



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC CASE NO. 53 OF 2016**

**THE FAITH HOMES OF KENYA.....PLAINTIFF**

**VERSUS**

**ROBERT CHERUKWO.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff commenced this suit by way of a plaint dated **8/3/2016** and filed in court on the same day seeking following orders:

- 1. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land in Chepkopegh Group Ranch situate at Pserum Location, also known as Land NO 127 which was gifted to it by the late Lotudokomol Cherukwo.**
- 2. That neither the defendant his agents nor any persons claiming through him have any right whatsoever of the said suit land;**
- 3. A permanent injunction restraining the defendant whether by himself his servants, agents and /or any persons claiming through him from entering the suit property;**
- 4. Costs of the suit;**
- 5. Any such other or further relief as this honourable court may deem appropriate to grant.**

**PLEADINGS.**

**The Plaintiff**

2. The plaintiff's case is that the deceased Lotudokomol gifted the plaintiff a portion of land which was then known as Land no **127** and the plaintiff constructed a church thereon. The plaintiff also built a nursery school and ran a school feeding programme on the land which it operated for **4** decades without interference from any person. It is said that these operations benefited the neighbouring community. On **13/11/2015** the defendant laid claim to the land occupied by the plaintiff. In December of the same year the defendant forcibly entered the suit land and dug holes thereon. It is stated that here have been constant confrontations between the defendant and the plaintiff's workers and the local administration and County Government officials have attempted to resolve the dispute. The plaintiff claims to have been deprived of the possession and occupation and quiet enjoyment of the suit property, and that the defendant has disrupted the plaintiff's communal programmes.

3. The defendant denied the claim in his defence dated **7/6/2018** and filed on the same date. He stated that it is the plaintiff who had encroached onto the land belonging to the deceased. He stated in the alternative that land in the group ranch is community land and no person had the right to sell land without the Chepkopegh Group Ranch management. He further stated that the plaintiff institution is under the directorship of a foreigner and cannot claim ownership rights over land regarding which it does not possess any ownership documents.

4. The plaintiff filed a reply to defence on **19/6/2018** reiterating matters in the plaint and denying the claims of encroachment which are in the defence.

**EVIDENCE OF THE PARTIES.**

### The Plaintiff's Evidence.

5. The plaintiff's Managing Director, **Bernhard Fried Nilsson** testified on **4/2/2021** and on **24/2/2021** and adopted his witness statement dated **8/3/2016**. His evidence is that the plaintiff is a church and a charitable organization registered in **1972** under **Section 10** of the **Societies Act**. He produced a copy of minutes from **Chepkopegh Group Ranch** which required the plaintiff to vacate the suit land and averred that he was not invited to the meeting that made that resolution and a letter asking the plaintiff to vacate. He produced photographs showing alleged encroachment by the defendant. He stated that the plaintiff's fence was uprooted and replaced with the defendant's fence and that the defendant has constructed a *mabati* structure that houses his goats. His further evidence was that the group ranch was formed in **2002** after the plaintiff acquired the suit land in **1975**;

6. Upon cross-examination by Mr. Kaosa he produced his Kenyan national identity card and asserted that he became a Kenyan citizen in **2016** though he was born in Sweden; that the defendant's late father was an Assistant Chief at the time he gifted the plaintiff with the land; that the deceased requested that a church and a nursery school be built on the suit land; that PW1 is not a member of the group ranch and that the plaintiff has not vacated the suit land.

7. Upon re-examination by Mr. Bisonga he stated that the Assistant Chief wanted to have a church close to his home.

**8. PW 2** testified on **24/2/2021**. His evidence is that he is a member of the plaintiff organization and that the defendant's late father gave the suit land to the plaintiff in his presence; that he is a former Pastor with the plaintiff and he is aware that there are several developments on the suit land; that the plaintiff has occupied the suit land for **4** decades without interference and that the defendant only claimed interest in the suit land recently.

9. Upon cross-examination by Mr. Kaosa he stated that demarcation of the boundaries to the suit land was done by way of planting some trees that produce milky sap. Upon re-examination he stated that the defendant's father asked that the church be built on the suit land; that a church was therefore built followed by a nursery school and then a primary school. At that juncture the plaintiff closed its case.

