



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 79 OF 2014

JOHN KIBOR SERONEY.....1ST PLAINTIFF

JOSEPH KIBOR.....2ND PLAINTIFF

CATHERINE CHELAGAT KIBOR.....3RD PLAINTIFF

SAMWEL KIBET TOO.....4TH PLAINTIFF

VERSUS

STANLEY KIPTORUS CHEMOSY.....1ST DEFENDANT

JACKSON KIPNGETICH KOMEN.....2ND DEFENDANT

JOSEPH SAWENJA WANINGILO.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. Vide a plaint dated 30/4/2014 and filed in court on the same date, the plaintiffs seek judgment against the defendants for:-

a. A declaration to the effect that the suit subject matter KAPKOI SETTLEMENT SCHEME/63 measuring 5.0 acres belongs to the Estate of MAMA MARACHI CHEPKEMOI MARACHI (deceased) to be held in trust by the plaintiffs herein.

b. A permanent injunction to issue restraining the defendants jointly and severally from trespassing onto, entering, selling alienating and/or in any way interfering with the plaintiffs' use, possession and/or ownership of all that parcel of land LR No. KAPKOI SETTLEMENT SCHEME/63 measuring 5.0 acres.

c. That this honourable court to issue an order to vest the said land and create a trust over the said land to wit KAPKOI SETTLEMENT SCHEME/63 measuring 5.0 acres in favour of the plaintiffs pending full Probate and Administration to be made in the joint names of the plaintiffs.

d. Costs of this suit.

e. Any prayer this honorable court may grant.

PLEADINGS

The Plaint

2. In their claim, the plaintiffs state that they are the beneficial owners of the suit land comprised in **Kapko Settlement Scheme Plot No 63**; that the suit land belongs to the estate of **Mama Mariachi Kipkemoi Marachi**, deceased, whose estate they represent; that the 1st defendant obtained a forged letter of allotment and purported to transfer the suit land to the 2nd defendant who then purported to sell the same to the 3rd defendant. They stated that the transfers were fraudulent.

The 3rd Defendant's Statement of Defence

3. The 3rd defendant filed a statement defence on **25/6/2014** denying the claim. It is a mere denial devoid of statements of fact as to how the land came to be registered in his name.

The 1st defendant.

4. The 1st defendant never filed appearance or defence in the suit.

The 2nd defendant.

5. The 2nd defendant appeared briefly through an advocate but failed to participate in the proceedings.

The Plaintiffs' Evidence

6. PW1, John Kibor Seroney, the 1st plaintiff testified on **9/7/2019**. He adopted his witness statement dated **9/10/2012** as his evidence-in-chief. His evidence is that he is the son of the late Mama Marachi Chepkemoi Marachi who is now deceased; that he was brought up on the suit land; that his mother was employed as a cattle herder in a white settler's farm in **1963**; that in **1974** she was allocated **2.5** acres of land in **Plot No 101 Kapkoi Scheme**; that he and his parents and siblings lived on that land and in **1983** his mother was allocated additional **2.5** acres of land in land that was described then as **Kapko Settlement Scheme No 63**. That his mother met her demise in the year **1984** after continuously living on the suit land; that **PW1's** parents' remains were interred on the suit land and that the plaintiffs continued utilizing the suit land even after their parents died. Among the plaintiffs' exhibits were an order allowing them to bring the suit out of time a grant of letters of administration to their mother's estate, a letter of offer from the Settlement Fund Trustees and a copy of a receipt. A valuation report was also produced in evidence as was also an "*accountability list*" from the District Settlement Office.

7. PW2, Crecentia Atieno testified on the same date as **PW1**. She stated that she is a Land Adjudication and Settlement Officer with the National Government in Trans Nzoia County. Her evidence is that she holds the records for **Plot No 63 Kapkoi Settlement Scheme**; that the plots were issued to allottees in **1982**; that the legal charge in respect of the plot in question in this suit was issued to the 1st defendant who signed it and sent it back to the director of land adjudication and settlement; that the 1st defendant paid the **10%** deposit of **Ksh 625/=** in **1987**; that the 1st defendant transferred the suit land to a Mr. Komen and consent of the land control board was sought for the transaction; that the 1st defendant's letter of acceptance is in the file record. She produced the accountability list showing that **plot no 63** is not yet discharged; that that is the list on which all the names of the allottees are written even before the letter of offer is issued; that **PExh. 4** is also in the official file record.

