



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 69 OF 2014

**DR. SARAH JELANGAT SIELEY (suing as administrator and legal representative
of the estate of AZARIA KIPSIELE CHEPKWONY).....PLAINTIFF**

VERSUS

REUBEN KIPNGENO SANG.....1ST DEFENDANT

ROBERT KIPKOECH.....2ND DEFENDANT

NICHOLAS YEGON.....3RD DEFENDANT

WASHINGTON KOECH.....4TH DEFENDANT

JUDGEMENT

1. By a Plaint dated 19th December, 2014 and filed in court on 22nd December, 2014, the Plaintiff **Dr. SARAH JELANGAT SIELEY** – complained that the defendants **REUBEN KIPNGENO SANG, ROBERT KIPKOECH, NICHOLAS YEGON and WASHINGTON KOECH** - had unlawfully encroached onto and taken possession land parcel no. **KERICHO/SILIBWET/664** belonging to the late **AZARIA KIPSIELE CHEPKWONY** thereby denying her use and occupation of it and causing the estate of the late **AZARIA** to suffer loss and damage. The plaintiff instituted the suit as the legal representative of the late **AZARIA KIPSIELE CHEPKWONY**. The plaintiff wants the defendants evicted.

2. More specifically, the following orders are prayed for:

- a) *An order of eviction against the defendants by themselves, agents, servant, employees, or otherwise to vacate **L.R NO. KERICHO/SILIBWET/664** forthwith*
- b) *Costs of the suit and interest*
- c) *Any other relief the court may deem fit and just to grant.*

3. The defendants filed a joint defence on 23rd January, 2015 and counterclaimed. They denied the plaintiff's claim and pleaded, inter alia, that they had variously purchased portions of that land from some beneficiaries of the estate. In their counterclaim the defendant claimed entitlement and/or ownership of the portions they had bought and asked for an order compelling the plaintiff to transfer the purchased portions to them.

4. In a more specific way, the defendants asked for the following orders:

- a) *An order compelling the plaintiff to transfer the defendants respective portions of land out of **L.R NO. KERICHO/SILIBWET/664**, 0.37 of an acre to the 1st defendant, 0.6 of an acre to 2nd defendant, 0.1 of acre to 3rd defendant, and 0.15 of an acre to the 4th defendant.*
- b) *Costs of the suit.*
- c) *Any other relief the court may deem fit and just to grant.*

5. Records show that the plaintiff later on donated a power of attorney to one **JOYCE CHEPNGENO CHEPKWONY** to handle this

matter for her. The power of attorney is on record and is dated 16th March, 2018. Joyce was heard by the court on 6th December, 2108 as PW1. She was the only one to testify on the plaintiff's side. She told the court, inter alia, that the donor of the power of attorney to her is her elder sister. The register owner of the land- the late Azaria Kipsiele owner of the land- the late Azaria Kipsiele Chepkwony- is her late father. He was the plaintiff's father too and the plaintiff is the personal representative of his estate. She said the defendants allegedly bought portions of land from the children of her late brother- Onesmus Siele. This is said to have caused problems as there are some nephews who have nowhere to live.

6. Joyce also relied on the plaintiff's written statement. That statement is dated 9th December, 2014 and was filed on 22nd December, 2014. It essentially re-states the plaintiff claims in the plaint and expresses her wish to get the prayers asked for. During cross-examination Joyce said that the size of the land is 10.8Ha and for reasons She did not know, it has not yet been sub-divided to the beneficiaries. Those who sold portions of the land to the defendants were said to be **Jeremiah Kiplangat Rono, Wilson Kipkoskei Rono, Peter Rono and Jessica Rono**. These are children of Joyces's late brother – **ONESMUS SIELE**- who had two wives, both named Esther.

7. The late Onesmus, Joyce said further, had given each of the children a portion of land. These are the portions that were sold to the defendants. She said further that no one from the family of the late Onesmus is complaining about the sale. The portion earmarked for the Plaintiff was said to be still intact. The portions of land were said to have been sold before legal representation for the estate of the deceased had been done or obtained.

