be registered as the owner. The Defendant prays for an order of declaration that the plaintiff's registration of parcel of land known as MOI'S BRIDGE/ZIWA BLOCK 17 (CHEKATA SIKAONI) 231 in the plaintiff's name was acquired by fraud.

She further prays for an order for the cancellation and or rectification of the Lands Register so as to delete the name of the Plaintiff and in its place be entered the Names of the Defendant on behalf of and for the benefit of the Estate of the late Jerono Tabarngoror Tebesa. The defendant further prays for an order of eviction to issue against the Plaintiffs and or his agents and or servants. In the alternative he prays for an order against the Plaintiff to pay the Defendant the market value of the suit land.

In reply to the defence and defence to counter claim the plaintiff denies fraud and states that he is the lawful owner of the suit property. The plaintiff prays that the counter-claim be dismissed.

When the matter came up for hearing, PW1 who is the plaintiff testified that the land in dispute belonged to the late Cheboo Kobot who was married to the defendant. The late Cheboo Kobot sold the land to the plaintiff. On cross-examination by M/s Kipsei, he states that he bought the parcels thus MOI'S BRIDGE/ZIWA BLOCK 17 (CHEKATA SIKAONI) 230 and MOI'S BRIDGE/ZIWA BLOCK 17 (CHEKATA

SIKAONI) 231 when the two were still comprised in one parcel. There was no written agreement, it was oral. This was in 1979. He did not have the book used for payment. He did not remember the account number he deposited money into. He did not have the receipt for payment. He got his title deed on 2/9/1999 and yet Cheboo Bot Chepchumba died on 9/7/1999. Two months after her death. He was placed in the list of members in 1989. His son resides on the disputed land with his family but has no children.

PW2, Kipkerei Arap Cheruiyot testified that he knew the late Cheboo Bot Chepchumba as they were neighbors. The defendant was married to Cheboo Chepchumba. The plaintiff was brought up by Cheboo Chepchumba in the 1970's. He states that Cheboo Chepchumba informed him that the plaintiff bought the land. He can't recall the year. On cross examination by the counsel for defendant, he states that Cheboo Chepchumba never gave him any task to watch over the property.

The PW2 Kipkemei Arap Cheruiyot stated that he was a neighbor to Cheboo Bot Chepchumba and that the defendant was married to the said Cheboo Bot Chepchumba and that the plaintiff was brought up by the said Cheboo Bot Chepchumba in the 1970s. According to this witness, the late Cheboo Bot Chepchumba mentioned to him that she wanted to sell the land to the plaintiff. On cross examination he states that he did not witness the sale agreement and that he did not know why the late Cheboo placed the plaintiff on the parcel of land. The witness states that he did not witness any agreement and did not know why the plaintiff was placed in the land.

PW3 Philip Kipkemei the brother to the plaintiff states that the plaintiff told him that he bought the suit land from Cheboo around 1973 but he does not remember the exact year. He does not know when the said Cheboo married the defendant and does not know whether he had already bought the land when she married the defendant. He contradicted the plaintiff by denying that he witnessed the agreement.

PW4, Drussila Cherogony from Ministry of Cooperative Services states that Joseph Kipkoech Lelei is a member of Chekata Sikaru farm cooperative society having joined by buying shares. Joseph Lelei bought shares from Pauline Chepchumba Maina. She had no details of Pauline Chepchumba Maina. She produced the list of members showing that the plaintiff was a member.

On cross examination, she states that the list was drawn in 1989 when she was in school. She is not aware of the dispute. She states that the list of members was signed by the chairman and secretary. She states that the plaintiff bought the land and therefore his name should have been marked "B" and not "+" as "+" meant those who inherited the land from the deceased relatives or those whose relatives decided to allocate them the land while alive.

The Defence opened its case by Pauline Chepchumba Maina testifying that she was married by a lady known as Cherono Tabergat Tebasa. The plaintiff who was a nephew to Cherono was not sold land by her husband and never paid any money. She states that Joseph Leley was given 2 acres for taking care of her husband. On cross examination by M/s Isiaho learned counsel for the plaintiff, she states that she was married in 1970 and lived with the deceased until 1979 when she died. The deceased died at 105 years.

DW2, was Joseph Njongio Tarus who lives at Chekata farm testified that he knows both the plaintiff and the defendant. He states that the plaintiff was a watchman to the land in dispute. The land belongs to Pauline Chepchumba Maina.