8. Upon cross-examination the witness however averred that according to the official documents in her possession the proprietor of the land was one **Jackson Kipngetch Komen**; that the copy of **PExh 4** which she has is illegible; that **PExh 4** is a temporary certificate that can not confer ownership and that the proper document evidencing ownership has to be signed by the allottee and the **SFT**. She stated that Jackson finally paid the **Ksh 45,000/= vide a receipt dated 17/1/2014**.

9. PW3, Jacob Namukholondo Wanyama, used to work at Lands office as a clerk and Settlement Fund Trustee office Trans Nzoia. He adopted his statement dated **11/9/2014**. His evidence is that he used to work at the Trans Nzoia SFT land office as a clerk and that the deceased Mama Marachi was one of the persons issued with land in the scheme;

10. PW4, Shikombe Masika Shikuyu, testified on **29/1/2020**. He adopted his statement dated **11/9/2014**. He stated that he owns **plot no 64** at the Kapkoi Scheme; that his land borders that of Mama Marachi; that her children still live on the suit land; and that the remains of Mama Marachi and those of her husband were interred on the suit land upon their demise.

11. At that juncture the plaintiffs closed their case.

The Defendants' Evidence

12. DW1, Joseph Sawenja Waningilo, the 3rd defendant testified on **8/10/2020** and on **15/6/2021**. He stated that he purchased the suit land from one **Samuel Chachalia**; that he took possession of the suit land in **2011** and built a house thereon; that he produced original receipts for the payments in respect of the suit land as defence **exhibits 3, 4 and 5. DExh 3** is the receipt for **Ksh 45,500** mentioned by **PW2. DExh 2** is an agreement dated **6/8/1987** between the 1st defendant and one Mrs Chemosy on the one hand and **DW1** on the other hand. It cites **Plot No 63 in Kapkoi Settlement Scheme**. He produced no agreement between him and the person who is said to have sold him the suit land.

13. The 3rd defendant then closed his case.

SUBMISSIONS

14. The 3rd defendant filed written submissions on **18/6/2021**. The plaintiffs filed their written submissions on **19/7/2021**. I have considered those submissions.

DETERMINATION

Issues for determination

15. The main issues for determination in this matter are:

- a. Whether the suit land belonged to the estate of the late Mama Marachi;*
- b. Whether the plaintiffs have established their claim of fraud against the defendants;*
- c. What orders should issue.*

16. The issues are addressed as hereunder:-

a. Whether the suit land belonged to the estate of the late Mama Marachi.

17. The only document in **PW2'S** records which could have shed light on whether the land was ever allocated to the late Mama Mariachi is a for the greater part illegible. It is not clear how that document got into the record and by whom it was issued. The plaintiffs never produced its original; the plaintiff's own witness testified against their case and failed to state that the land belonged to the late mama mariachi. She instead stated that the records how that the land was allocated to one **Jackson Kipnetich Komen**. There is no letter of allotment that as ever produced in the name of Mama Marachi. The family of the deceased Mama Marachi can only claim long occupation of the suit land but they lack any documentation to demonstrate that the same was allocated to them by the Director of Land Adjudication and Settlement. Only such documents can be used in a court of law to prove that the land has been allocated. In this court's view such basic evidence was necessary to prove that the land belonged to her having not been produced the plaintiff's claim can not stand.

d. Whether the plaintiffs have established their claim of fraud against the defendants;

18. I have perused the particulars of fraud in the plaint. The Director of Land Adjudication and Settlement was not enjoined in the suit. However, owing to the evidence given by **PW2** I can not state that the plaintiffs have proved fraud against the defendants.

(c) What Orders should issue?

19. In the light of the foregoing I find that the plaintiffs' claim lacks merit and the same is hereby dismissed. However in view of the circumstances of this suit, I order that each party shall bear their own costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2021.

MWANGI NJOROGI

JUDGE, ELC.