8. The defendants testified as DW1, DW2, DW3, and DW5 respectively. From their evidence, it is clear that they bought their portions of land from either the grandchildren of the deceased registered owner or from persons to whom the grandchildren of the deceased registered owner or from persons to whom the grandchildren had sold. Reuben (DW1) is shown to have bought three (3) portions from **WILSON KIPKURUI RONO**, a grandson, and one from **ERICK KIPKURUI CHERUIYOT**, a purchaser to whom a portion had been sold by yet another grandson –**JEREMIAH RONO**.

9. Robert (DW2) bought two portions from **JEREMIA RONO** and **ANTONY KIPLANGAT**, both grandsons of the deceased registered owner, while **ERIC KIPKURUI** and **JOHN ROTICH**, both of them buyers from **JEREMIAH RONO**, sold him his third and fourth portions. **NICKSON** (DW3) bought his **from WILSON KIPKURUI RONO** while **WASHINGTON** (DW4) bought his first portion from **WILSON** while his second portion was purchased from one **JESSICA**, a grand-daughter of the deceased registered owner.

10. It is clear from evidence that all these grandchildren were children of **ONESMUS KIPRONO SIELE** and **ESTHER CHESANG**, both deceased, and who are son and daughter-in-law to the deceased registered owner. They are also step-children to PW5 – **ESTHER CHEMUTAI SIELE** – who is the surviving wife of the late **ONESMUS KIPRONO SIELE**.

11. While testifying the defendants were able to produce their various sale agreements for the portions of land they bought. And from the cross-examination done by the plaintiff's counsel it is clear they knew the sellers did not have title deeds and/or that succession had not been done.

12. DW5, **ESTHER CHEMUTAI SIELE**, testified and confirmed that she was daughter in law to the deceased registered owner, wife of the late **ONESMUS KIPRONO SIELE**, co-wife to the late **ESTHER CHESANG**, step-mother to **JEREMIAH RONO, PETER RONO, WILSON RONO** and **JESSICA SIELE**, who are variously shown as sellers of land to the defendants. According to DW5, her late husband had given 0.5 acre to each of his 8 sons, leaving 1.3 acres for himself. When he did, the 1.3 acres were subdivided, giving her 0.6 acres while her co-wife, the other Esther, got 0.4 acres. 0.1 of an acre was earmarked for an access road. She said she was well aware that her step-children had sold their portions of land and gone to live elsewhere. She said further that she and the defendants live in harmony.

13. After hearing, both sides filed written submissions. The plaintiff's submissions were filed on 17th February, 2020. The plaintiff outlined both her own case and the defendants case. She then delineated the issues for determination, pointing out that the court should determine whether the sale between some of the beneficiaries and the defendants was valid and whether the plaintiff is entitled to the prayers she is seeking.

14. The plaintiff then submitted that Section 82 (b) of the Succession Act (cap 160) prohibits sale of both movable and immovable property before a grant is confirmed. She went further and cited Section 45 (1) of the same act, which forbid intermeddling with a deceased's estate. The actions of the defendants and those who sold them portions of land were said to surmount to intermeddling. To reinforce this position, the plaintiff cited some cases, one being **In the matter of the Estate of Isaac Kaburu Marete: Succession Cause No. 7 of 2011, MERU**, where F. Gikonyo J emphasized the illegality of sale of property of a deceased estate before confirmation of grant. The other is **In the matter of the Estate of KAKUA KIOKO (deceased) Succession Cause No. 54 of 2010, MACHAKOS**, where the same legal position was espoused.

15. The defendants submissions were filed on 19th February, 2020. According to the defendants, the court had to establish where they have encroached onto **L.R NO KERICHO/SILIBWET/664**, whether the plaintiff is entitled to the prayers sought, and whether the defendants counter-claim should succeed. They submitted, inter alia, that there is encroachment, each having bought the land from bonafide beneficiaries, and with the beneficiaries themselves not complaining at all.

16. The defendants should get titles to their portions of land, it was submitted, as each has paid full consideration. Evicting them, it was further said, would tantamount to evicting the rightful beneficiaries who sold the land. Section 93 of the Succession Act (cap 160) was cited and said to be offering protection to purchasers who have bought property of a deceased's estate before a grant is confirmed. The defendants cited **MERU HCC SUCCESSION CAUSE NO. 499 of 2010: MECLINA KIRIGO M'MURITHIU VS MARY GANTUKUSI MUKIRI & 2 OTHERS: (2016) eKLR**, which expressed the view that a purchaser of the estate property is not precluded from being a party in succession proceedings.

