



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CIVIL CASE NO.105 OF 2007

LEAH KIPRUTO.....1ST PLAINTIFF

ESTHER C. KIPRUTO.....2ND PLAINTIFF

(Suing as Administrators of RICHARD KIPRUTO SIGILAI

VERSUS

JULIUS KIPKOROS ROP.....1ST DEFENDANT

JOSEPH LANGAT ROP.....2ND DEFENDANT

TAPSABEA KOSGEL.....3RD DEFENDANT

JUDGMENT

1. **Leah Kipruto and Esther C. KiPruto**, herein after referred to as 1st and 2nd Plaintiff respectively, suing as administratrixes of the estate of **Richard Kipruto Sigilai**, filed this suit through the plaint dated 21st August 2006 against **Julius Kipkoros Rop, Joseph Langat Rop** and **Tapsabea Kosgei**, hereinafter referred to as the 1st to 3rd defendant respectively, seeking for the following orders;

‘a) A declaration that the Defendants have no legal right to be on the suit land and are trespassers.

b) A permanent injunction barring the Defendants whether by themselves their agents or servants from entering upon or otherwise interfering with the Plaintiff’s quiet possession and use of the suit property.

c) General damages for trespass to property

d) A declaration that the Plaintiffs are the rightful persons to enjoy the profits emanating from the suit property and an order that the Defendants do provide accounts showing all payments made to then on account of their use of the property, an order that all such receipts be paid to the Defendants (?) and in default such receipts be recovered as a judgment debt.

e) An order directing the Defendants, their agents or servants to vacate the suit property within such time as the court may be pleased to direct and in default they be evicted therefrom and the costs of such eviction be charged on them.

f) Costs of this suit and interest at court rates and such costs and (?) on (c) from the date of

judgment until full payment.

g) Interest at court rates on the amount found payable under (d) from the date of such payments by the Defendant until full settlement.”

The Plaintiffs avers that the deceased, **Richard Kipruto Sigilai**, was the registered proprietor of land parcel No.289 **Fort –Ternan Settlement Scheme**, the suit land, and that the Defendants have without colour of right entered and hived off a portion of the land on which they have been forcefully carrying out various activities. That despite being asked to vacate and notice of intention to sue being issued, the Defendants have continued with their forcible occupation of the suit land. That the Defendants filed Muhoroni **RMCC No.13 of 2001** seeking for the plaintiffs to be enjoined from interfering with their use of the land, surrender of the title and maintenance of the boundary but that suit is yet to be prosecuted.

2. The Plaintiffs claim is denied by the Defendants through their statement of defence and counterclaim dated 24th August 2007 that was amended on 25th August 2013. They averred that their grandfather and husband namely, **Babonya Koskey**, and **Kipruto Sigilai** had contributed equally to purchase the suit land **No.068/289, Fort Ternan Settlement Scheme** and were therefore owners in common. That **Kipruto Sigilai** was registered as proprietor of the suit land to hold in trust pending subdivision. That the Defendants are jointly and severally the beneficial and equitable owners of the portion due to the late **Babonya Koskey** and therefore are not trespassers. The Defendants prays for the following in their counterclaim against the Plaintiffs;

“(a) a declaration be made that the Plaintiffs are trustees as relates half share of the said land, that they are holding the said share in trust for the Defendants and an order be issued directing them to subdivide the same into two equal parts and handover to the Defendants their equitable share thereof.

(b) Costs of this counterclaim be borne by the Plaintiff’s.”

The Defendants have set out the particulars of trust at paragraph 6 of the counterclaim which are summarized as follows;

- i) That both **Richard Kipruto Sigilai** and **Babonya Koskey** contributed equally to the purchase of the suit land.
- ii) That only one name could be entered in the title and it was agreed that the suit land be registered with **Richard Kipruto**.
- iii) That the families of **Richard Kipruto** and **Babonya Koskey** have been living on the suit land since.
- iv) That the remains of **Babonya Koskey** was interred on the suit land after his death.
- v) That there has been several decisions made in arbitration forums between the two families that they are each entitled to half share.

The Plaintiffs filed a reply to the defence and defence to the counterclaim dated 7th May 2013 denying the Defendants claim.

3. **Daniel Kiprop Bingen** testified as PW1 on the strength of the power of attorney donated by both Plaintiffs to testify on their behalf while for the defence the 1st and 2nd Defendants testified as DW1 and DW2. The Defendants also called **Fred Onyango Sago**, a former Chief at **Fort Ternan**, who testified as DW3. Mr Otieno and Onsongo advocates represented the Plaintiffs and Defendants during the hearing.

