



**REPUBLIC OF KENYA**

**IN THE**

**ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 45 OF 2019**

**SELLY JEPCHUMBA SAMOEI(Suing on behalf of the Estate  
of the late JOSEPH KISORIO SAMOEI.....1<sup>ST</sup> PLAINTIFF  
DAVID KIMTAI MWEL.....2<sup>ND</sup> PLAINTIFF  
JAMES KIMARU SONGOK.....3<sup>RD</sup> PLAINTIFF  
WILLIAM SOME SONGOK.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**KIMWEI ARAP SAMOEI.....DEFENDANT**

**JUDGMENT**

1. This is a suit in which all the parties are members of one family, formerly headed by their patriarch one **Kipsongok Arap Chepkulei**, now deceased. All the original parties are his sons, but the 1<sup>st</sup> plaintiff, Joseph Kisorio Samoei, met his demise during the pendency of this suit and was substituted with his widow, Selly Jepchumba Samoei. With his demise these proceedings suddenly assumed an urgent tempo not there before anticipated by the parties as the defendant raised objection to the interment of his remains on the suit land, which he claimed was his absolute property. Therefore, on **30/1/2020** orders were made that the hearing of the main suit would be on priority basis beginning **4/2/2020 at 9.00 a.m.** The application for temporary injunction filed by the defendant was allowed by consent of the parties to the effect that a temporary injunction do issue against the 1<sup>st</sup> plaintiff, the widow of the deceased and other family members from interring the remains of her deceased husband on the suit land pending the hearing and determination of the main suit.

2. The claim by the plaintiffs is as follows: by a plaint dated **29/5/2019** the original four plaintiffs claimed against the defendant for the following orders:-

- (a) **A declaration that the defendant hold title No. Kitale Municipality Block 15/Koitogos/246 in trust for the plaintiffs;**
- (b) **An order for cancellation of title No. Kitale Municipality Block 15/Koitogos/246 and an order for subdivision of the same in to four equal portions to be transferred into the names of the plaintiffs.**
  - (bb) **the body of joseph Kisorio Samoei be buried at his home on the suit land.**
- (c) **Costs of the suit.**

**The Plaint**

3. The plaintiffs' claim is that the plaintiffs and the defendant are all sons of the late **Mr. Chepkulei Kipsongok Arap Korir**; that in or around the year **1969 Mr. Chepkulei** entrusted the defendant with money to purchase land in Kitale; that the defendant purchased land measuring **10 acres** in Koitogos within Kitale but before obtaining title thereto he disposed of **5 acres** against the wishes of all the family members. Later on in the year **1993** the defendant processed a title deed in his name over the remaining **5 acres** which were now baptized **Kitale Municipality Block 15/Koitogos/246**. It is averred that the 1<sup>st</sup> plaintiff had been living on the suit land until the date of filing of the

suit. The plaintiffs also averred that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs moved out of Kitale for the purpose of obtaining gainful employment and in the year 2009 when they wanted to come back and settle on their respective share of the suit land the defendant denied them access thereto. The plaintiffs pray that the trust be terminated and the defendant be ordered to transfer the land to the plaintiffs. They aver that the defendant does not deserve any share in the 5 acres since he disposed of 5 acres before the suit land was registered in his name.

### **Statement of Defence and Counterclaim**

4. The defendant's statement and counterclaim was filed on 27/11/2019. In that pleading his defence is that he purchased the suit land using his own funds and not with any monies obtained from Mr. Chepkulei. He admits having sold 5 acres but denies ever having an obligation to seek the consent of the plaintiffs or Chepkulei or any other family member before disposing of the same. He also admits that title was issued in his name in 1993 but he denies holding it in trust for the plaintiffs. Finally he states that he merely granted a license to Joseph Kisorio Samoei to live with him on the suit land simply on account of the latter being his younger brother and that should not be misconstrued as right of ownership on the latter's part.

5. In his counterclaim he reiterates that he is the registered proprietor of the suit land, maintains that Joseph Kisorio Samoei trespassed thereon and failed to vacate therefrom despite his effort. He claims for an order of eviction and a permanent injunction to restrain Joseph Kisorio Samoei, his agents, servants, relatives and friends from trespassing onto the suit land after eviction. He prays for the plaintiffs' suit to be dismissed with costs and that he be awarded the costs of the counterclaim.

6. Upon the demise of the original 1<sup>st</sup> plaintiff as mentioned hereinbefore, he was substituted with one Selly Jepchumba Samoei his widow vide an amended plaint filed on 13/1/2020. In that amended plaint an additional prayer was sought that the body of Joseph Kisorio Samoei be interred on the suit land. The amended defence and counterclaim was filed on 31/1/2020 and the notable addition is that the defendant objects to the interring of the body of Joseph Kisorio Samoei on the suit land. The defendant avers that that body should be buried on the family land at Kiplombe on Parcel No. Kiplombe/Kiplombe Block 4 (Kiplombe)/90. These amendments were effected pursuant to an order made by this court on 30/1/2020. On the same day further orders were made that the hearing of the main suit would be on priority basis beginning 4/2/2020 at 9.00 a.m. The application for temporary injunction filed by the defendant was allowed by consent of parties to the effect that a temporary injunction do issue against the widow of the deceased and the family members from interring the remains of Joseph Kisorio Samoei on the suit land pending the hearing and determination of the main suit. Leave was also granted to the defendant to file and serve a further witness statement latest by 31/1/2020. On 4/2/2020 the parties' respective counsel confirmed that they had complied and they were ready for hearing and therefore hearing commenced that morning.

