



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**E.L.C NO. 72 OF 2016**

**JOHN CHERUIYOT SANG.....PLAINTIFF**

**VERSUS**

**HILLARY SANG.....1ST DEFENDANT**

**ERICK SANG.....2ND DEFENDANT**

**KENNEDY KIPNGETICH .....3RD DEFENDANT**

**DAVID KIPLIMO.....4TH DEFENDANT**

**JUDGMENT**

**Introduction**

1. The suit herein was commenced by way of Plaintiff dated 20th September 2016. The Plaintiff seeks the following orders from this Court:-

- a. That a perpetual injunction do issue restraining the defendants by themselves, their workers, employees, servants, agents and/or those claiming through or under them from interfering with the plaintiff's use, possession and/or ownership of ALL THAT piece or parcel of land known as Title number KERICHO/GETARWET/1029 and/or in any manner or in any way whatsoever interfering with the Plaintiff's use, possession and/or ownership of the said land.
- b. General damages aforesaid.
- c. Interest thereon.
- d. Costs of this suit.
- e. Any other or further relief as may seem fit this Honourable Court to grant.

**1. BACKGROUND**

2. The Plaintiff alleged that he is the absolute registered proprietor of all that parcel of land known as Kericho/Getarwet/1029 measuring 1.79 hecatres or thereabouts and situate in Kericho County (the "suit premises"). The Plaintiff avers that on or about 7th September 2016, the Defendants jointly and severally interfered with the Plaintiff possession and/or use of the suit premises by forcibly evicting one Richard Kipngetch Langat whom the Plaintiff had given possession of a portion of land measuring 0.5 acres from the suit premises.

3. The Plaintiff avers that the Defendants have no legal rights over the suit premises and therefore their actions are unlawful and without reasonable cause, excuse and/or justification. The Plaintiff further contends that by reasons of the Defendants actions, he has been deprived of the full use, possession and /or enjoyment of his land and the Plaintiff has thereby suffered loss and damage. The Plaintiff claims to have suffered loss as a result of the Defendants trespass over the suit premises.

4. The Defendants filed their joint Statement of Defence and Counterclaim dated 27th October 2016. In the said Defence the Defendants contend that they have legal rights to the suit premises but deny forcibly evicting one Richard Kipngetch Langat who is said to have purchased 0.5 acres of the suit premises from the Plaintiff.

5. The Defendants aver that the 1st and 2nd Defendants are the children of the Plaintiff and they have a customary right to occupy Kericho/Getaret/1029 since it is their ancestral home.

6. The Defendants in the Counterclaim contend that in the year 1974 the Plaintiff now the Defendant married Mary Chebet Sang and they were blessed with children. The Defendants aver that in the year 1978 when the Plaintiff divorced his wife the 4th Defendant had already been born and that the 3rd Defendant was born a few months after they divorced.

7. The Defendants now seek orders compelling the Defendant to allow the 3rd and 4th Plaintiffs in the counterclaim to occupy part of Kericho/Getarwet/1029 permanently since it is their customary right.

8. The Defendants/Plaintiffs in the Counterclaim now claim for:-

a. A declaration that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants now Plaintiff are children of the Plaintiff (now defendant) and that they are entitled to in law to occupy part of Kericho/Getarwet/1029.

b. A permanent injunction do issue restraining the Plaintiff (now Defendant) by himself his workers, servants, agents from dispossessing the 3<sup>rd</sup> and 4<sup>th</sup> defendants (now Plaintiffs) from Title number Kericho/Getarwet/1029 once prayer (a) is granted.

c. Costs of the dismissal and costs of the counter claim.

d. Any other relief that the Honourable Court may deem fit.

9. In the Replying Affidavit sworn by Erick Sang ; the 2nd Defendant herein on 27th October 2016. Mr. Sang deposes that he is the brother of the Plaintiff. He deposes that the 3rd and 4th Defendants herein are his nephews and sons to the Plaintiff. He deposes that in the year 1974 the Plaintiff married Mary Chebet Sang and they were blessed with 2 children; Kennedy Kipngetch and David Kiplimo who are the 3rd and 4th Defendants herein. Mr. Sang annexes a copy of the Judgment in respect of the divorce petition marked E.S 1. He avers that after the divorce, the Plaintiff's wife went away with the two children.

