



**REPUBLIC OF KENYA**

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

**CIVIL CASE NUMBER 245 OF 1977**

**KIPTALAM ARAP BOIWO**

**KIPSELELEI ARAP MARUSIN**

**MANYIMKUT ARAP JEGO**

**SAWE ARAP TUWEI**

**WILSON SINGOEI**

**KIPTOO ARAP GOGO**

**CIPERENCHE SHININI**

**CHUMA KITUR**

**ANNAH MUKWE**

**MOLAH**

**NJOROGE JEBUKIWE**

**DOERO MATTETE**

**KIPLAGAT ARAP KOSGEI**

**CHEPSIRORO ARAP MASABUT**

**KISOI ARAP MASABUT**

**CHUMA RAP TUM**

**BENJAMIN TUM**

**DAVID LELEI**

**SAMWEL ARAP YETO**

**JOEL SIELEI**

**KIPKOECH ARAP KOECH**

**KIOSO LETUK**

**KIMALIT A. BIRIR**

**SANYISHA SHANINI.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**JOSEPH KIPSANG KOSGEY.....DEFENDANT/RESPONDENT**

**RULING**

1. Brief Background to the application by Notice of Motion dated 23<sup>rd</sup> March 2015 by the plaintiffs.

Judgment in this case was delivered on the 26<sup>th</sup> June 1979 after a full hearing, and a decree issued that:

*(a) a declaration that the Defendant acted at all material times as the agent of the plaintiffs and purchased the property being L.R. No. 5499 for and on behalf of the plaintiffs.*

*(b) An order that the defendant is the registered as the proprietor of the said property as Trustee for the plaintiffs.*

*(c) General damages.*

2. The defendant was not satisfied with the Judgment. He lodged an appeal being **C.A.C.A No. 17 of 1980** but the appeal was not heard in court but settled amicably resulting to the transfer of 200 acres out of the suit property to the plaintiff's for a consideration of Kshs.80,000/=.

With participation of the parties respective Advocates the plaintiffs formed a Co-operative Society namely **Chelambut Farmers Co-operative Society Limited** and obtained the Land Control Board consent on the 25<sup>th</sup> August 1983 for consent to transfer the land which was granted to the members.

Thereafter the plaintiffs were issued with a certificate of the Title on the 22<sup>nd</sup> August 1985 on their 200 Acres of land.

3. On the 6<sup>th</sup> May 1991 upon revival of the appeal, and upon the matter being referred back to the High Court for taking additional evidence, Honourable B.K. Tanui (as he then was) and upon taking such additional evidence, made findings that there was a binding and lawful agreement between the plaintiffs and the defendant for the sale of the 200 acres from the defendant for a sum of Kshs.80,000/=

4. The Judge recommended that a compromise judgment be recorded in terms of the findings. Thereafter, the defendant avers that he sub divided and sold to 3<sup>rd</sup> parties the balance of 300 acres and therefore the Original L.R. No. 5499 ceased to exist.

5. By their application dated 23<sup>rd</sup> May 2015, the plaintiffs sought the following orders:

*1. That the Respondent be and is hereby committed to civil jail for 6 months for continuous disobedience and breach of the courts judgment delivered on the 27<sup>th</sup> June 1979.*

*2. That the Honourable court be pleased to order that the plaintiffs as the lawful owners of the property LR No. 5499 and Registered at the Land Titles Registry at Nairobi as L.R. 14249/1 be allowed to take possession of this property.*

*3. That costs of the application be born by the respondents.*

6. Kiptalam Arap Boiwo the 1<sup>st</sup> plaintiff/applicant swore the supporting Affidavit on the 20<sup>th</sup> March 2015. The deponent avers that leave to commence these contempt of court proceedings were granted to the applicants on the 10<sup>th</sup> March 2015.

He acknowledges the judgment delivered on the 27<sup>th</sup> June 1979 and has annexed a copy of the decree as “**KAB2**”

7. He deposes that subdivision of the property was ordered, contrary to the judgment by the provincial administration and the applicants but despite their protestation, nothing has come out of it, and the defendant has continued to threaten the applicants as trespassers. It is deposed that the respondent acts are contemptions of the Court's judgment and that he has colluded with the executive arm of government to frustrate them and therefore by this application they seek the court's protection and punishment of the defendant for contempt of the court judgment.

Annexed as exhibits to the affidavit are several letters exchanged between the applicant's and the Provisional Commissioner, Nakuru, and recently a letter to the Governor Nandi County dated 17<sup>th</sup> September 2013.

8. The defendant/respondent opposes the application by his Replying Affidavit sworn on the 8<sup>th</sup> March 2016 and filed on the 9<sup>th</sup> March 2016. Annexed to the affidavit are numerous documents, the Notice of Appeal to the Court of Appeal dated 6<sup>th</sup> July 1979, Letter dated 19<sup>th</sup> September 1980 written by A.H. Malik & Co. Advocates for the defendant to K.M. Patel, Advocate for the plaintiff's informing him that the matter has been settled amicably out of court and forwarding consent letter for execution, a transfer instrument dated 15<sup>th</sup> August 1985 duly registered between the defendant (vendor) and Chelambut Farmers Co-operative Society Ltd, Letter of Consent for the transfer of the land from the Tinderet Land Control Board dated 25<sup>th</sup> August 1983 and the certificate of Title in respect of the Subdivision **L.R N. 5499/1**.