### The Defendant's Evidence.

10. The defendant's documents were all admitted by consent of the parties during the hearing of the defence evidence. The defendant testified on **24/2/2021**. His oral evidence is that his father's name was Cherukwo Kwapamoi Chemrighai; in the written statement he has admitted that his father was also called Cherukwo Lokodokumul (a name that almost resembles "*Lotudokomol*" the name the plaintiff uses to refer to his father. He stated that that his father lived on the suit land; that he was a member of the group ranch; that the register of the group ranch shows that his late father was member no **127**; that his father never sold the land to any person; that he has not filed proceedings for a grant of representation to his estate; that his late father lodged a dispute with the District Officer who seeing no documents entitling the plaintiff to the suit land ordered it out of the land; that the church the plaintiff erected on the land was in use until **1990**; that before his father's death in **2008** the plaintiff was summoned; that in **2013** the dispute was taken before the group ranch and subsequently a letter dated **19/11/2015** was written to the plaintiff requiring it to remove itself from the land; that the plaintiff ceased using the building on the suit land in **1990**; that the group ranch owns the land yet it has not been enjoined in the instant suit; that no titles have been issued to the group ranch members including the defendant and that the land had earlier belonged to the forefathers of the members of the group ranch.

11. Upon cross-examination by Mr. Bisonga he stated that he lives on the suit land; that his father was an Assistant Chief; that before his father died it had been resolved that a letter be written to the plaintiff; that the DO wrote no letter and that the plaintiff was unrepresented at the meeting held on **13/11/2015**; he admitted that the plaintiff built a secondary school aided by local fundraising efforts.

**12. DW 2** testified on **24/2/2021**. His evidence is that the defendant's father went by the name Cherukwo Kwapamoi Chemrighai; that **DW2's** membership number in the group ranch is **128**; that he neighbours the defendant's father's land; that he has lived on his land since the **1960s**; that the defendant's father never sold any land; that the plaintiff bought land for the construction of other schools built within the group ranch; that the defendant's father and the plaintiff had a dispute but he does not know how it was determined. On cross-examination he denied being the defendant's brother; he stated that there is no church located on the defendant's land; that the defendant has placed his goats on the suit land; that the defendant has not barred the plaintiff's members from the land; that the schools the plaintiff has built have helped the area residents; that there is no dispute over the school land; that Lokodomokul was not the defendant's father; that the defendant's father was an Assistant Chief; when pressed further by Mr. Bisonga he stated that there is a church on the suit land.

**13. DW 3** testified on **3/5/2021**. His evidence is that he is the secretary to the group ranch; that the defendant is member no **127** in the group ranch; that his father went by the name Cherukwo Kwapamoi who was also member no **127**; that "*membership*" means that one is a member and resides on group ranch land; that members were registered in **1982**; that the defendant's father was a Chief; that the defendant's father came to the group ranch office and complained about a white man in or about the year **2000**; that he reported that the white man had refused to vacate the land; that the defendant's father died soon after the complaint was lodged; that the group ranch tried to summon the white man to no avail; that subsequently a meeting was held on **13/11/2015** which resolved that the plaintiff vacates the suit land; that a letter was written to the plaintiff dated **19/11/2015** but the plaintiff has not vacated from the suit land; that there is a church on the suit land and the defendant also has animals on the suit land; that the group ranch is processing subdivision and titling of individual parcels; that the white man's name is not in the group ranch register; that if a member sells land to any person that member normally comes to the group ranch office and shows how much land he sold; that the defendant has never gone to the group ranch office to report such;

14. When cross-examined by Mr. Bisonga he stated that he came to the land in the **1990s** and that he does not know when the plaintiff took possession of the suit land; that the plaintiff was not in attendance at the meeting of **13/11/2015** that resolved that it vacates the land; that there are no disputes over the land on which schools built by the plaintiff are located; that plot no **127** is about **3** acres.

### **SUBMISSIONS.**

15. The plaintiff filed submissions on **28/5/2021**. The defendant filed submissions on **2/6/2021**.

## **DETERMINATION.**

16. It is not in dispute that the suit land originally belonged to the defendant's father and that he was an administrator holding the position of either an Assistant Chief or a Chief.

17. However, there is ample evidence that the plaintiff has been on the suit land for a very long time. The only record of a dispute produced as evidence in this suit is of that between the plaintiff and the defendant and not between the plaintiff and the defendant's father. While the defendant's father was alive permanent buildings were erected on the suit land and there is no evidence of any dispute between him and the plaintiff. There is also evidence that the developments effected in the group ranch by the plaintiff were not confined to the defendant's father's land. They included schools, both primary and secondary and churches. It is common ground that there is no dispute regarding the land on which the schools erected by the plaintiff are built.