### **The Plaintiffs' Evidence**

7. P.W.1 Selly Jepchumba Samoei gave sworn evidence and adopted her replying affidavit dated 28/1/2020. Her evidence is that he got to know Joseph Kisorio Samoei in 1976 while he was living with his elder sister Leah at Kesses; that in 1979, Joseph came to ask for her hand in marriage in a ceremony called "Koito"; that during the "Koito" the defendant and his wife were present as were Leah and Joseph amongst other family members; that during the ceremony her father asked Kimwei the defendant where the couple would stay after marriage; that she heard the defendant respond that there is family land in Kitale where they could settle; that in 1980 PW1 and Joseph moved to Kitale and joined the defendant on the suit land where they stayed with the defendant for one year before building their own house on the suit land and moving out of the defendant's house in 1981; that the defendant advised Joseph to ask Mr. Chepkulei where to build; that her father-in-law Mr. Chepkulei showed his son Joseph where to build and they have lived there to date; that all her children have been born and brought up on the suit land; that upon Joseph passing away on 20/1/2020 the defendant objected to his interment on the suit land; that her family has no other home; that her father-in-law had also settled on the suit land with his second wife; that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs moved out of the suit land for different reasons: 2<sup>nd</sup> plaintiff due to a bitter dispute with the defendant and the 3<sup>rd</sup> plaintiff to seek employment; that while they were away the defendant demolished their houses and subsequently tried to evict her family unsuccessfully; that the dispute had been taken before the area Chief and the village elders who resolved that PW1's family be given one acre but the defendant confined her family to ½ an acre; that the defendant also quarreled with his father and step-mother and caused his father to vacate the land and they moved to her aunt's land in Kiplombe where they lived and were buried after their demise. On that basis she avers that the suit land is a family land and hence she has a right to bury the remains of her husband thereon. She maintains that the defendant will be not prejudiced, the deceased's remains would be buried where his family had been living since 1981. Her exhibits comprised of birth certificates for her children which showed that they were all born in Kibomet and that the deceased was their father.

8. PW2, Leah Jemanyur Busienei gave her sworn evidence and adopted her replying affidavit sworn on 28/1/2020 as her evidence-in-chief. She identified the plaintiffs and the defendant as her brothers and that she is the eldest among the 11 children born to her parents; that she lived with Joseph Kisorio Samoei at Kesses from age 12 and Joseph met his wife PW1 while living in her house and married her from there in 1979 after which the married couple later moved to the suit land in 1980 which land, according to PW2, Mr. Chepkulei had bought after selling the family's ancestral land situate in Kesses; that she was present during the "Koito" ceremony mentioned by PW1 and it was the defendant who requested PW1's family to allow Joseph to marry her; that upon enquiry by PW1's father as to where the newly married couple would live the defendant answered that they would live on family land in Kitale; that thereafter Joseph was allowed to marry PW1 and the couple stayed with her to await the harvesting of maize which Joseph had planted but in the year 1980 the couple moved to the suit land where they have been living to date.

9. PW3, Julius Chirchir Kipkemei gave sworn evidence and adopted his replying affidavit sworn on 28/1/2020. His evidence is that he met the defendant between 1974 and 1975 during the registration of members of Koitogos Farm Ltd when PW3 was one of the four area representatives of the Farm representing the directors in respect of land subdivision and allocation of shares; that one of the directors introduced the defendant to him for the purpose of showing the defendant the location of his land; that he allocated the defendant 10 acres but the defendant now occupies 5 acres alongside Joseph's family; that his land is situate about half a kilometre away from defendant's land; that the defendant, his father and the 2<sup>nd</sup> plaintiff built their houses on the suit land and lived as a family and he used to interact with them all; that Joseph joined the family with his wife in 1980 on the suit land and established a home thereon where his children were borne and brought up; that he took part in the resolution over dispute under the leadership of Kibomet Location Chief which dispute was between the defendant and Joseph whereby the defendant wanted Joseph to vacate the suit land and Joseph had refused to do so claiming it was family land in which he had a share; that the meeting resolved that Joseph do remain on 1 acre while awaiting a final resolution; that the evidence of

Mr. Chepkulei at the meeting was that the land belonged to him and that it should be shared amongst his five sons. In brief his evidence is that the suit land belongs Mr. Chepkulei's family.

**10. PW4, Mary Rongoe Chematia**, gave sworn evidence and adopted her replying affidavit sworn on **28/1/2020**. Her evidence is that she is sister to all the parties to the suit; that her mother passed on in **1973** and her father in **2002**; that she is the **9<sup>th</sup>** born in the family; that she was aware and indeed witnessed the defendant's relationship with one Shadrack Kemboi; that in **1971** the defendant and Kemboi attended the Kitale Agricultural Show and when he returned home he told their parents that there was land on sale in Kitale and proposed that the family land be sold in order to purchase land at Kitale; that soon thereafter the family land at Lessos was sold and she witnessed her father give money to Kemboi whom he sent together with the defendant to purchase land in Kitale; that by then she was **11** years old and could comprehend the goings on; that in **1972** all the family members moved from Lessos to Kitale to settle on the suit land and she was left alone to take care of the households and the livestock on the land; in the meantime her sick mother was taken to Eldoret for treatment; that after about a month her father came and sold the livestock and took her to Kitale while carrying some household items; that it was only after she settled on the suit land that she learnt that her mother had died and had been buried at Eldoret; that she stayed in the defendant's house and got married from there after which she moved to Makoi area in Trans Nzoia; that her father and the **2<sup>nd</sup>** plaintiff had established their respective homes of the land while the **4<sup>th</sup>** plaintiff had in **1969** left home for his aunt's in Kiplombe and Joseph had gone to live with **PW2** at Kesses in Eldoret the same year; that her aunt was childless; that in **1980** Joseph together with his wife settled on the suit land. According to her the suit land is family land.