10. Mr. Sang deposes that in the year 1998 the Plaintiff wrote a letter to his former wife and children inviting them back home and the said letter is annexed and marked as ES 2. He deposes further that the Plaintiff accepted back his wife as well as the said children and built them a house. He deposes further that there were a number of clan meetings held in the presence of the area assistant chief and it was resolved that the children belonged to the Plaintiff and that they are Kaptuiyek clan members. He annexes minutes dated 14/10/2005, 7/11/2015 and 23/11/2015.

11. The Plaintiff (Defendant in the counterclaim) filed his Reply to Defence and Defence to Counterclaim dated 5th October 2017. In the Reply to Defence, the Plaintiff denies that the Defendants have legal rights to the Plaintiff's land known as Tile Number Kericho/Getarwet/1029. He further denies that the 3rd and 4th Defendants are his children.

12. In the Defence to Counterclaim, the Defendant concedes that he was married to Mary Chebet Sang but denies paternity of the 3rd and 4th Defendants herein. He further states that the marriage was dissolved through a divorce issued by the court. He avers that the Defendants are therefore not entitled to any parcel of the suit premises as claimed.

13. He dismisses the Defence and Counterclaim as being frivolous, incompetent, scandalous and an abuse of the court process and urges the court to dismiss it with costs.

14. The suit was set down for hearing and each of the parties testified and called witnesses.

#### **Plaintiff's case**

15. The Plaintiff's case is that the Defendants have interfered with his possession and/or use of the parcel of the suit premises. It is common ground that the suit premises are registered in the name of the Plaintiff and indeed the certificate of official search dated 19th September 2016 evidences as much. From the said search, the land known as Title No. Kericho/Getarwet/1029 measures approximately 1.79 HA

#### **Defendants' case**

16. The Defendants in their Counterclaim contend that in then year 1974 the Plaintiff now the Defendant married Mary Chebet Sang and they were blessed with children. The Defendants aver that in the year 1978 when the Plaintiff divorced his wife the 4th Defendant had already been born and that the 3rd Defendants was born a few months after they divorced.

17. I have noted the witness statements of Hillary Sang , Erick Sang and Wilson Sang dated 15th December 2016. The three aver that the Plaintiff herein is their brother. They claim that the Plaintiff is the biological father of the 3rd and 4th Defendants herein. In his statement Wilson Sang states that Plaintiff married Mary Chebet Sang and that they had 3 children Shadrack Kipchirchir (who came with the mother) and 2 biological sons of the Plaintiff namely David Kiplimo and Kennedy Kipngetch Cheruiyot.

18. In the Judgment of 20th September 1978 in Civil case No. 163 of 1978 wherein the order of divorce was granted, it was mentioned that the Defendant Mary Chebet Sang was pregnant.

19. Upon cross examination by David Kiplimo PW1 states that he does not know whether David Kiplimo is his son as his mother left when she was pregnant. Upon cross examination by the 3rd Defendant, PW1 states that he does not know him and that he was amongst the people who destroyed the house of Richard and that he saw him at around 4:00 a.m. I find it difficult to believe that he would recognize and identify someone at 4:00 am when it was dark .

20. The Defendants testimony was by and large consistent that the 3rd and 4th Defendants were the Plaintiff's children. DW2 stated that the Plaintiff demolished the house put up by David after he had shown his sons where to build a house. In cross examination, DW2 stated that David Sang was born in 1976 and that by the time Mary left, he had already been born.

21. The Defendants now seek orders compelling the Defendant to allow the 3rd and 4th Plaintiffs in the Counterclaim to occupy part of Kericho/Getarwet/1029 permanently since it is their customary right.

22. From the copy of official search certificate in respect of the suit premises it is noted that David Kiplimo; the 4th Defendant herein registered a caution as against the title to the suit premises claiming a beneficial interest.

23. In the circumstances, the first question that this court must grapple with is whether the 3rd and 4th Defendants have a valid claim over the suit premises.

24. Section 28 (b) of the Land Registration Act 2012 provides in part as follows:-

Overriding interests.

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) spousal rights over matrimonial property;

(b) trusts including customary trusts

25. The Court of Appeal in the case of **Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR** considered the issue of customary law trusts and stated as follows:-

**“After passionately and extensively analyzing the concept of Customary law trusts, Khamoni J. in Gathiba v Gathiba, Nairobi HCCC 1647/84 (decided in January 2001 and reported in [2001] 2 EA 342) at Pg 368 stated:**

**“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee”.**

We respectfully agree with that conclusion. Which brings us to the case before us.