18. The defendant's father's land happened to be one of the parcels that benefited from the developments. The plaintiff maintains that the defendant's father asked for the church to be built on the suit land which was his land and that the land was gifted to the plaintiff and the defendant has no right over it. The defendant maintains a twofold argument that the land belonged to his father and also that the land belongs to the group ranch and that the plaintiff lacks documentary evidence of ownership.

### **Issues for determination.**

19. The issues that arise in this matter are narrowed down to the following:

**a. Is the plaintiff entitled to exclusive and unimpeded right of possession and occupation of the suit land?**

**b. Does the defendant have any right or interest in the suit land?**

**c. Should an injunction issue restraining the defendant from interfering with the suit land?**

**d. Who should bear the costs of the suit?**

20. Regarding the first issue it is admitted by all witnesses that the land is within the Chepkopegh Group Ranch and that the plaintiff has been in occupation thereof. From much of the evidence given it is clear that the plaintiff has had a church standing on the land for decades and that the taking up of possession and the construction was done with the permission of the person who was considered the owner of the suit land at the time. That was certainly not the defendant who according to the evidence given was in his teenage during that period. If the construction happened during the lifetime of the defendant's father and there is no evidence that he opposed it, then he must have given his consent and the defendant can not therefore purport to reverse that consent. I find that the defendant has tried to create some confusion regarding the real name of his father. The defendant avers that his father was known by the name Cherukwo Kwapamoi Chemrighai in his oral evidence. However this appears to be an afterthought on the part of the defendant because in the written statement he had identified his father as *Lotudokomol Cherukwo*. The plaintiff knows the person who gifted it land by the name *Lotudokomol Cherukwo*. No documentary evidence of the formal names of the person referred to by the defendant and by the plaintiff was adduced. The common ground is that the land occupied by the plaintiff belonged to the defendant's father and this court is entitled to make the reasonable presumption that the two names by which the parties herein refer to him refer to the same person who owned the land. **PExh 2** is a record of the Chepkopegh group ranch meeting and it refers to the defendant's father as "*Lotudokomol Cherukwo*." In the proceedings reflected therein the defendant and his brother are perceived to be admitting that the land was given to the plaintiff for what they consider as "meagre" consideration. The unfortunate position is that the defendant's father was already deceased by the date of that meeting and the allegations of his being shortchanged did not therefore originate from him and a person other than the giver can not validly allege that the giver was shortchanged unless they can demonstrate the giver's incapacity to transact.

21. I have noted that **PExh 4(d)** shows a very old building said to have been erected by the plaintiff. There is no possibility that a building of that magnitude could have been erected without the consent of the landowner or without intent by the owner to part with possession and ownership thereof. I therefore find that the land was indeed gifted to the plaintiff as the plaintiff claims.

22. Regarding the second issue, the defendant has already admitted that he was a mere youth by the time the plaintiff took possession of the suit land. The land belonged to his father and not to him. That was also admitted in **PExh 2**. I find that the defendant has no interest whatsoever in the suit land.

23. As regards whether a permanent injunction should issue against the defendant, this court has noted that the defendant's claim has no justification. He therefore has no right to interfere with the plaintiff's right of possession and occupation of the suit land. This court finds that the plaintiff justly acquired the land and occupied it. An order of injunction is therefore merited.

24. As the activities of the defendant prompted the instant suit, the defendant should bear the costs of the instant suit.

## **CONCLUSION.**

25. In the end I therefore find that the plaintiff has established its claim on a balance of probabilities and I enter judgment for it against the defendant and I order as follows:

**(1) A declaration is hereby issued declaring that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land it occupies in Chepkopegh Group Ranch situate at Pserum Location, also known as Land NO 127 which was gifted to it by the defendant's now deceased father.**

**(2) A declaration is hereby issued that neither the defendant his agents nor any persons claiming through him have any right whatsoever of the said suit land;**

**(3) A permanent injunction is hereby issued restraining the defendant whether by himself his servants, agents and /or any persons claiming through him from entering the suit property;**

**(4) That the plaintiff shall be considered as a public institution while the land is being demarcated and titles issued for issuance of title for public use only;**

**(5) Costs of the instant suit shall be borne by the defendant.**

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 10<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**MWANGI NJOROGI**

**JUDGE, ELC, KITALE.**