



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 3 OF 2014**

**MARITIM CHERUIYOT JOSEAH.....1<sup>ST</sup> PLAINTIFF**

**ANNAH CHEBET LABOSO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BILLY KIPKOROR MARITIM.....1<sup>ST</sup> DEFENDANT**

**THEOPHILUS KIPKURUI MARITIM.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By a Plaint dated 3rd February 2014, the plaintiffs commenced suit against the defendants seeking inter alia an order of eviction from land parcel no. KERICHO/CHEBUNYO/71. (Hereinafter referred to as the suit property). The Plaintiff and the defendants are step brothers and the sons of the late HEZEKIAH MARITIM LABOSO while the 2<sup>nd</sup> Plaintiff is the widow of the deceased. It is the Plaintiffs case that they are the registered owners of the suit property measuring 9.60 hectares (approximately 23 acres) which was bequeathed to them by the deceased during his lifetime. The defendants were given land parcel no. KERICHO/CHEBUNYO/73. The 2<sup>nd</sup> defendant subsequently subdivided land parcel no. KERICHO/CHEBUNYO/73 and sold portions of it to third parties. They later trespassed onto land parcel no. KERICHO/CHEBUNYO/71 thus denying the plaintiffs the use and enjoyment of the suit property.

2. The defendants filed their defence dated 2<sup>nd</sup> April 2014 and Counterclaim dated 11<sup>th</sup> December 2015 in which they deny the plaintiffs' claim and aver that the plaintiffs were registered as the owners of the suit property in trust for the defendants. They further claim that they have been in occupation of the suit property all their lives and are the rightful owners of land parcel no. KERICHO/CHEBUNYO/71 as the plaintiffs were given land in Transmara. They therefore pray that that the suit property be registered in their name.

3. Both parties sought orders of injunction against each other at different times but the court ordered that the status quo be maintained pending the hearing and determination of the suit.

The suit was set down for hearing and each party testified and called their witnesses.

**PLAINTIFFS' CASE**

4. The 1<sup>st</sup> Plaintiff testified that the 2<sup>nd</sup> Plaintiff was his step-mother while the defendants were his step brothers. He stated that the suit property which was given to him by his late father was registered jointly in his name and the name of the 2<sup>nd</sup> Plaintiff. He said was holding the same in trust for his mother's household. He stated that the 2<sup>nd</sup> defendant was the registered as the owner of Land Parcel No. KERICHO/CHEBUNYO/73 measuring 14 acres which he was given on behalf of his mother's household. The late Hezekiah Maritim had 3 wives. The defendants' mother was the first wife, the 2<sup>nd</sup> plaintiff was the second wife while the 1<sup>st</sup> plaintiff's mother was the third wife. The deceased transferred the suit property to the plaintiffs in 2001 though he never informed him about it until much later. He explained that in addition to the suit property, the deceased had a parcel of land in Transmara which was still registered in his name and it was supposed to be divided among all his beneficiaries. He stated that after selling portions of land parcel no. KERICHO/CHEBUNYO/73 the defendants had wrongfully entered his land and constructed houses therein thereby denying him the use and enjoyment of the suit property. He produced a copy of the title in respect of land parcel no. KERICHO/CHEBUNYO/71, the sale agreement in respect of a portion of parcel no. 73 and minutes of a meeting held by the elders on 11.10 2013 to resolve the dispute.

5. Upon cross-examination he stated that he had constructed a house on a different parcel of land which he bought. He said his mother lives on a parcel of land measuring 20 acres in Transmara. He said he did not know how the suit property was acquired. He stated that he had lived on the suit land as a child but he later moved and lived with his mother in Transmara. He said he cultivated the suit land and used part of it

for grazing his cattle for a period of 6 years. He said that both his late father and the defendants' late mother were buried on the suit property. He also said that a portion of land parcel no. 73 was sold to cater for his father's burial expenses on the understanding that the defendants would be compensated with one acre from land parcel no.71.

