



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO. 1 OF 2008 (O.S)**

**JOYCE NYANCHAMA KALYA.....1<sup>ST</sup> APPLICANT**

**STEPHEN KORIR.....2<sup>ND</sup> APPLICANT**

**(Suing in their capacity as personal representatives of the estate of KIPKORIR ARAP KALYA-  
DECEASED)**

**VERSUS**

**DAVID MALAKWEN TERER.....1<sup>ST</sup> RESPONDENT**

**HELLEN CHEPKOECH LANGAT.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

What is before me is an Originating Summons (O.S) filed by the Applicant on 21<sup>st</sup> January, 2008 in respect of land parcel number **KERICHO/KAITET/252**. In the said Originating Summons the applicant seeks determination of the following questions;

1. Whether the Respondents obtained sub-division and mutation of L.R number KERICHO/KAITET/252 belonging to the deceased by fraud in that they failed to take out succession proceedings in respect of the estate of KIPKORIR ARAP KALYA, deceased.
2. Whether by their fraudulent sub-division, the Respondents secured portions excised from land parcel number KERICHO/KAITET/252 and more particularly:
  - i. L.R No. KERICHO/KAITET/1090 registered in the name of the 1<sup>st</sup> respondent.
  - ii. L.R No KERICHO/KAITET/1089 registered in the name of the 2<sup>nd</sup> Respondent.
3. Whether by their fraudulent registration, the Respondents denied the applicants and all other dependants of the deceased their rightful share of the estate of the deceased.
4. Whether the resultant titles which were issued upon sub-division of L.R KERICHO/KAITET/252 should be cancelled and the original title restored to reflect the name of the deceased.
5. Whether the Respondents should bear the costs of this suit.

In support of their case, the Applicants rely on the affidavits of **Joyce Nyanchama Kalya**, the 1<sup>st</sup> Applicant sworn on the 18<sup>th</sup> January 2008, her further affidavit sworn on the 12<sup>th</sup> April, 2012 and the supplementary affidavit filed on 11<sup>th</sup> October, 2016. The said affidavits are sworn on her behalf and on behalf of the 2<sup>nd</sup> Applicant.

The parties elected to canvass the suit by way of affidavit evidence. They were allowed to file additional affidavits and annex all the relevant documents in order to bring out the real issues in controversy. They then filed written submissions.

The thrust of the Applicants case is that land parcel number **KERICHO/KAITET/252** which was registered in the name of **KIPKORIR ARAP KALYA**- Deceased, the husband and father of the Applicants respectively, was fraudulently sub-divided into seven parcels and transferred to the Respondents as no Grant of Letters of Administration had been taken out in respect of the estate of the deceased at the time the sub-division was done. In 2005, the Applicants discovered that the deceased's land had been sub-divided into seven parcels without the knowledge of the applicants. On further inquiry from the Land Registrar, Bomet, they discovered that the sub-divisions had been effected by the Respondents in 1999. The Respondents claim to have bought land from the deceased although none of his family members and beneficiaries were aware of this. In view of the foregoing, the applicants are seeking orders for cancellation of the titles issued as a result of the sub-division of land parcel number **KERICHO KAITET/252** so that the same can revert to the deceased's name for distribution to his lawful beneficiaries.

The 1<sup>st</sup> Respondent filed a Replying Affidavit in which he denied that the 1<sup>st</sup> Applicant was the sole surviving widow of the deceased. He further deposed that the deceased had other beneficiaries including Christopher Korir and Charles Korir. He claimed that the deceased left an oral will before he passed away, in which he provided for the sub-division of the suit land.

The Respondents contend that the deceased held the suit land in trust for **KIPLANGAT ARAP KOSKE** who later sold his portion of the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The 1<sup>st</sup> Respondent attached copies of sale agreements dated 28<sup>th</sup> August 1981, 4<sup>th</sup> January 1984, 1<sup>st</sup> May 1984 and 13<sup>th</sup> November, 1984 respectively.

Counsel for the Applicants submit that the acts of the Respondents amount to intermeddling with the estate of the deceased contrary to Section 45 of the Law of Succession Act which is an offence in law. They rely on the case of **Monica Achieng Akumu & 3 Others Vs Dishon Omindu Nyamondo & 2 Others 2013KLR** where Justice Sitati echoing the sentiments of Justice H. I. Ongudi expressed in **Alice Wanjiru Thika & Others Vs Joseph Gichono & Others Embu HC Misc Application No. 84 of 2007** stated as follows:

*“The purported transfer had nothing to stand on, premised as it was on a criminal act... It simply has neither legs nor a body on which something else can stand..”*

It is important to note that apart from the four (4) sale agreements, one of which is in Kipsigis language, without translation there are no other documents such as the Consent of the Land Control Board or Transfer forms to support the purported sale. It is also not clear when the purported oral will of the deceased was uttered and to who, not to mention that the contents of the said will are not disclosed. All these leads me to the conclusion that the sub-division by the Respondents coming as it did ten years after the death of the deceased, smacks of illegality and ulterior motives.

The Applicants seek a cancellation of the titles issued as a result of the sub-division of land parcel number **KERICHO/KAITET/252**. These are land parcels number **KERICHO/KAITET 1090** registered in the name of the 1<sup>st</sup> Respondent and land parcel number **KERICHO/KAITET/1089** registered in the name of the 2<sup>nd</sup> Respondent.

**Section 26 (1) of the Land Registration Act** provides as follows:

*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 and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that person shall not be subject to challenge except-*

- a) On the grounds of fraud or misrepresentation 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.*

In order for the two titles mentioned above to be cancelled, I must be satisfied that either of the above situations obtains in this case. On the first limb, the pleadings and evidence adduced by the Applicants through their various affidavits must lead me to the conclusion that there was fraud. Black's Law Dictionary, Ninth Edition defines fraud as:

*"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment"*

I am not persuaded that the Applicants pleadings and affidavit evidence meet the threshold of fraud. It is however obvious that by sub-dividing the suit land ten years after the death of the first registered owner without taking out a Grant of Letters of Administration, the Respondents acted illegally and unprocedurally. Their actions therefore fall within the ambit of Section 26(1) (b) of the Land Registration Act No 3 of 2012.

For the above reasons, I find that the titles resulting from the sub-division of land parcel number **KERICHO/KAITET/252**, more particularly title number **KERICHO/KAITET/1090** and **KERICHO/KAITET/1089** are illegal and liable to be cancelled.

In conclusion, the Applicants have proved their case on a balance of probabilities and I therefore enter judgment in their favour and make the following orders:

1. The Respondents obtained sub-division and mutation of L.R No. KERICHO/KAITET/252 belonging to KIPKORIR ARAP KALYA Deceased illegally and unprocedurally.
2. The titles in respect of land parcels number KERICHO/KAITET/1089 and 1090 were obtained illegally and unprocedurally.
3. By their illegal registration of the suit land, the Respondents denied the Applicants and all the dependants of the deceased their rightful share.
4. The titles in respect of land parcel number KERICHO/KAITET/1090 and 1089 are hereby cancelled in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are hereby cancelled and I further direct that the said land parcels do revert to the original number KERICHO/KAITET/252 in the name of KIPKORIR ARAP KALYA- Deceased.
5. The costs of this suit be borne by the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MAY, 2017.

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**J.M ONYANGO**

## **JUDGE**

### **In the presence of:**

1. Mr. Mwita for the Plaintiff/Applicant.
2. Mr. Bii for J.K.Kirui for the Respondents.
3. Court assistant- Wambany