**11. PW5, Some Songok** the **4<sup>th</sup>** plaintiff testified on **5/2/2020** and adopted his affidavit dated **28/1/2020**; his evidence is that he lived with his aunt Maria who was unmarried and childless; that when his mother died she was buried at Kiplombe on his aunt's land since there was no house on the Kitale land; that his father sold the **5** acre family land parcel at Lessos and bought land at Kitale; that his father remarried; that Maria died in **1991** before obtaining title to the Kiplombe land; according to him that land never belonged to his father; that Maria bequeathed the land to him (**PW5**), Rosa, (his stepmother) and Paul (Rosa's son); his explanation for having gotten land from Maria was that it was a reward for having taken care of Maria; according to him Rosa was chased away from the Kitale land by the defendant; that he knew nothing about the sale of the Lessos land and or the Kitale land. Under cross-examination by Mr. Arusei he stated that he did not know the land reference number of the Lessos land or the consideration it was sold for. However he stated that Arap Lengwet bought it. According to him his mother was taken to Kiplombe while sick and it was expected that once she recovered she would be taken to Kitale. According to him the defendant preceded his father on the Kitale land but his father later joined him after his mother's demise and subsequent interment at Kiplombe. He has never lived on the Kitale land but **5** of his siblings have. His stepmother left Kitale for Kiplombe before his father after they quarreled with the defendant, then his father followed her in **1986**. After that they never returned to Kitale. He does not know what happened to **5** acres of the land at Kitale or who the registered owner of the remaining **5** acres is; by the time his father died in **2002** he had not subdivided his land among his children; he also never knew any case between the defendant and his father or between Joseph and the defendant before this suit. He wants the land distributed among the family members. His aunt died in **1991** and the title was processed in the name of **3** people after she died. According to him he does not recall any attempts by the defendant to prevent his late father's burial at Kitale; that his father's second wife has **6** children who live at Kiplombe and none of them have claimed the Kitale land.

**12. PW6, James Kimaru Songok**, the **3<sup>rd</sup>** plaintiff testified on the same day as **PW5** and adopted his affidavit filed on **28/1/2020**. His evidence concurs with the evidence of the other witnesses **PW1 - PW5** but adds a little more detail: that he was staying with **2<sup>nd</sup>** plaintiff in the same house on the Kitale land; however he left in the year **1984** for Nyahururu where he got employed; that he would visit the suit land every now and then; in **1992** while visiting the suit land he found that the defendant had demolished the house **PW6** and the **2<sup>nd</sup>** plaintiff used to live in; that the defendant then chased the two away from the land claiming that it is his own land. In his evidence he states that the land was bought from the proceeds of sale of ancestral land in Lessos in Nandi County. On cross-examination he stated that he is the **5<sup>th</sup>** born, born at Lessos in Nandi; that his father later moved to Koisagat and bought **5** acres but the same was later sold in **1972** to one Arap Lengwet. However he does not know the finer details of the sale since he was not present at the time of the sale of the land. However according to him the defendant was asked to go and seek land in Kitale in **1972** and then his father sold the Lessos land and gave the defendant money to go and buy land. Again he does not know the finer details of the purchase of the Kitale land. According to him he stayed at Kitale, having come there with his father in **1974**, till **1984**. He also does not recall why his father moved from Kitale but by the time he left for Kiplombe he had a second wife.

**13. PW7, David Kimtai Mwei**, testified on **5/2/2020** and adopted his affidavit filed in on **28/1/2020**. According to him there arose a dispute when the defendant blamed him and James the **3<sup>rd</sup>** plaintiff for not doing any work on the land; however according to him these allegations were false; that **3** houses were first built on the land; that **PW7**, Anna (a sibling), the defendant and his wife lived on the land; later his father, James and Mary came onto the land; Joseph lived with Leah at her house away from the land while **PW7** lived with Joyce, yet another of his sisters. However he only fled to Joyce's home following family squabbles on the suit land. When he came back he found his house demolished and his father gone. At one time he had attempted to persuade his father to have the land subdivided but the defendant refused. On cross-examination he stated that at one time the family lived at Koisagat where his father had bought **5** acres of land and they lived there till land was obtained and purchased on behalf of the family by the defendant. However he does not know the finer details of the sale of the Lessos land. When they came to Kitale they lived with the defendant, his wife and Anna at the NOREC area before they were shown their land then his father also came and they lived in one house built on the land; After his father had come to Kitale he went back to Kiplombe to receive his **2<sup>nd</sup>** wife from Maria and returned with her to the suit land where after quarreling with the defendant he returned to Kiplombe with his family; he left the suit land in **1987** for Nyahururu after the domestic squabbles began. According to him the land belong to his father. When he came back in **2002** he found his house demolished, he returned to Nyahururu, he became sick and he did not return to Kibomet. His father only parceled some land to Joseph and to no other person.