6. The 2<sup>nd</sup> Plaintiff testified that the suit property was transferred to her and the 1<sup>st</sup> plaintiff to hold the same in trust for the second and third households of the deceased. She testified that she was married to the deceased in 1986 and resides on the suit property. She said that the defendants are entitled to one acre out of the suit property. It was her testimony that under Kipsigis customary law, she was not allowed to stay on a parcel of land that was purchased using the proceeds of dowry from another woman.

7. PW 3 one Ezekiel Rono Kiprono testified that he was informed by the deceased that he had given the suit property to his 2<sup>nd</sup> and third wives while he had given his first wife land parcel no 73. He said that the deceased bought the two parcels of land before he married his third wife. He said that the parcels of land were bought using money from the deceased's businesses. He confirmed that both the deceased and the defendants' late mother were buried on the suit property. He denied that the deceased transferred the suit property to the plaintiffs to avoid creditors. He stated that the deceased allowed the 1<sup>st</sup> defendant to live on the suit property and said that the defendants should be given three acres out of the suit property so that each of his three households would get 17 acres.

8. PW4 and PW 5 testified to the effect that the deceased bought the suit property using the proceeds of his business.

9. PW6 testified that he was aware that the suit property was given to the plaintiffs. He stated that the 2<sup>nd</sup> defendant lives on the suit property and even though the 1<sup>st</sup> defendant does not live there, his houses are still there. He corroborated the evidence of PW1 that the deceased and the defendants' late mother were buried on the suit property. He said that the 1<sup>st</sup> plaintiff's mother used to live on the suit property and she was moved to Transmara where she currently lives. He confirmed that the 1<sup>st</sup> Plaintiff has no house on the suit property.

## **DEFENDANTS' CASE**

10. The defendants both testified and called two witnesses. The 1<sup>st</sup> defendant Billy Kipkorir Maritim (DW1) testified he is the eldest son of Ezekiel Maritim Laboso and that he and the 2<sup>nd</sup> defendant were allowed to build their houses on the suit property. He explained that their late father acquired various portions of land next to each other between 1950 and 1971. The said portions of land were later consolidated and registered as land parcel no. KERICHO/CHEBUNYO/71. Out of the 23 acres, about 6 acres were acquired in 1965 using the proceeds of the dowry paid for the defendant's sister Sally Chepkoros. He said that they had all lived on the suit property except the 1<sup>st</sup> plaintiff who was told to go and build his house on the parcel of land allocated to his mother in Transmara. He said the 1<sup>st</sup> plaintiff was only allowed to graze his cattle on a portion of the suit property

11. He testified that the dispute over the suit property was occasioned by the fact that the deceased married his third wife (2<sup>nd</sup> defendant) and built her a house next to the defendants' mother's house on the suit property. This irked the defendants and they confronted their father over the matter. He then said that she would only stay there temporarily as he intended to settle her elsewhere. He later bought her a parcel of land in Transmara. The said parcel was registered in the name of 2<sup>nd</sup> wife though it was meant for the third wife. The 1<sup>st</sup> defendant's mother was given a parcel of land measuring 21 acres in Transmara. He produced the certificates of official search in respect of land parcels no. TRANSMARTA/KIMINTET/ 1021 and 1026 as defence exhibits 1 and 2 respectively.

12. The 1<sup>st</sup> defendant further testified that his late father purchased a tractor on loan and when he failed to pay for it, it was repossessed and sold . Since there was still an outstanding amount, he transferred the suit property to the plaintiffs in order to avoid his land being sold to recover the debt. He said that it was never his father's wish that he be evicted from the suit property. He said that the dispute over the suit property had created bitterness between the plaintiffs and their step –brothers and step- mothers. He said he wanted the plaintiffs to get their rightful share of the deceased' property but they should not dispossess the defendants.

