



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CASE NO. 191 OF 2014

MICHAEL LIMO CHEPTARUS.....PLAINTIFF

VERSUS

PHILIP KIMAIYO KIRUI.....1ST DEFENDANT

STEPHEN KIRUI MURUN.....2ND DEFENDANT

DISTRICT LAND REGISTRAR UASIN GISHU COUNTY.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit against the defendants through his plaint dated 9th June, 2014, seeking for the following orders:

(a) *A declaration that he is the legal owner of the parcel of land known as Moiben/Kapsumbere Block 4 (Sesia) 104.*

(b) *An order compelling the 3rd defendant to rectify the register by cancelling the irregular title issued to the 1st and 2nd defendant and registering the plaintiff as legal owner.*

(c) *Mesne profits and other relief this court may deem fit and just to grant.*

The plaintiff avers that he was at all material times a member of Sesia Farm Ltd and lawful owner of Moiben/Kapsumbere Block 4 (Sesia)104, the suit property. That he has been in uninterrupted occupation of the said land since 1975. That the defendants have colluded, and fraudulently had the said land registered with the 1st and 2nd defendants.

2. The plaintiff's claim is opposed by the 1st and 2nd defendants through their statement of defence dated and filed the 18th September, 2014. They aver that they are the lawful owners of the suit property, and have been in uninterrupted occupation since the 1970's. They denied obtaining registration with the suit property fraudulently, and averred that the plaintiff has a pending criminal case over the said land after destroying their crops and house. They prayed for;

(a) *The suit to be dismissed with costs.*

(b) *In the alternative and without prejudice to the above, a declaration that the defendants are the legal owners of parcel of land known as **Moiben/Kapsumbere Block 4 (Sesia)104.***

(c) *Damages.*

(d) *Costs of the suit*

(e) *Any other relief the court may deem fit and just to grant.*

3. The plaintiff filed the reply to the 1st and 2nd defendants' statement of defence, dated the 3rd October, 2014 reiterating the contents of his plaint and praying for the said defence to be dismissed and judgement be entered in his favour.

4. The 3rd and 4th Defendants also opposed the plaintiff's suit through their statement of defence dated 10th June, 2015. They denied the allegations of collusion and fraud in the registration and issuance of the title to the suit property. They aver that the title to the suit property was erroneously issued to the 1st and 2nd defendants on the 16th January 2013, and upon discovering that there existed a dispute on its ownership, the title was called for, and surrendered back on the 11th March 2014. They prayed for the plaintiff's suit be dismissed with costs.

5. That in support of his case, the plaintiff testified as **PW1**. He called Paul Chebii and Peter Rono as witnesses, and they testified as **PW2** and **PW3** respectively. The plaintiff's case is that he and others came together and bought Sesia Farm from the white owner in 1972. That he was member No. 9 and he bought 8.3 acres of the suit land. He produced a list of members of Sesia Farm, a copy of the minutes of the meeting held on 29th June, 1975, receipts for payments of Kshs.500 and 1700 as **PMFI-1 to 4** respectively. He also produced a copy of a KRA receipt and copies of the transfer documents as **PMFI-5 and 6** respectively. That it is his testimony that after making the payments for the title and completing the transfer form, he was asked to return for the title after a week. That when he went for the title, he was informed that the same had already been issued to the 1st and 2nd defendants. The Plaintiff stated that he reported the matter to the police who wrote a letter to the Land Registrar which he produced as exhibit **PMFI-7**. The Plaintiff further testified that the suit land is not developed, and that he has been utilizing it from 1972 until 2013 when the court stopped him. It was his contention that the 1st and 2nd Defendants are not his brothers, and that they have never resided on, or occupied the suit land. During cross-examination the Plaintiff stated that he does not have any receipts or certificate to prove that he had bought shares in Sesia Farm. He denied that one Chepkurui Murung was his father. He agreed that the transfer documents that he had produced as exhibit **PMFI-6** do not indicate that they were signed by the Commissioner of Lands or registered or received at the land registry. He further confirmed that title to the suit land was issued on 16th January, 2013 and by then he had not paid for the said transfer. He also confirmed that he does not have any document of ownership of the suit land, and that he had made payments for the title deed to Sesia Farm offices and not at the land registry. Paul Chebii who testified as **PW2**, stated that he was a public surveyor and worked under the late Mr. Maingi in subdividing Sesia Farm. That during cross-examination, **PW2** stated that he does not have any report to show that he undertook the said survey work or any document to confirm that he was a surveyor. That the suit land number was originally 89 before changing to 104. Peter Rono, who testified as **PW3** stated that the plaintiff was a member of Sesia Farm. During cross-examination, it was also his testimony that he saw the Plaintiff during the Sesia Farm Annual General meeting and on the suit property in 1975, but does not know whether he had bought the suit land.