14. The plaintiffs then closed their case.

#### **The Defendant's Evidence**

**15. DW1 Kimwei Arap Samoei**, testified on **5/2/2020** and adopted his statement filed on **25/11/2019** as well as his supplementary affidavit made on **30/1/2020** as his evidence-in-chief. His evidence is that he was born in Lessos at a place called Lodukar on a European settler's land. He later left his home and family for Nanyuki where he stayed upto **1968**. He later returned to Lessos and began working as a tractor

driver. According to him his father never bought any land in Lessos. He was also never entrusted with any money to go and buy land for the family at Kitale. He carried out the business of buying and selling maize and later travelled to Kitale. While there, he became desirous of buying land but he found himself short of money sufficient to make him a shareholder at Koitogos Farm Ltd; so he pooled his monies with one person who was already a shareholder, whose name was Shadrack Arap Kemboi for the purpose of jointly securing land; from that land Arap Kemboi would after allocation excise a parcel for the defendant. Shadrack Kemboi took the money and gave it to a chairman called Arap Koros and got a land parcel from which he excised some land for the defendant. However the defendant's land could not attain the acreage he had paid for and so he exchanged it with one Isaiah's land; he was then moved to Isaiah's original parcel. That land he got from Isaiah was located at Makunga. According to him his father and his sister lived on the land at Kiplombe; he does not know who owned the Kiplombe land; he has never lived at NOREC; he admitted that Anna his sister lived with him and took care of his children; his sister Mary also lived with him until she got married; David and James never lived with him but they used to visit him on the suit land; that also, they did not have any houses built on the suit land; his father also never lived on the land with his 2<sup>nd</sup> wife but merely visited the defendant occasionally. According to the defendant he was allocated **10** acres and sold **5** acres for school fees without any objection from his father and brothers. His remaining land is about **4.7** acres. He produced a title deed for **Kitale Municipality Block 15/Koitogos/246** registered solely in his name, issued on **1/2/2005**. He also produced copies of receipts bearing the date **19/10/1993** for various sums of money by which he paid for the processing of the title deed. Only Joseph and his wife had ever lodged a caution against the suit land's title. He admits the dispute with Joseph over the land, avers that he wrote to the Land Registrar to remove the caution on **10/12/2010** through David Ingosi Advocates and on **4/4/2012** through Onindo & Onindo Advocates. The dispute was never taken to the Chief's office; however, elders came to his home and requested for his father to be called to the meeting; when his father came he denied having any land in Kibomet and the defendant thereafter confined Joseph to one small area pending his moving out from the land with his family. However, he was still resident on the land at the time of his death. While being cross-examined by Mr. Barongo he stated that he had a good relationship with his father though he was not the eldest son. He was earning **Kshs.170/=** per month and worked for about **4 - 6** years while driving a tractor belonging to a European settler. He also used to do casual work at the scheme. He admitted that Arap Lengwet whom he refers as "Kiplengwet" was their neighbour. He averred that all his siblings who had testified in court were not telling the truth. He concurred with the evidence that Joseph used to live with Leah at her home. He admitted that he took cows to the 1<sup>st</sup> plaintiff's home as dowry when Joseph was about to marry her; that those cows came from dowry paid for Mary; that Joseph delayed for a year after marrying a wife and then came to the suit land and had been there till the date of his demise. He denied allegations that his father and brothers had houses on the land and also denied that Chirchir, his neighbour is related to his wife. He has no evidence that the land at Kiplombe did not belong to his aunt. By the time his mother died he had not yet obtained an allocation of land at Kitale; that he took care of Mary and Anna his sisters who are now poised against him in this suit. According to him Joseph had never stated that the land is a family land. As Joseph did not have any land at Kiplombe, **DW1** invited him to come to the suit land and live in an existing house; however when Joseph came he built two more houses against the defendant's wish and the defendant complained to the Chief. According to him also **P. Exhibit 5** is not genuine as the land belongs to his father. He could not however account for his failure to claim a portion of that land. In the same breath he alleged that there was land measuring **17 acres** at Kiplombe which was shared between his mother and the 2<sup>nd</sup> wife; that the Chief at Kiplombe gave him a share of that land and some of it was appropriated by the armed forces and only a little portion of it remained. Joseph was given **1.5 acres**. James was also given a portion which he sold and went to Nyahururu. He also filed **Kitale ELC No. 48 of 2013** challenging the caution but the same was dismissed. He was not aware of **HCCC No. 102 of 2009** at Kitale High Court. In cross-examination he maintained that none of the family members had ever claimed that the suit land was family land before the instant suit was lodged. He also maintained that Joseph married Selly while living at Leah's place because he had no land.

**16. DW2, Noah Mortis Arap Bett** testified and adopted his statement dated **25/11/2019** as his evidence-in-chief. His evidence is that he has lived about one kilometre away from defendant's home since **1972**; that he was member in a committee in Koitogos Farm in charge of **Area A** on the Makunga side; that the defendant was transferred from the Sinendet area after they differed with Arap Kemboi whereupon he exchanged land with one Isaiah, got some land and subsequently sold **5** acres thereof. No complaints arose in respect of the land administered by the defendant; the defendant's father came to the suit land, got a young wife and then left. The defendant's two brothers also came to the suit land and left. He recalled that dispute lodged by William Songok the **4<sup>th</sup>** plaintiff against the defendant which was dealt with by the Assistant Chief called Amae who summoned a panel of elders to determine the case. According to him Julius Chirchir was not present at that meeting; the panel of elders summoned the defendant's father. When he arrived he was asked whose land the suit land was and he denied owning it. At the same meeting when Joseph was asked about the land he said he did not know anything about it. So **DW3** begged **3** points of the suit land from the defendant on behalf of Joseph but the defendant conceded to giving Joseph only **2** points. Thereafter Joseph and the defendant quarreled and Joseph called his brothers with whom they jointly sued the defendant in this suit. Other than that case there has never been any other dispute deliberated on in his presence in respect of the land. He has never participated in a common sitting deliberating on the land where **Chirchir, PW3**, attended. Under cross-examination by Mr. Barongo he admitted that the defendant's father came and lived with his 2<sup>nd</sup> wife on the suit land. He also admitted the defendant's two brothers came to live on the suit land and then left. His further admission was that the defendant's sisters Mary and Anna lived on the suit land till they got married. According to him, in Kalenjin tradition a married person could not live with his father. He did not know the source of money with which the defendant paid for the land. According to him the **4<sup>th</sup>** Plaintiff was the first one to complain to the Chief claiming the land to be family land. By the time of his complaint he was living in Eldoret. Thereafter Joseph also complained to the Chief. However when their father was called he never alleged that the Lessos land was sold to buy the Kitale land. He never alleged that the defendant was ever given money to buy land in Kitale. When shown the **3<sup>rd</sup>** last paragraph in his witness statement dated **25/11/2019**, he averred that nobody had claimed during the dispute that the defendant had been given money to buy the land. Soon thereafter he reversed this position and admitted that it was the **4<sup>th</sup>** defendant's case during that dispute that the defendant had been given money to buy the Kitale land.