13. Upon cross-examination he stated that land parcel no. KERICHO/CHEBUNYO/73 was registered in the name of the 2<sup>nd</sup> defendant but his father sold a portion of it during his lifetime to enable him (1<sup>st</sup> Defendant) pay fees for his son in Russia. He said that his late father had called him when he was ailing and he had explained to him how he wanted his land apportioned among his three households. He said his father had given the 1<sup>st</sup> plaintiff's mother land parcel no. TRANSMARA/KIMINTET/1026 measuring 21 acres while the second household was given land parcel no. KERICHO/KIMINTET/1021.

14. The 2<sup>nd</sup> defendant who testified as DW2 corroborated the 1<sup>st</sup> plaintiff's testimony that their late father registered the suit property in the plaintiffs' names to defeat his creditors. He also corroborated the 1<sup>st</sup> defendant's testimony on how the suit property was acquired. He stated that land parcel no. KERICHO/CHEBUNYO/73 was registered in his name as he was the one living at home at the time. He stated that the bulk of the said parcel of land (12 acres) was sold in bits during their father's lifetime while the last portion was sold in 2011 to cater for their late father's burial expenses.

15. Sally Chepkoros Kibalat (DW3) who is the defendants' sister testified that her late father bought 6 acres of the suit property using proceeds from her dowry. She stated that by the time he died, her father had distributed his land among his 3 wives as follows: parcel no. 71 was given to the first house, the parcel no. 1021 to the second house and parcel no 1026 to the third house. She said that the 1<sup>st</sup> plaintiff's mother lives on her land in Transmara and the plaintiffs had no right to claim a portion of the suit property as it belonged to the first house.

16. Joseph Kipkemei Ngeno who testified as DW4 stated that he knew the defendants from birth and that they were born on the suit property. He confirmed that the 1<sup>st</sup> defendant lives on the suit property and that the defendants' parents were buried on the suit property. He said that the 1<sup>st</sup> plaintiff had no house on the suit property and that he lives on a separate parcel of land. He however forcefully entered the suit land and started grazing his cows on it. He stated that the late Maritim had given land to each of his 3 wives and even though the suit land was

given to his first wife, he had it registered in the plaintiffs' names in order to evade his creditors. He did this on the advice of one Kipruto who was his advocate. He emphasized that it was not the intention of the late Mzee Maritim to transfer the suit property to the plaintiffs to the exclusion of the defendants. That marked the close of the defendants' case after which the parties were directed to file their submissions.

## ISSUES FOR DETERMINATION

17. Having considered the pleadings, evidence on record and written submissions, the following issues fall for determination:

- i. Who is the lawful proprietor of land parcel no. KERICHO/CHEBUNYO/71
- ii. Whether the plaintiffs hold the suit property in trust for the defendants
- iii. Whether the defendants have trespassed upon the suit property
- iv. Whether the plaintiffs are entitled to the reliefs sought

## ANALYSIS AND DETERMINATION

18. The first issue for determination is who is the lawful proprietor of the suit property.

19. It is not in dispute that the plaintiffs are the registered owners of the suit property. Indeed the 1<sup>st</sup> Plaintiff produced a title deed and a certificate of official search showing the said parcel was registered in his name jointly with the 2<sup>nd</sup> plaintiff on 2<sup>nd</sup> January 2001. This was done during the lifetime of the late Mzee Ezekiel Maritim Laboso. Even though the defendants alleged that the said transfer was done fraudulently to avoid creditors and was not intended to dispossess them of the said title, they did not particularize nor prove the allegation fraud. It is also instructive to note that they took no steps to reverse the position during their father's lifetime.

Section 26 (1) of the Land Registration 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.