It is significant, we think, that unlike the Muriuki Marigi case (supra) where the father had his own land and could therefore do whatever he wished with it, the land registered in the name of Mbui was ancestral land that devolved to him on the death of his father. It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. It is also significant that unlike the Esiroyo case, where the sons invaded the land occupied by the father, Gerald in this case, was in possession and occupation of the land with the consent and knowledge of Mbui since his birth in 1956. He has constructed a five-roomed permanent house and has planted coffee in the suit land. The respondent is not ready to compensate him for those permanent developments. We think the superior court was right in distinguishing the authorities cited on that score. But more significantly, we think a trust arose from the possession and occupation of the land by Gerald which has the protection of sections 28 and 30(g) of the Act unless there is an inquiry made which discloses no such rights, which would be superfluous in this case.

It is for those reasons that we answer the issue posed earlier in the negative. We consequently find the appeal lacking in merits. It is hereby dismissed but each party will bear its own costs as it is a family matter.” (Emphasis supplied)

26. The court in this case also cited the case of **MURIUKI MARIGI v RICHARD MARIGI MURIUKI & 2 others** (Unreported) where the court of appeal concluded in similar circumstances that since the owner of the land was still alive his property was not available for distribution. The court stated as follows:-

**The first one is a decision of this court made in May 1997, Nyeri C.A No. 189/96 MURIUKI MARIGI v RICHARD MARIGI MURIUKI & 2 others (UR). The three sons of Muriuki Marigi (the father) who had five wives and several other children sued him in the High Court seeking to compel him to equitably subdivide and allocate to his wives a parcel of land registered**

in his name under the Registered Land Act Cap 300. The sons feared that the father who was *intending to subdivide the land*, would do so in a manner that would disadvantage them. The father in his defence pleaded that as the registered proprietor he had the absolute and indefeasible right over the property and he could not be urged, directed or compelled to share the land in any particular manner. The suit however did not proceed to trial as the parties referred it to arbitration by consent and it was the award in favour of the sons which was being challenged before Ang'awa J who saw no reason to upset it. The father appealed and this Court examined the root cause of the dispute and found that there was no cause of action in the first place. The arbitral proceedings were declared a nullity ab initio . The court made a finding that the claim of the sons was based on a customary law right but held that such right was excluded under sections 27, 28 and 30 of the Registered Land Act . The Court stated:

“We earlier set out the provisions of sections 27 and 28 of the Registered Land Act which in effect state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests which are set out in section 30 of the act. The evidence on record is silent on whether or not the respondents’ Kikuyu customary law rights over the suit property are noted in the land register respecting the land. In absence of such evidence we may not properly infer or imply that they are. The only other aspect outstanding for consideration is whether the customary law rights, if they exist at all, are overriding rights or interests recognizable under that section. The issue was considered in the following two reported cases of Obiero -vs- Opiyo & others [1972] EA 227 and Esiroyo -vs- Esiroyo & another [1973] EA 388, and in both cases it was held that they are not. The Court in both cases was bound to come to that conclusion because of the clear language of section 30, above. Moreover, considering the provisions of section 3(2) of the Judicature Act which we partly reproduced above, customary law rights being subject to rights under a written law, the respondents’ rights are clearly excluded by the clear language of sections 27 and 28 of the Registered Land Act.”

And concluded: -

“The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to subdivide and distribute it among them. He may not be urged, directed or ordered to do it against his own will.” Emphasis supplied

27. In the instant case, I am inclined to believe that the 3rd and 4th defendants are the plaintiff’s children. I agree with the concept of intergenerational equity with respect to ancestral land as considered in the case of **Mbui Makangu** (supra) where the land is held by one generation for the benefit of succeeding generations. However, as held in MURIUKI MARIGI (supra) the defendants’ right to the plaintiff’s land does not accrue to them as of right during their father’s lifetime.

28. In view of the foregoing, the defendant’s counterclaim is dismissed.

29. On the other hand, even though the plaintiff has proved that he is the absolute owner of the suit land he has not satisfied me that he is entitled to injunctive orders against his sons as he has not demonstrated that he will suffer any loss or harm if the defendants are not perpetually restrained from interfering with his land. The fact that he is not in good terms with the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and their mother should not make him banish them from his land. In any event he has not satisfied this court that any of the defendants have threatened to occupy the suit land by force.

30. Accordingly, the plaintiff’s suit is also dismissed.

31. This being a case involving family members, each party shall bear their own costs.

Dated, signed and delivered at Kericho this 11<sup>th</sup> day of September, 2018.

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J.M ONYANGO

JUDGE

**In the presence of:**

1. Plaintiff present in person
2. Defendants present in person
3. Court assistant - Rotich