**17. DW3, Jeremiah Ngetich** testified on **6/2/2020** and adopted his witness statement dated **13/1/2020** as his evidence-in-chief. According to him the defendant lived at Sinendet while **DW3** was a treasurer as well as **Area B** representative during the survey exercise for Koitogos Estates Ltd Farm. That that area falls within Naisambu area. The defendant came to him and informed him and others that he wanted Kemboi to excise for him land because Kemboi held his money. Land was excised for him; later the defendant exchanged that land with one Isaiah and moved to Isaiah's land which is now the suit land, while Isaiah went to live near Shadrack Kemboi on what was **DW1's** land. Under cross-examination he stated that he did not know the defendant's father or brothers and that from his home to the defendant's home is a distance of about **5** kilometers. He could not testify much about the defendant's life on the suit land and does not even know whether his siblings or his parents have ever lived there.

**18.** The defendant then closed his case. This court has taken the trouble to replicate with fidelity to the original record in this judgment, though lengthy, as much of the evidence that the parties gave.

## Submissions

19. The plaintiffs filed submissions on 7/2/2020. The plaintiffs' counsel submitted that the evidence of PW2 - PW7 is consistent that their father sold 5 acres of land in Lessos and gave money to the defendant and one Shadrack Kemboi to buy alternative land in Kitale. He submitted that the family moved to the suit land, except three siblings who stayed elsewhere, he emphasizes that the witnesses concur that some of their siblings and their father lived on the suit land between 1970 and 1980 and that DW2 corroborated that evidence. The burial of their parents and stepmother at Kiplombe was also explained. Counsel submitted that the defendant's evidence comprised of mere denials. He also maintained that the defendant's witness, DW2, contradicted the defendant's own testimony by stating that the defendant's father, stepmother and two siblings had stayed on the suit land. Counsel maintains that PW4's evidence that she saw her father give the defendant and Shadrack Kemboi was corroborated by the defendant who acknowledged that it was Kemboi who brought him to Kitale. He also submitted that the defendant did not satisfactorily account for how he got the money to purchase the suit land. He also submits that the defendant paid dowry for Joseph and that the claim by the defendant that there was family land at Kiplombe was not well established. He cited the case of **Supreme Court Petition No. 10 of 2015 Isack Minaga Kiebia -vs- Isaiah Theuri M'Lintari and Isack Mungai M'Lintari**. He also relied on **Twalib Hastayan Twalib & Another -vs- said Saggat Ahmed Al-Heidy & Others [2015] eKLR**. He maintains that they have established their claim on a balance of probabilities.

20. The defendant filed submissions on 13/2/2020. The defendant maintains that the evidence of the plaintiffs was full of hearsay and contradictions. He poked holes into the evidence of PW1, PW2, PW3 and PW4. He maintained that the defendant has accounted fully for how he acquired the money used to purchase the suit land and that the fact that the defendant paid Kshs.2,960/= after earning Kshs.170/= per month is credible. He maintained that the defendant never became a shareholder in the company due to insufficiency of funds. He underscored the importance of evidence showing a long running dispute between the defendant and the 1<sup>st</sup> plaintiff. He highlighted the evidence to the effect that the defendant's father was allegedly in attendance at the Chief's meeting at which he is alleged to have said that the land does not belong to him. He highlighted the demeanour of PW2 and PW3 and maintained that the plaintiffs and their sisters are bitter because the defendant declined to allow the body of Joseph Kisorio to be interred on the suit land. He maintained that the suit is time barred, having been filed outside the prescribed period of 12 years without the leave of court. Regarding the issue of constructive trust, he cited the absence of agreement between the parties' father and Arap Lengwet and maintains that none of the witnesses gave evidence warranting the inference of a resulting or constructive trust. He maintained that the defendant did not acquire the property by way of wrong doing or unjust enrichment and reiterated the evidence of the defendant's income. Finally he highlighted the lack of any dispute between the defendant and his father over the suit land until the latter's death in 2002 and stated that there is no evidence that the father ever settled on the suit land and if so the nature of that settlement. He raised a question as to why, if the Kiplombe land belonged to Maria the defendant's aunt, his father settled thereon together with his 2<sup>nd</sup> wife and children. He pointed out that the agreement for the sale of the Lessos land was not produced and that witnesses did not have critical details relating to that alleged sale transaction. He claimed that the conflicting versions among the plaintiffs' witnesses as to whether the defendant or his father sold the Lessos land and whether the sale money was handed to Shadrack Kemboi render it very hard to take the evidence of the plaintiffs' witnesses into account. Lastly he pointed out that the plaintiffs waited until after the death of their father to claim a share of the suit land and that that erodes the strength of their evidence; he pointed out the fact that they did not complain when the defendant sold 5 acres of the suit land. He maintains that the plaintiffs have not proved their case and that their suit should be dismissed with costs.