20. In support of his submission that the plaintiffs are the lawful owners of the suit property learned counsel for the plaintiffs cited the case of **Simon Njage Njoka v Simon Gatimu Kanyi [2007] eKLR** the Court of Appeal held as follows:

***“The Appellant having provided a valid title to the piece of land and the Respondent having not impugned it by way of counterclaim in the suit, the learned magistrate had no choice in the matter really than to hold that the Respondent was a trespasser to that parcel of land belonging to the Appellant and liable to eviction. She should have proceeded to evict the Respondent”.***

21. Whereas I agree that the certificate of title is prima facie evidence that the person named therein is the absolute owner of the land, I shall in the following paragraphs proceed to demonstrate why the plaintiffs' ownership of the suit property is not absolute.

22. I now move on to address the three remaining issues jointly. The defendants adduced evidence to the effect that at least 6 acres out of the suit property was acquired using the proceeds of dowry paid by their sister Sally Chepkoros Kibalat and according to Kipsigis customary law, it cannot be given to their step-brothers. The said Sally testified as DW3 and corroborated the defendants' evidence. This evidence was however challenged by PW3 and PW 4 who testified that the deceased was a businessman and he purchased the suit property using his own money. Given the fact that PW3 and PW4 were not present when the deceased acquired the suit property, I am inclined to believe the defendants version as to how the suit property was acquired. The defendants also testified that they were born on the suit property and they and they had lived there up to 1998 when their father chased them away. They have both constructed their houses on the suit property while the 1<sup>st</sup> plaintiff has no house on the suit property. However, the 1<sup>st</sup> defendant is the one who is currently living on the suit property. They also testified that their father established a matrimonial home for their mother on the suit property and that is where both their parents were buried.

23. The 1<sup>st</sup> Plaintiff testified that he and the 2<sup>nd</sup> plaintiff were registered as the owners of the suit property to hold it in trust for the second and third households of the late Mzee Ezekiel Maritim. They were emphatic that the defendants have no stake in the suit property since the 2<sup>nd</sup> defendant was registered as the owner of land parcel no. KERICHO.CHEBUNYO/73 way back in 1997. According to the plaintiff, the 2<sup>nd</sup> defendant was to hold this parcel of land in trust for the first household. What I find interesting is that even though the deceased registered the said parcel of land in the name of the 2<sup>nd</sup> defendant, he sold a huge chunk of it during his lifetime. It is inconceivable that he would have wanted to live only one acre for the first household. The remaining one acre was sold by the family in order to raise funds for the Mzee Maritim's burial expenses. In fact, what emerged is that parcel no. 73 is no longer in existence as it has been sub-divided and sold to third parties.

24. The 1<sup>st</sup> plaintiff admitted to having been privy to the sale of the last acre in order to raise money for their father's burial. He stated that this was done on the understanding that the defendants would get a portion of one acre from the suit property yet this had not yet been effected. The plaintiffs did not challenge the defendants' evidence that the deceased sold a large portion of parcel no. 73 during his lifetime.

25. It is clear from the evidence on record that the defendants have an overriding interest in the suit property. The defendants both have their houses on it and the 2<sup>nd</sup> defendant lives there. It is not in dispute that their mother's house still stands on the suit property and that she was buried thereon. By the plaintiff's own admission, the defendants are entitled to one acre of the suit property as compensation for the sale of one acre out of land parcel no. 73.

26. PW3 who is a clan elder testified that Mzee Maritim instructed the 2<sup>nd</sup> defendant to live on the suit property and that the first household should be given 3 acres out of the suit property. It would appear from the deceased's conduct that his intention was that the defendants be given a portion of land parcel no. KERICHO.CHEBUNYO/71. It therefore follows that even though he transferred the suit property to the plaintiffs, it was his intention that they hold it in trust for the defendants.

27. While section 25 of the Land Registration Act makes it clear that the registration of land in one's name entitles him to all the privileges and appurtenances thereto and free from all encumbrances and other rights except those noted in the register and any overriding interests recognized under section 25(1) of the same, there is a proviso in sub-section 2 in the following terms:

*Section 25 (2) "Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject as a trustee". A similar provision is found in section 28 of the Registered Land Act under which the title to the suit land was issued. It is clear from the above therefore that notwithstanding the registration of the suit land in the name of the defendant that does not relieve him of the duty to which he is subject as a trustee".*

28. Furthermore, Section 28 of the Act recognizes trusts including customary trusts and provides as follows:

**Section 28 "Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:**

a) .....