On cross-examination, states that he is a member of the farm. The plaintiff was not a member. He had no evidence of membership of the committee. He states that the plaintiff was a caretaker of the land. The Defendant is a wife of Cheboo according to the Nandi Customary Woman to woman marriage.

DW3, Joel Kiplagat Arap Too, a farmer at Chekata farm states that Joseph leley, the plaintiff was a caretaker of the farm on behalf of Cheboo Bot Kipchumba. He is a member of the farm and treasurer. He states that anybody who bought land was registered and a mark "B" was placed besides the name. Those who were given as a gift were registered and a mark "+" placed besides the name. Cheboo bought the land in dispute and was given number 57. Joseph Lelei was not a member but was seconded by Cheboo to attend meetings because she was old. He states that the plaintiff has a plus "+" and not a "B" which means he did not buy the land.

On cross examination by Isiaho learned counsel for the plaintiff, he states that he was the treasurer but does not have the minutes. He did not have the file. He confirms that the defendant was wife to the Cheboo in Woman to Woman marriage but does not remember when. Titles in Chekati farm were issued in 1999. He states that title could not be issued with transfer. According to the witness, the property belongs to the defendant as the wife of Cheboo.

DW4, David Kasibe a judicial staff attached to the family Division High Court in charge of Probate and administration produced file number 165 of 2009 as evidence that Cheboo Bot Chepchumba died and letters of administration ad litem granted to Pauline Chepchumba Maina for defending a suit against Joseph Kipkoech Leley. The order was made on 12/7/2010.

DW5, Wilson Kimtai Sirma, a Senior Chief Moi's bridge states that Cheboo had land in SikataChekata Sikaoni farm. The defendant is her wife. She complained that the plaintiff took her land. He heard the case with elders and found that the land belonged to the defendant. The plaintiff agreed to surrender the land. He produced the minutes as Dex 1 and the titles as DEX3a and 3b. On cross examination by Isiaho, he produced the Job card. He did not know Cheboo but called people who knew her. The plaintiff did not have a receipt for Chekata Sikaoni farm.

The gravamen of the submissions by Isiaho, learned counsel for the plaintiff is that the plaintiff is the registered proprietor of the suit land and therefore entitled to all rights and privileges appurtenant thereto and that there is no evidence of fraud against the plaintiff. According to the plaintiff the defendant merely made allegations of fraud but did not prove the same. The plaintiff on the other hand produced copies of the title documents which shows that the land is registered in the plaintiff's name. The plaintiff is the title holder hence should enjoy all rights and privileges appurtenant thereto.

Kipsei, learned counsel for the defendant on the other hand submits that there is no evidence of any oral agreement between Cheboo and the plaintiff and that there are no witnesses for the alleged oral agreement. The defendant submits that the plaintiff has not responded to the

defendants claim in the counter claim in respect to the parcel of land known as Mois Bridge Ziwa Block 17(Chekata Sikaoni) 230 and therefore the court should make a decision in favour of the defendant. The defendant submits that the plaintiff did not acquire the suit parcel of land legally. The defendant relied on the letter drawn by Mr S.K Murey the then district cooperative officer which requested the plaintiff's name as a grandson of Cheboo Kobot Chepchumba to be inserted in the register as a bonafide holder of plot number 57 and that the nomination was done in the office of the officer in the presence of Jeboo Kobot Chepchumba and her nominee Joseph Kipkoech Lelei.

The defendant argues that he is entitled to the two parcels of land namely Mois Bridge Ziwa Block 17 (Chekata Sikaoni) 230 and **Moi's Bridge/Ziwa Block 17 (Chekata Sikaoni)/231**. The defendant submits that she has proved fraud on the part of the plaintiff and therefore the plaintiff is not entitled to the parcel of land. There was no evidence of payment of consideration as alleged by the plaintiff and that the allegation of payment through the defendant was denied.

Moreover, the list of members showed that the plaintiff was a beneficiary and not a purchaser as his name was marked "+".

I have considered the pleadings, evidence on record and rival submissions and do find that the sole issue for determination is whether the plaintiff obtained title to the properties known as **Moi's Bridge/Ziwa Block 17 (Chekata Sikaoni)/230 and Moi's Bridge/Ziwa Block 17 (Chekata Sikaoni)/231** legally.