17. I have considered the pleadings, evidence, and rival submissions. It is clear to me that the defendants bought their portions of land.

They bought most of their portions before the relevant succession process had been concluded. In my view, the beneficiaries who sold the portions should have sought to include the defendants in the succession process. The defendant themselves should sought to be so included. They didn't. They chose to rest comfortable in the belief that they were legally the new owners of the portions they bought. This case by the plaintiff must be a rude shock to them, for they don't understand why the plaintiff should seek to evict them while the beneficiaries themselves are not complaining.

18. The defendants sought reliance on Section 93 of the Succession Act. Section 93 is as follows:

93 (1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this act by a person to whom a representation has been granted shall be valid, notwithstanding any subsequent revocation or variations of the grant either before or after the commencement of this act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.

19. A careful reading of Section 93 (*supra*) would show that the defendants are quoting it out of context, and therefore inappropriately. The side note next to the section reads as follows: “**Validity of transfer not affected by revocation of representation**”. The section clearly refers to a situation where a transfer is made to a purchaser pursuant to a grant that is subsequently revoked. And that transfer must be by the legal representative. The point made by that provision is that such transfer does not lose validity by reason only that the grant is subsequently revoked.

20. That is not the situation that obtains here. There has been no transfer yet, and the sellers were not legal representatives. They were beneficiaries or, in some instances, prior purchasers. There is therefore no useful benefit that the defendants can derive from that provision.

21. In my understanding, the law is as explained by the plaintiff. Under Section 82 (b) (11), a duty is reposed in the legal representative to ensure that no immovable property of the estate of a deceased person is sold before confirmation of grant. For clarity, the provision is as follows:

82 (b) (11)

“No immovable property shall be sold before confirmation of Grant.”

Confirmation of grant in this matter happened in the year 2013. The defendants bought almost all their portions of land before this time.

22. It seems to me also that when the alleged beneficiaries were selling portions of land to the defendants, they were wittingly or unwittingly, inter-meddling with the estate of their dead grandfather. By so doing, they were running afoul of Section 45 (1) of the Succession Act, which provides as follows:

45 (1) Except so far as authorized by this act, or by any other written law, or by a grant of representation under this act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

23. In the cases cited by the plaintiff, the learned Judge presiding – F Gikonyo J In the Estate of **Kaburu Marete** (deceased) (*supra*) and D.K.Kemei J in the estate of **KAKUA KIOKO** (deceased) (*supra*) – simply spell out the law as it is. They apply well to the matter at hand. One may additionally cite **In the matter of the estate of M' Thuranira M' Mwereria (deceased): HCC: Succession Cause No. 5 of 2015, MERU**, and **In the matter of the estate of JOHN GAKUNGA NJOROGE (deceased) HCC: Succession Cause No. 256 of 2007, MACHAKOS**, where F. Gikonyo J and E. Muriithi J respectively took broadly similar positions.

24. But even as I endeavour to make my decision, I feel for the defendants. It is clear to me that they bought their portions of land from people whose interest in the land could be said to be legitimate. They may need to consult with these people. In courts of law however, it is not the feelings of the judge that matter; it is the position of law. As the maxim goes: **FIAT JUSTITIA RUAT CAELUM**, which is simply: Let justice be done though heavens fall.

25. Given what I have said heretofore, it is very clear that merit is on the side of the plaintiff. The defendants counter-claim on the other hand cannot succeed. The law does not support it. I therefore hold that the plaintiff's case is well proved on a balance of probabilities. I grant prayer (a) in the plaint. The defendants counter-claim is not successful. I dismiss it. The circumstances of this case impel me to order that no one should pay costs to the other. The plaintiff is the winner but I fail to understand why it has taken her so long to distribute the estate. Had she done so, the beneficiaries would probably have done the needful to make the defendants legal owners of the portions they bought. I therefore order that each side should bear its own costs.

Dated, signed and delivered at Kericho this 29th day of April, 2020.

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A. K. KANIARU

JUDGE