## Determination

### Issues for determination

21. The issues for determination in this suit are as follows:

**a. Whether the suit is time barred;**

**b. Whether the defendant bought the suit land on behalf of and holds it in trust for the family of the late Chepkulei and if so whether that trust should be determined and the land distributed to the family;**

**c. Whether the deceased Joseph Kisorio Samoei should be interred on the suit land;**

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

22. The issues are discussed as hereunder:

#### **(a) Whether the suit is time barred**

23. The defendant relies on the Limitation of Actions Act and avers that the suit was filed outside the 12 year statutory period prescribed therein and without leave of the court.

24. This issue was not addressed in the plaintiff's submissions. **Section 7 of the Limitation of Actions Act (Cap 22)** states as follows:

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person”.**

25. I have examined the pleadings in this suit. This is not a suit for the mere recovery of possession of the suit land; it is a claim for a declaration that the defendant holds the land in trust for the family of the late Arap Chepkulei and for the determination of that trust and the vesting of title in the names of the plaintiffs, and for orders that the body of the 1<sup>st</sup> plaintiff's husband be buried at his home on the suit land.

26. As at the time of his death the 1<sup>st</sup> plaintiff's husband was living on the suit land. The 1<sup>st</sup> plaintiff and the remaining members of her family are still resident thereon. They are therefore in possession of a portion thereof. It is not recovery of land that they seek. There is one title to the suit land. They only want that the trust be determined and the suit land be distributed to the *cestui que trust*. This court should not exert itself seeking to distinguish the position of the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs from that of the 1<sup>st</sup> plaintiff: they all claim the same thing, save that the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs are not in occupation of the suit land currently. In **James M'Ngaruthi M' Rintari & another -vs- Muguna M'Rintari [2017] eKLR** the plaintiffs filed the suit on 18/3/2002 claiming a share of the suit land on the basis of customary trust. The defendant averred that he is the sole registered owner of the suit land. It was pleaded by the defendant that the suit is stale and time barred by statute of limitation. In that case the court relied on the case of **Macharia Kihari -vs- Ngigi Kihari Civil Appeal No. 170 of 1993**, where it was held that:-

**“We are unable to accept Mr. Thiongo's contention that the suit was time-barred. Limitation prescribed in Section 20 (2) of the Limitations of Actions Act, will not apply to a trust coming into existence under customary law. Under customary law the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law. We reject this ground of Appeal.”**

27. The court also relied on the case of **Stephens & 6 Others -vs- Stephens & Another Civil Appeal No. 18 of 1987**, where it was held that:-

**“...the period of limitation as prescribed in the Limitation of Actions Act (Cap 22) Section 20 (1) (b) do not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use”.**

28. Therefore whether the plaintiff's claim under customary trust or any other trust, the provisions of **Section 7 of the Limitation of Actions Act** are not effective so as to defeat their claim.

29. In view of the holdings in the decided cases quoted above the objection to the suit on the basis of limitation has no merit.

**(b) Whether the defendant bought the suit land on behalf of, and holds it in trust for, the family of the late Chepkulei and if so whether that trust should be determined and the land distributed to the family;**

30. The facts as agreed to by the parties are as follows:

- a. That the suit land is registered in the defendant's sole name;
- b. That the family originally lived at Lessos;
- c. That there is land at Kiplombe measuring **2.70 Ha** which is referred to as **Kiplombe/Kiplombe Block 4(Kiplombe) 90**;
- d. That Maria, an aunt to the defendant lived on **Kiplombe/Kiplombe Block 4(Kiplombe) 90** and was buried thereon;
- e. That the defendant's father, mother and stepmother were buried on the Kiplombe land upon their demise;
- f. That the 1<sup>st</sup> plaintiff and her family have lived on the suit land since the **1980's** and had their own houses independent of the defendant's dwellings;
- g. That many of the family members at one time or another lived on the suit land but later left for one reason or another;
- h. That the defendant's sisters Mary and Anna left the suit land upon their getting married;
- i. That while their father was still alive the defendant led the delegation that went for the “*Koito*” ceremony at the 1<sup>st</sup> plaintiff's home when Joseph expressed the intention to marry her and paid dowry for her using proceeds of dowry given for Mary;
- j. That Shadrack Kemboi was instrumental in the purchase of the suit land and he originated from Lessos just like the defendant and his parents.

31. Proof of trust is a matter of evidence. In the case of **Susan Mumbi Waititu Vs Mukuru Ndata & 4 Others 2007 eKLR** the court observed that trust can not be imputed but must be proved by way of cogent evidence. The dispute in that suit revolved around the issue of a customary law trust. In the instant suit the dispute revolves around the issue of whether there was a resulting trust. In **Vitalis Mbugua Wainaina Vs Daniel Ndure Wainaina 2005 eKLR** the court (Ransley J) observed that the plaintiff had produced no evidence of trust and dismissed the suit. However the evidence in that case was inconsistent with the pleadings and that formed the main basis of the dismissal. In **Re Estate of James Muiruri Kamau 2018 eKLR** the court (A. Ndungu, J) observed that it matters not that the land was registered in the name of the alleged trustee without his description as a trustee in the register as his capacity as trustee could be established by way of cogent evidence. As the Court Of Appeal has in the case of **George Mbiti Kiebia and another vs Isaiah theuri M'lintari and another 2014 eKLR** there are numerous decisions to show that **Section 28 of the Registered Land Act** (now repealed) did not preclude the declaration of trust over registered land.

32. It is the case therefore that where sufficient evidence has been led to enable the court to decipher the existence of a trust the court will

then declare a trust. The issue that arises in the instant suit is whether the claimants have given evidence sufficient to persuade this court that the defendant holds the suit land in trust.