This court after considering the testimonies on record, finds that the properties number **Moi's Bridge/Ziwa Block 17 (Chekata Sikaoni)/230 and Moi's Bridge/Ziwa Block 17 (Chekata Sikaoni)/231** were a portion initially comprised in a parcel of land known as LRNO 841/2 registered in the name of the Chekata Sikaoni Farm. The plaintiff was a registered member of the group as a beneficiary after being nominated by the late Cheboo Kobot Chepchumba. Before nomination the property was unoccupied and the defendant lived with the late Cheboo Kobot Chepchumba at Sugo farm far away from the disputed parcels as husband and wife under the Nandi traditional woman to woman marriage. Though there was no evidence produced to prove that there was a sale agreement between the plaintiff and the late Cheboo Kobot Chepchumba in respect of the plot number **Moi's Bridge/Ziwa Block 17 (Chekata Sikaoni)/231** and that the plaintiff paid Ksh 85,000 as the consideration for the parcel of land, there is evidence that the late Cheboo Kobot Chepchumba nominated the plaintiff as the beneficiary of 14.4 acres of land at Chekata sikaoni farm LR NO 841/2 CS.224. In a letter dated 23<sup>rd</sup> August 1989 produced as the plaintiffs exhibit number 2, the chairman of and secretary of the said chekata Sikaoni farmers' cooperative society ltd wrote to the District Commissioner Uasin Gishu indicating how the farm had been demarcated and it was indicated that through an attached list the names of the original members plus other members who moved on the farm later but were all living on this farm. It was indicated that the names marked with a plus(+) were members whose shares were transferred to them after the death of related members or members still alive but decided at their own will to transfer to them either all or part of it. The names marked with (B) were the people who bought shares from the original members on the farm. The above is evidence that the plaintiff never bought land but was nominated by the late Cheboo Kobot Chepchumba as a beneficiary of the 14.4 acres of the farm.

This court finds that the plaintiff did not participate in the nomination but the said nomination was done by the late Cheboo Kobot Chepchumba and the farm managers and that there is no evidence that the late Cheboo was coerced into nominating the plaintiffs name. There is no evidence of fraud in the nomination exercise.

The legal burden of proof is provided for in Section 107 of the Evidence Act Cap 80 Laws of Kenya which provides that whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact he relies on the burden of proof is on that person. The onus is therefore on the defendant to prove that the plaintiff obtained title to the suit property fraudulently.

The evidential burden of proof requires that a party with the burden of proof provides sufficient evidence to support what he asserts. The evidential burden may shift to the other party where the asserter has produced sufficient evidence.

The standard of proof is the degree or level of proof demanded in specific cases in order for a party to succeed. In this matter, the defendant did not prove that the plaintiff's name was illegally inserted in the register of the members of the Chekata Sikaoni Cooperative Society ltd. In this case the defendant has failed to prove that the plaintiff caused himself to be registered as the proprietor of the suit land illegally and therefore has not discharged the burden of proof. This being a first registration after demarcation by the members of the farm there was no requirement for a transfer.

On the ownership of the parcel of land, Section 24 of the Land Registration Act provides that: -

(a)the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b)the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the Land Registration Act states;

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a)to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and(b)to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

The plaintiff was registered as the proprietor of property number Moi's Bridge/Ziwa Block 17 (Chekata Sikaoini)/230 and Moi's Bridge/Ziwa Block 17 (Chekata Sikaoini)/231 after having been validly and legally nominated by the late Cheboo Kobot Chepchumba as a beneficiary of the land.

Having found no fraud in the acquisition of the land by the plaintiff which was as a result of being nominated by the late Cheboo Kobot Chepchumba, I do allow the plaintiffs claim and do grant a declaration that the plaintiff is the absolute owner of that parcel of land known as Moi's Bridge/Ziwa Block 17 (Chekata Sikaoini)/231. Further, I do grant a permanent injunction restraining the defendant either by herself agents and/or servants from ploughing or entering onto, in any manner interfering with the plaintiff's possession, title and use of land parcel number Moi's Bridge/Ziwa Block 17 (Chekata Sikaoini)/231.

On the defendants counter-claim, I do find that parcels number Moi's Bridge/Ziwa Block 17 (Chekata Sikaoini)/230 and 231 were created from the same portion of the land namely plot no. 57 allocated to the plaintiff after being nominated by the late Cheboo and therefore the same principles apply thus that the defendant has not given any tangible evidence of fraud in the acquisition of the two parcels of land by the plaintiff and therefore the claim is dismissed. This being a "family" dispute, each party to bear own costs.

**SIGNED, DATED AT KISUMU THIS 29TH DAY OF APRIL, 2021.**

**A. O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

**DELIVERED AND SIGNED AT ELDORET THIS 5<sup>TH</sup> DAY OF MAY 2021**

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**