9. There is also letter by Chalambut Farmers Co-operative Society giving names of its members those who should reside in the Land Parcel as at 28<sup>th</sup> April 1982 and a reply to the said letter dated 5<sup>th</sup> January 1984.

In this letter, it was acknowledged that the applicants with others, all 34 in number would be the only persons to be authorised to reside at the property.

Others included are the order by the Court of Appeal and the findings on the Additional evidence ordered by the Court of Appeal.

10. I have considered the parties oral submissions on the application taking into account the background I have stated above.

Mr. Orina Advocate for the applicants submission is that the judgment of the Court gave the applicants the suit property and therefore they are entitled to vacant possession. It was his submission that the provincial administration attempted to subvert the judgment by interfering with the enforcement and execution and referred to the several letters exchanged between the applicants and the Provincial commissioner, Nakuru.

11. It was his submission that the applicants have never obtained possession of the suit property as the defendant/respondent persists in possession of the property.

He urged the court to order delivery of the property to the applicants. He did not however address the court on the prayer for contempt of court judgment nor did the reply to any of the grounds of opposition filed on the 22<sup>nd</sup> January 2016 nor averments in the Replying Affidavit.

12. Mr. Kagucia for the Respondent argued on his grounds of opposition filed on the 22<sup>nd</sup> January 2016 as well as the Replying Affidavit.

He submitted that the judgment having been delivered more than 30 years ago in 1979 execution thereof is barred by the Limitations of Actions Act, that the applicants are guilty of laches and indolence and the inordinate delay was not explained.

It was his further submission that the issues between the parties are long resolved in **C.A.CA. No. 17 of 1980** and no appeal was lodged against the said ruling. It is submitted that the High court in its findings on additional evidence resolved the dispute and recommended for adoption by the Court of Appeal.

I have not been provided with any contrary judgment order or ruling on the matter. No appeal has been filed against the courts findings.

13. I have carefully read the court findings on the additional evidence. It is clearly stated that during the pendency of the appeal to the Court of Appeal, the parties with assistance of the provincial administration agreed to an out of court settlement whereupon the applicants were given by way of transfer to a Co-operative Society, M/S Chalambut Farmers Co-operative Society Limited, formed by the plaintiffs, for that purpose. All the relevant conveyance procedures were complied with by both the plaintiffs and the defendant's advocates. There can be no issue as to whether or not the plaintiffs were not aware as they were active parties to the agreement and the subsequent transfer that sealed the case.

14. It was a further finding that the plaintiffs/Applicants have been on the land, (on the subdivisions since the transfer) and their small sub-titles were in the process of being processed from the Co-operative Society to themselves. I have also confirmed from the court's ruling that the issue of whether there was collusion or fraud by the provincial administration was ably considered in an earlier application and the court found none on grounds that the plaintiffs behaviour during the conveyance did not speak of any collusion but agreement. This issue having been dealt with and findings made by a competent court is *Res-Judicata*. I can therefore not go into it. Basically all the issues raised in the present application were discussed and findings made by of Honourable B. K. Tanui Judge (as he then was) in his findings and forwarded to the Court of Appeal for adoption on the 6<sup>th</sup> May 1991. The Honourable Judge found that there was compromise on the dispute that lead to the transfer of 200 acres to the plaintiffs who have subdivided among themselves. It was a further finding that the agreement/compromise was lawful land bidding on the parties.

15. By this application, the applicants are asking this court to sit on appeal upon findings of a judge of equal status then. That I am not authorised to do.

See the **Judicature Act Cap 8 Laws of Kenya.**

If the applicants were not satisfied by the findings of the 6<sup>th</sup> March 1991, they ought to have moved and lodged an appeal to the Court of Appeal. They did not do so. Time has lapsed.

16. It was also submitted that the Defendant has subdivided the balance of 300 acres and sold the subdivision portions to 3<sup>rd</sup> parties. There is therefore no suit land known as **L.R. NO. 5499** that the applicants seek to be given possession of. The applicants steered away from submitting on whether or not the 300 acres they seek to be given possession of actually exists on the ground. They are in occupation of their small subdivisions on the land, the 200 acres they were given. They therefore know or ought to know who is in actual possession of the 300 acres. No doubt they failed to shed light to the court on this very vital and material information. The court will not go out on a wild goose chase to seek for information.

17. For those reasons I find the application dated 23<sup>th</sup> March 2015 without merit and an abuse of the court process. It is dismissed with costs to the Respondent.

**Dated, Signed and Delivered this 11<sup>th</sup> Day of May 2017**

**J.N. MULWA**

**JUDGE**