33. The basis of the plaintiffs' claim is that their father's land situated at Lessos was sold and the proceeds were entrusted to the defendant to purchase the suit land, and the defendant therefore holds the land in trust for the Chepkulei family. This is a common thread consistently running through majority of the plaintiff's witnesses' evidence with only a slight variance as to whether the proceeds of the alleged sale of the family land at Lessos were given directly to the defendant or to Shadrack Kemboi.

34. The defendant denies that he received those proceeds either directly or indirectly or that he was sent to go and purchase the suit land for the family and avers, without producing tangible evidence of any enabling earnings, that he bought it with his own hard earned money.

35. The defendant at first disputed that his father had any land at Lessos; he later claimed that there was a **17 acres** at Kiplombe which was shared between his mother and the **2<sup>nd</sup>** wife; that he was allocated a share of that land and some of it was appropriated by the armed forces and only a little portion of it remained. Joseph was given **1.5 acres**. James was also given a portion which he sold and went to Nyahururu. However the defendant never availed any evidence that the family owned any land measuring **17 acres** at Kiplombe. He also never availed any evidence that **Kiplombe/Kiplombe Block 4(Kiplombe) 90** was Chepkulei's family land and not Maria's land. He testified that he knew very little about that land. I consider his claims regarding the 17 acres and the land parcel No. Kiplombe/Kiplombe Block 4(Kiplombe)/90 to be a mere red herring.

36. It is the evidence of **PW4, Mary Rongoe Chematia** that she witnessed her father give money to Kemboi whom he sent together with the defendant to purchase land in Kitale; that by then she was **11** years old and could comprehend the goings on.

37. Shadrack Kemboi is acknowledged by the defendant to have originated from Lessos, and to be the one who brought the defendant to Kitale. Neither the plaintiffs nor the defendant called the said Shadrack to shed light on the origin of the funds with which the suit land was purchased.

38. The plaintiffs do not have any details of the land at Lessos, or of the sale transaction thereof by which it was allegedly sold.

39. The defendant appears oblivious of the existence of any such **5 acre** portion of land. However the defendant appears to remember that Arap Lengwet was their neighbour at Lessos. In the plaintiffs' version of events, the said Arap Lengwet whom the defendant refers to as "Kiplengwet", purchased the family land at Lessos. The defendant does not explain whether the said Arap Lengwet was a neighbour within the European settler's land where it is alleged that the parties' parents were accommodated or on land privately owned by the two neighbours.

40. However great a drawback the plaintiff's ignorance of the alleged sale and purchase transactions mentioned in respect to the Lessos and the Kitale lands is to their claim, several facts stand out: that they all seem to largely concur that Shadrack Kemboi was involved in the purchase transaction and that the land was purchased on behalf of the family; that the family appears to have gone through turbulent times at the time of the migration to Kitale as that was the time Chepkulei's first wife died and was buried at Kiplombe.

41. It appears however that the general direction that the family members took was towards Kitale; despite the defendant's denials, some of the male children in the family as well as their father and his second wife are established to have at some time lived on the suit land; the defendant's statement that his father has never lived on the suit land and only visited occasionally was contradicted by his own witness **DW2**, who testified on oath that the defendant's father, stepmother and two siblings had stayed on the suit land. **DW2** is said to be a close neighbour of the defendant. Therefore it is credible evidence in this suit when he states that the defendant's father, his second wife as well as James and David lived on the suit land. It is credible that the father had his own house and James and David shared a house. The defendant's own evidence supplemented the plaintiffs' by naming at least three sisters whom he lived with on the suit land before they got married. Out of Mr. Chepkulei's 10 surviving children, 7 (including the defendant) resided on the suit property. These were Joseph, David, James, Anna, Mary, Esther and the defendant; two, Joyce and Leah were already married by the time the movement to Kitale began and they did not participate, having settled in their matrimonial homes. William live with Maria his aunt at Kiplombe and he never followed the family to Kitale. Mr. Chepkulei and his second wife joined the settlers on the suit land after migrating from Kiplombe. Therefore only William and the two married sisters never stayed at Kitale and they had a good reason for that.

42. Vital questions arise as to why, if the defendant singlehandedly raised the land purchase funds, so many members of the Chepkulei family would be allowed to reside on the suit land.

43. In the case of **George Mbiti Kiebia and another vs Isaiah Theuri M'lintari and another 2014 eKLR** cited above the Court of Appeal's view was that to prove a trust in land one need not be in actual physical occupation of the land. The decision was upheld by the Supreme Court.

44. Failure to establish by way of tangible evidence that he single handedly secured the funding for the purchase of the suit land leaves the defendant on the same footing as the plaintiffs and this court has to rely on circumstantial evidence.

45. That the defendant attempted to deny but was contradicted by **DW2** on the fact that so many of his family members had resided on the suit land is a pointer to some intent to conceal a fact. It is clear that from the year **1972** when the family is said to have moved from Lessos no dispute was registered in court challenging their occupation. In the meantime the defendant so quietly obtained the title document to the suit land in his name in the year **2005** such that even some of the plaintiffs never became aware of the fact.