6. In their defence, the 2nd and 1st defendants testified as **DW1** and **DW2** respectively. They called Christopher Kipkorir, Phillip Kiplagat Komen and Joseph Leibalia Lesan who testified as **DW3 to DW5** respectively. Their case is that the suit property was bought by their late father, named Chepkurui Murun, a member of Sesia Farm Society, in 1972. That the plaintiff and **DW2** are brothers from the same mother but different fathers, and **DW1** is their stepbrother. That by the time the Sesia Farm land was being subdivided, their father had passed on. That as the plaintiff had claimed ownership of the suit land, the dispute was heard before **DW3**, who was the assistant chief. That it was decided in 1997 that the land be shared equally between their mothers, named Elizabeth and Selina. That before Elizabeth who was the mother of both the plaintiff and **DW2** passed on, she had directed that her share be registered with 1st defendant as the plaintiff had already been given land by his father elsewhere. That though the Sesia Farm management had not sorted out the suit land's ownership dispute as between the plaintiff and 1st and 2nd defendants, **DW5** issued the plaintiff with a clearance upon paying for the title and green card. That however, when the plaintiff returned to correct the title, he learnt that the Land Registrar had already issued a title for the suit property in the names of the 1st and 2nd defendants in 2013, without a succession cause having been filed. That title was later recalled in 2014 allegedly because it had an error in terms of the acreage of 1.61 Ha instead of 8 acres.

7. That Sarah Chelimo Maina, the Land Registrar, testified as **DW6** for the 3rd and 4th defendants. It is her evidence that upon calling for the documents relating to the suit land including the green card, correspondence and the Sesia Farm Register that was duly signed by the Chief and District Officer Moiben, Sesia Farm Chairman, Secretary and Treasurer, she confirmed that parcel 104 had an outstanding ownership dispute between the Plaintiff and the 1st and 2nd Defendants. That a title deed over the land had been issued to the 1st and 2nd defendants on the 16th January 2013, but later recalled. The witness denied that her office had colluded with the 1st and 2nd defendants in issuing them with the title deed, adding that the office had relied on the clearance signed by the Sesia Farm treasurer. She also confirmed that 1st and 2nd Defendants are currently the registered owners of the suit land though the title has been restricted as the office await the outcome of this case. That the Sesia Farm register received and kept at her office had left the space for ownership of parcel 104 blank. She further stated that the Land Registrar had taken remedial measures including restricting the title from any further actions awaiting the court's decision.

8. That after closing the parties' oral evidence, the learned counsel for the plaintiff, 1st and 2nd defendants filed their submissions dated the 25th June, 2021 and 21st April, 2021 respectively.

9. The following are the issues for the court's determinations;

(a) Who is the legal proprietor of parcel of land known as Moiben/Kapsumbere Block 4 (Sesia) 104?

(b) Whether the Plaintiff is entitled to any of the prayers sought?

(c) Whether the 1st and 2nd defendants' defence dated the 18th September, 2014 contains a counterclaim, and if so, whether they are entitled to any of the prayers sought therein.