**b) Trusts including customary trusts"**

29. Furthermore, I am guided by the Supreme Court decision in **Isack M'Inanga Kiebia v Isaya Theuri M'Lintari and Another [2018] eKLR** where the court observed as follows:

*"Each case has to be determined on its own merit and the 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 v Kinuthia** that what is essential is the nature of the holding of the land and the intention 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 members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:*

- 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"*

30. The court further observed that ...."It is now clear that customary trusts as well as other trusts are overriding interests. These trusts being overriding interests are not required to be noted in the register....the rights of a person in possession or actual occupation of land previously envisaged under section 30 of the Registered Land Act ( now repealed) have now been subsumed in the customary trusts under section 25 (b) of the Land Registration Act. Thus under the latter section a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively from the fact of rightful possession or occupation of the land"

31. In the instant case, the land in question is family land which was initially registered in the name of Mzee Ezekiel Maritim Laboso. The 1<sup>st</sup> Plaintiff and the defendants are step brothers while the 2<sup>nd</sup> plaintiff is the deceased's second wife. The defendants were born and raised on the suit property and they have constructed their houses thereon. This is where their mother was buried. The suit land was registered in the plaintiffs' names by the late Ezekiel Maritim under circumstances that suggest that he was evading his creditors. Even though the plaintiffs maintain that the defendants were given their own parcel of land, (KERICHO/CHEBUNYO/73), it is instructive to note that most of it was sold during the lifetime of the deceased with his acquiescence. In fact the defendants testified that in one instance the deceased sold a portion

of the land to raise fees for the 1<sup>st</sup> defendant's son who was studying in Russia. The last one acre was sold by the family to raise money for the burial of the deceased on the understanding that the defendants would be compensated with one acre from the suit property. It is on record that the deceased instructed the 1<sup>st</sup> plaintiff not to build his house on the suit property and instead build it in on parcel no. TRANSMARA/KIMINTET/1021 where the 1st Plaintiff's mother lives. It is therefore inconceivable that the defendants could be considered to be trespassers on their father's land. All these factors lead me to believe that it was not the intention of the deceased to exclude the defendants from owning a share of the suit property. I reject the plaintiff's assertion that the defendants are trespassers and that they are occupying the suit property illegally.

32. In the circumstances, it is my finding that the plaintiffs hold the suit property subject to the overriding interests of the defendants. Although I do not agree with the defendant's claim to the entire parcel of land, I am persuaded that the plaintiffs hold 4 acres of the suit property in trust for the defendants. This comprises of three acres being the defendants homestead, including their mother's homestead and an additional one acre which is owed to them as compensation for the sale of one acre out of land parcel no.73 to cater for the deceased's burial expenses. Flowing from my finding hereinabove, I dismiss the plaintiff's suit and enter judgment in favour of the defendants on their counterclaim. I therefore make the following final orders:

- a) *A declaration is hereby made that the plaintiffs hold the land parcel no. KERICHO/CHEBUNYO /71 subject to the overriding interest of the defendants.*
- b) *The defendants are entitled to 4 acres out of land parcel no. KERICHO/CHEBUNYO/71 where their homesteads stand.*
- c) *The Plaintiffs shall transfer 4 acres of the suit property to the defendants jointly and severally, failing which the Deputy Registrar of this Honourable court shall sign the necessary forms to effect the said transfer.*
- d) *As the suit involves members of the same family, each party shall bear their own costs.*

Dated and Signed this .....day of January 2020.

**J.M ONYANGO**

**JUDGE**

Dated, signed and delivered at Kericho this 10<sup>th</sup> day of February, 2020

**ANTONY KANIARU**

**JUDGE**