4. The following is the summary of the Plaintiff and Defendants evidence:

a) PLAINTIFFS EVIDENCE

That the suit land was acquired by the late father of PW1 in 1968 from the Settlement Fund Trustees. That the land is 170 acres and was registered in PW1 late father's name. That upon the death of **Richard Kipruto Sigilai**, on 26th August 1990, the Plaintiffs filed **Kisumu High Court Succession Cause No.296 of 1996** and obtained a grant on 10th March 1997 which was confirmed on 13th November 1997. That the Plaintiffs were then registered as joint proprietors of the suit land title number **Kisumu/Fort-Ternan/289** on 3rd October 2006 and title deed issued on 11th October 2006. That **Babonya Kosgei** started working for PW1 father on the suit land in 1969. That Babonya was married to 3rd Defendant who is deceased. PW1 confirmed that 1st and 2nd Defendants are grandchildren to **Babonya**. That the Defendants have been demanding a share of the suit land and that is why the Plaintiffs filed this suit against them. PW1 denied that the **Babonya** had contributed in the purchase of the suit land. That the Defendants have been planting coffee, sugarcane, and maize crops on the suit land without the Plaintiffs permission. That **Ogenya Arap Korir** was a neighbor to **Kipruto Sigilai** but had not contributed to the purchase of the suit land nor did he claim any portion of it. That the case filed by the Defendants **being Mohoroni Civil Case No.13 of 2001** over the same land was dismissed. PW1 said the Defendants are not entitled to the half share of the suit land that they are asking in their counterclaim. During Cross examination PW1 testified that **Kipruto Sigilai** had shown **Babonya** a portion of the suit land of about two acres to cultivate in 1972 but not to keep permanently. That **Babonya** and his wife were buried on that land after their death without the Plaintiffs raising any objection. That the Defendants increased the size of the land they were using on the suit land after filing the Muhoroni Court case. That since the sisals on the boundary were planted by PW1 father when he was about 13 years to stop their livestock from crossing to the other side of the land and not as a mark of the boundary between their portion and that of Babonya.

b) DEFENDANTS EVIDENCE

That their late grandfather, **Babonya Arap Kosgei**, acquired the suit land jointly with the late Richard **Kipruto Sigilai** and shared it among themselves equally and have been using it that way since. That DW1 was born 40 years ago and DW2 in 1961. That DW1 was born on the suit land while DW2 started residing on it after it was bought. That the land was registered **in Richard Sigilai's** names and the two families lived without any disputes until after the deaths of **Richard Sigilai and Babonya** when the Plaintiffs demanded that the Defendants vacate. That the Defendants declined to vacate and the dispute was heard by the elders, Assistant Chief and the Chief at different times. That the family of **Richard Kipruto** later offered the Defendants a ten acre portion and the agreement was reduced into writing by DW3. That the matter was then taken to the Magistrate's Court from where it was referred to the Tribunal who ruled that the two families maintain the boundary as it was. That the Defendants have been planting coffee, sugarcane, maize, bananas and trees on their portion of the suit land. During cross examination DW1 stated that his grandfather, **Babonya**, died in 1986 while **Richard Sigilai** died in 1990. That they had filed objection proceedings in Kisumu H.C. Succession Cause No.296 of 1996 to challenge the grant and distribution. That the Defendants had not obtained a grant in respect of their grandfather's (Babonya) estate. That the 3rd Defendant who was a widow to **Babonya** died in 2009. That though the order dated 6th October 2011 appear to have been served on their advocate and Muhoroni Sugar Company the Defendants were not aware about it and have continued using the suit land without being stopped by the Plaintiffs. That they are using 20 acres to grow sugar cane, five acres for coffee and substance crops on about seven acres. That the Plaintiffs have not approached the Defendants to open a joint account for the sugarcane and coffee proceeds. That one **Korir** who had also participated in the purchase of the suit land was reported by one **Ezekiel Odeny** during one of the parties arbitration forums to have been given Kshs.5000 by **Richard Kipruto Sigilai** to buy another land for himself.

5. The following are the issues for the court's determination;

- a) When the Defendants settled on the suit land.
- b) Whether the Defendants are trespassers.
- c) Which of the prayers sought by the Plaintiffs against the Defendants should issue.
- d) Whether the Plaintiff hold title to the suit land as trustees for the Defendants, and if so whether Defendants are entitled to half share of the suit land.
- e) Which of the prayers sought by the Defendants against the Plaintiffs in their counterclaim should issue.
- f) Who pays the costs of the Plaintiffs suit and Defendants counter claim.

6. The court has considered the pleadings by both parties, evidence by PW1, DW1 and DW2, the submissions by the parties counsel and come to the following conclusions:

- a) That the 3rd Defendant having died in 2009 and not having been substituted, the Plaintiffs case against her lapsed. That the 3rd Defendant case against the Plaintiffs in the counterclaim could not have continued after her death and is struck out.
- b) That the letter of offer from the Ministry of Lands dated 1st January 1972, and the Charge of even date produced by PW1 as exhibit one shows **that Kipruto A. Sikilai**, whom the court takes to be the Plaintiffs late husband, was allotted two parcels of land numbers **289 and 689 Fourt Ternan Settlement Scheme**. That on accepting the offer the deceased (allottee) paid Sh.140/= and executed a charge of Kshs4,500/= which he was to pay in fifty (50) installments of Sh.183/= at half yearly intervals. That the evidence adduced by both the Plaintiffs and Defendants shows that their families had taken possession of the suit land before the formal documents were issued and executed. That according to PW1, his late father bought the land in 1968. That was confirmed by DW2, who was reportedly born in 1961.
- c) That while Defendants claim that their late grandfather, **Babonya**, contributed to the purchase of the suit land equally with the late **Richard Kipruto**, there are no documentary evidence availed to confirm that contention. That however, the late **Babonya** and **Richard Kipruto** moved onto the suit land at the same time either in 1968 or 1969. That the Defendants have taken that fact and the way their family has continued to use their portion of the suit land as a confirmation that indeed their late grandfather was an equal partner in the acquisition of the land. That the Plaintiffs case is that the late **Babonya** was an employee of the late **Richard Kipruto** to work on the suit land and had been allowed to use about two (2) acres of the land, but his family has continued to increase the acreage of the land under their use to the current size. That the Plaintiffs have however failed to avail evidence to show that the late **Babonya** was indeed an employee of their late husband. That the fact that the Defendants have planted cash crops like coffee and sugarcane and continued to use their portion of the suit land from the 1968 or 1969 without the late **Richard Kipruto** asserting his right over that portion until he died in 1990 shows that they were entitled to it. That the Defendants continued occupation of the suit land does not amount to trespass.
- d) That the Defendants occupation of the suit land may or may not have been with the consent of the late **Richard Kirpruto**. That if it was not with his consent or permission, then their occupation was adverse to his title. The 2nd Defendant started living on the suit land in the 1968 while the 1st Defendant was born on the suit land in 1976. That they initially derived their right to occupy the land from their grandfather, the late Babonya. That after the death of Babonya who reportedly died in 1986, about four years before the late **Richard Kipruto**, the Defendant continued occupying the land. That the court take the Defendants occupation of the suit land from the date of the late **Babonya's** death to be the commencement of their adverse possession of the suit land. That Late **Richard Kipruto** as the registered proprietor of the suit land then, and the Plaintiffs as the

administrators of the suit land and current registered proprietors of the suit land, did not take any legal steps to reassert their possession over the portion of land occupied by the Defendants before the expiry of twelve (12) years. That by the time the Plaintiff filed this suit in 2007, the same was statute barred in terms of **Section 7 of the Limitation of Actions Act Chapter 22 of Laws of Kenya**. That the outcome of **Muhoroni RM CC NO.13 of 2001**, which had been initiated by the Defendants against the Plaintiffs herein, did not stop the time running in favour of the Defendants. That suit was a manifestation of the Defendants sence of entitlement to the suit land.

e) That even though the Defendants statement of defence and counterclaim did not specifically raise a defence or claim based on adverse possession, the evidence adduced shows that the Defendant have been in occupation of the suit land without the Plaintiffs permission for over twelve (12) years without any interruption. That the Defendants have settled on a portion of the suit land on which they have planted cash crops and other trees and when asked to vacate by PW1 after the death of his father, they declined and instead demanded the land to be subdivided and they get a title for the portion under their use. That the Plaintiffs have lost their right to recover the land under **Section 7 of the Limitation of Actions Act chapter 22 of Laws of Kenya**. That none of the prayers sought by the Plaintiffs against the Defendants has merit.

f) That neither the 1st nor the 2nd Defendants has been appointed the administrator of the 3rd Defendant's estate to enable them defend or initiate a suit on behalf of the 3rd Defendant's estate. That as earlier pointed out the 3rd Defendant was never substituted after her death in 2009 and Plaintiffs case against her has abated.

g) That the Defendants are grandchildren to the late Babonya **Koskey** whom they claim bought the suit land with the late **Richard Kipruto Sigilai**. That the Defendants counterclaim is premised on the basis that the late **Richard Kipruto** got registered with the suit land as trustee for the late **Babonya Koskey**. That the Defendants have not been appointed the administrators of the late **Babonya's** estate and they lack capacity to lodge a suit for the benefit of **Babonya's** estate. That on that basis their counterclaim fails.

7. That flowing from the foregoing the court find that both the Plaintiffs and the Defendants have failed to prove their respective claims against the other parties to the standard required of balance of probabilities. That the court therefore orders as follows:

- a) That the Plaintiffs suit against the Defendants, under the Plaint dated 21st August 2006 is dismissed.
- b) That the Defendants counterclaim against the Plaintiffs under the counterclaim dated 25th April 2013 is dismissed.
- c) Each party bears their own costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 5TH DAY OF OCTOBER 2016

In presence of;

Plaintiffs Daniel Kiprop present

Defendants 1st and 2nd present

Counsel Mr Adiso for Oteino for Plaintiffs.

Mr Osongo for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/10/2016

5/10/2016

S.M. Kibunja J

Oyugi court assistant

Plaintiff and 1st and 2nd Defendant present

Mr Adiso for Otieno for Plaintiff.

Court: The Judgment dated and delivered in open court in presence of both Mr Adiso for Otieno for Plaintiffs Mr. Osongo for the Defendants plus 1st and 2nd Defendants and Mr Daniel Kiprop standing in for Plaintiffs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/10/2016