(d) Who pays the costs?

10. That I have considered the pleadings, parties' evidence, written submissions filed, superior courts decisions cited therein, and come to the following determinations;

(a) That on the issue of the legal proprietorship of parcel of land known as Moiben/Kapsumbere Block 4 (Sesia) 104, the suit

property, the plaintiff testified that as he was a registered member of Sesia Farm, and he had made all the requisite payments, the suit land belongs to him. The plaintiff relied on two receipts numbers 35 and 48 dated the 12th December, 2011 and 19th April, 2012 for Kshs.500 and Kshs.1700 respectively, issued by Sesia Farm in his name, receipt number 3178873 dated 5th June, 2013 for Kshs.3,300 for transfer issued by Department of Lands in his name, and transfer of land form that is undated, unregistered and not signed by the transferor. That on the other hand, the 1st and 2nd Defendants contend that the suit land belongs to their late father who was a member of Sesia Farm. That by virtue of them being his sons, the suit land belongs to them, and that their registration as proprietors was lawful. They have relied on among others, a receipt number 3099102 dated the 15th January, 2013 issued by Department of Lands to Sesia Farm, copy of the Sesia Farm register, clearance from Sesia farm, green card, demand notice for rates dated the 2nd September 2013 addressed to Chepkurui Murung as the rate payer, letters dated 24th July 2012 and 11th September, 2012 by the Assistant Chief. That having carefully perused the documentary evidence presented by the plaintiff on one side, and the 1st and 2nd defendants on the other side, it is not in dispute that the suit land was acquired through Sesia Farm Society that has since wound up its operations, upon subdividing and allocating the land to its members in 2012. That the register of the members and the owners of the plots the Sesia Farm Society management filed with the Land Registrar's office had the ownership of plot 104, the suit property, blank. That this has been explained by among others, the Assistant Chief (DW3), and Sesia Farm Society treasurer (DW5), to be due to the unresolved ownership dispute between the plaintiff, and the family of the late Chepkurui Murung. That dispute remains unresolved as confirmed through the filing of this suit, and the testimony of the parties and the Land Registrar, DW6. That dispute is the main issue for determination in this judgement.

(b) That the plaintiff did not avail any documentary evidence to support his claim that he was a paid up and registered member of the Sesia Farm Society. The only document that appears to support his claim is the copy of the register that at No. 70, where the name of Chepkurui Morum is, his name Michael Limo, is added in different pen and small letters, on top of it. That there is no explanation tendered on who added that name, and whether or not it was meant to replace that of Chepkurui Morum. That as the plaintiff's claim of being a member of the society has been disputed by the defendants, and in view of the evidence tendered by DW3 and DW5 that the suit property, that was previously plot No. 87 had been allocated to the late Chepkurui Murun, I find the plaintiff has failed to discharge his duty of proof that he was ever a paid up member of Sesia Farm Society.

(c) That Section 107 (1) of the Evidence Act, chapter 80 of the Laws of Kenya provides that;

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

And sections 109 and 112 of the Act provides that;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

That from the evidence availed by the parties in this suit, the plaintiff had the burden of proving that he is the legal or equitable owner of the suit property for the court to make a finding in his favour. That burden fell on the Plaintiff the moment he filed this suit, questioning the legitimacy of the 1st and 2nd Defendants' title, and alleged collusion and fraud on the part of the 3rd defendant in the process. The Plaintiff has however failed to produce any substantive evidence to prove his allegations. That it is my finding that the Plaintiff has not made up a case on a balance of probabilities for the court to grant the orders sought in the plaint in his favour.

(d) That though the evidence tendered confirms that the late Chepkurui Murun passed on in 1986, which is long before the suit land was registered, and that the 1st and 2nd defendants obtained registration as proprietors of the said land without complying with the provisions of the Law of Succession Act, chapter 160 of Laws of Kenya, I find that the plaintiff has nevertheless failed to prove collusion and fraud attributable to the 3rd and 4th defendants in view of the evidence presented by DW6, that shows the Land Registrar's office had relied on the clearance received from the Sesia Farm Society. That further, the Land Registrar's office cannot be faulted for failing to register the documents the plaintiff had obtained from the society as the ownership dispute had not been resolved.