46. It is to be noted that in African customary law the practice of sons - and at least until their marriage the daughters - of living on their parent's land and the sons' act of building their dwellings and marrying wives while resident thereon was very common. The fact that most family members followed the defendant to the suit land and lived there is persuasive of a long held belief that it was family land. Their

occupation or possession thereof is also persuasive of and traceable to the claim that the patriarch's land at Lessos was sold to enable the purchase of the suit land; However the claim of the plaintiffs, by virtue of the sale of the original land at Lessos and its substitution with the suit land, could not be classified as purely a customary law trust claim. In this court's view this is no hindrance to a declaration of trust in this case. Indeed in the case of **Isack M'Inanga Kiebia -vs- Isaaya Theuri M'Lintari & Another Supreme Court Petition No 15 of 2015** the court had this say:-

**“The categories of a customary trust are therefore no closed. It is for the court to make a determination on the basis of evidence, as to which category of such trust subsists as to bide the registered proprietor.**

**Each case has to be determined on its own merit and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the high court in Kiarie -vs- Kinuthia, that what is essential is the nature of the holding of the land and intension of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land.”**

47. The Supreme court in the **Isack Minanga Kiebia case** (supra) proceeded to state some of the elements that would qualify a claimant as a beneficiary are as follows:

**“(1) The land in question was before registration family, clan or group land**

**(2) The claimant belongs to such family clan or group**

**(3) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous**

**(4) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.**

**(5) The claim is directed against the registered proprietor who is a member of the family, clan or group.”**

48. The foregoing factors in the **Isack Minanga Kiebia case** (supra) are evident in this suit. In this court's opinion there is no other ground upon which the members of the defendant's family, including his father and step-mother, could have so quickly settled on the newly found land, and without demur on the defendant's part, unless they had some stake in it. If his father had land remaining at Lessos it is unlikely that he would have moved; if the land at Kiplombe was his he would have settled on it with his family and hence there would have been no need for migration to Kitale.

49. Since there is no conclusive proof by the defendant of how he obtained the purchase monies, it is credible that the perceived stake by the family members arose out of provision of funds to purchase the suit land by Mr. Chepkulei. It is therefore credible that there was some Chepkulei family land at Lessos and that it was sold to facilitate acquisition of what later came to be the suit land.

50. Though the facts were slightly different in the case of **Yogendra Purshottam Patel -vs- Pascale Mireille Bash (Nee Patel) and 2 Others 2006 eKLR** the observation of the court in that case is relevant to the situation herein; the court observed as follows:

**“The equitable presumptions which arise when purchase price is contributed by one person or by two or several persons are succinctly restated in the Australian Case of Calverly -vs- Green 56 ALR 483 thus:**

**“(i) Where a person pays a purchase price of a property and causes it to be transferred to another and himself jointly the property is presumed to held by the transferees upon trust for the person who provided the purchase price**

**(ii) Where two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds and hold the property upon a resulting trust in favour of those who provided the purchase price in the shares in which they provided it.”**

**Those are rebuttable presumptions. Parole evidence is admissible to show who provided the purchase price and if provided by several people to show their proportionate share of contribution. Parole evidence is also admissible to rebut the presumptions whenever they arise.”**

51. When the above statement is applied to the facts in this case as exhaustively analysed, the court's view is that there is therefore a resulting trust upon which the defendant holds the suit land for the family of the late Chepkulei.

52. As observed concerning previous court decisions **Section 28** of the repealed **Registered Land Act, Cap 300** (now repealed) did not preclude the declaration of trust. That Section provided that:-

**“The rights of a proprietor whether acquired on first registration or whether acquired 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 liable by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject to-**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:**

**Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is a subject as a trustee.”**

53. Holding the title in his sole name does not relieve the defendant of any duties to the plaintiffs. The defendant is therefore still liable to the plaintiffs as a trustee.

**(c) Whether the deceased Joseph Kisorio Samoei should be interred on the suit land**

54. It follows from the analysis above that Joseph was entitled to a share of the suit land and indeed he lived there till his death. He may be interred on the suit land as this would not be in any way prejudicial to the defendant's interests.

**(d) Whether the distribution of the suit land should exclude the defendant**

55. It is the plaintiff's position that the defendant should not share in the distribution of the suit land upon the determination of the trust. This court is however concerned with what is formally contained in the prayers in the plaint and not with any other conclusory statements in the body thereof. Prayer No. **(b)** however, by recommending that the land be shared equally only amongst the plaintiffs, implies that the defendant should be excluded.

56. The court is however alive to the fact that the general averments in the plaint are to the effect that the suit land is family land and the plaintiffs can not be permitted to deviate from this pleading in favour of selective distribution of the land. Parties must be bound by their pleadings.

57. In lieu of the prayer No. **(b)** this court would direct that the title in the defendant's name be cancelled and the land be registered in the name of the estate of the late Kipsongok Arap Chepkulei pending distribution at the appropriate forum.

**(e) Who should bear the costs of the suit?**

58. The defendant shall bear the costs of this litigation.

59. In the final analysis I enter judgment in favour of the plaintiffs against the defendant and I issue the following final orders:

**(a) A declaration that the defendant holds title No. Kitale Municipality Block 15/Koitogos/246 in trust for the plaintiffs and members of the family of the first wife of the late Kipsongok arap Chepkulei;**

**(b) An order that title No. Kitale Municipality Block 15/Koitogos/246 in the name of the defendant is hereby cancelled;**

**(c) An order that all the land comprised in title No. Kitale Municipality Block 15/Koitogos/246 shall be registered in the name of the Estate of the late Kipsongok arap Chepkulei;**

**(d) An order that the family of the late Joseph Kisorio Samoei is entitled and shall be at liberty to inter the remains of Joseph Kisorio Samoei at his home on the suit land;**

**(e) An order that the defendant shall bear the costs of this litigation.**

**Dated, signed and delivered at Kitale on this 27<sup>th</sup> day of February, 2020.**

**MWANGI NJOROGI**

**JUDGE**

**27/2/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Barongo for the plaintiffs

Mr. Arusei for the defendant

**COURT**

Judgment read in open court.

**MWANGI NJORGE**

**JUDGE**

**27/2/2020**