(e) That having perused the receipt No. 6237264 dated the 18th September, 2014 under which the defence of the 1st and 2nd defendants among other documents was filed, I have noted that only Kshs.75/- was paid for it. That I therefore have no difficulty coming to the finding that the said defence did not contain a counterclaim that the court can consider, as the prayers thereon were not paid for or formally filed.

(f) That on the issue of whether the 1st and 2nd Defendants were regularly and legally registered as the proprietors of the suit land, the overwhelming evidence adduced by witnesses, together with documentary evidence before this court confirms that the suit land belonged to Chepkurui Murun, now deceased, who was a member of Sesia Farm Society. That the said deceased was admittedly the father to the 1st and 2nd defendants. That while the said defendants stated that the plaintiff is their brother/stepbrother, the plaintiff has vehemently denied any such relationship. I will leave the issue of the relationship between the plaintiff, 1st and 2nd defendants at that, as it is not up for determination in these proceedings. That going back to the issue at hand, and considering that the family of the late Chepkurui Murung, and the Sesia Farm Society management had from the testimony tendered by DW3 and DW5, failed to resolve the dispute over the ownership of the suit property, and in view of the admitted fact that no confirmed grant had been obtained from the succession court before registering the said land with the 1st and 2nd defendants, I find the said registration was contrary to the provisions of the Law of Succession Act, and did not confer good title to them.

(g) That section 24 of the Land Registration Act 2012 No. 3 of 2012 provides as follows:

“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 section 25 (1) of the said Act further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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 to any lawful encumbrances, set out in this section.”

Additionally, section 26 of the same Act provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

(a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

That as the 1st and 2nd defendants knew their claim to the ownership of the suit land was as children of the owner, the late Chepkurui Murun, they were obligated to first move to the succession court to get a confirmed grant to get the legal power, to administer and or distribute his estate, including the suit land. That the registration of the 1st and 2nd defendants with the suit property and the title deed issued to them that was later recalled, is not entitled to the protection provided for under Article 40 of the Constitution 2010 and section 26 of the Land Registration Act No. 3 of 2012.

(h) That though the plaintiff has failed in his claim of title to the suit property, and the defendants would ordinarily under Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya, been entitled to costs, the history of this case, the alleged relationship between some of the parties, and the fact that the registration of the suit property with the 1st and 2nd defendants had been made possible through the clearance issued by Sesia Farm, I find this a suitable case where each party should bear their own costs.

11. That flowing from the foregoing, I find and order as follows;

(a) *That the plaintiff's claim against the defendants fails and is hereby dismissed.*

(b) *That each party bears their own costs.*

(c) *That having become evident that the registration of Moiben/Kapsumbere Block 4 (Sesia) 104, the suit property on the 16th January 2013, in the names of the 1st and 2nd defendants, and the issuance of the title deed thereof, was done without applying for and obtaining a confirmed grant, it is only fair and just that the court issue appropriate order to correct the irregularity. That accordingly, the Land Registrar Uasin Gishu (3rd defendant), is hereby directed to rectify the said land's register by cancelling entries numbers 2 and 3, and entering the name of Chepkurui Murun alias Chepkurui Murung alias Chepkurui Morun, (deceased) as proprietor, so as to enable those interested with his estate to move to the succession court in accordance with the provisions of the Law of Succession Act.*

It is so ordered.

DATED AND DELIVERED VIRTUALLY THIS 6TH DAY OF OCTOBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

In the Presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Kinyanjui for Kimani for Plaintiff.

M/s Tum for 1st and 2nd Defendants and

M/s Odeyo for 3rd and 4th Defendants.

Christine: Court Assistant: