



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 153 OF 2013**

**[Formerly Eldoret Hccc No. 49 of 2012]**

**JOHN CHEPKWONY CHEBII.....1<sup>ST</sup> PLAINTIFF**

**TIMOTHY KIPROTICH CHEBII.....2<sup>ND</sup> PLAINTIFF**

***[Both suing as administrators of the estate of the deceased - CHEPKURUI KETURE]***

**VERSUS**

**SIMON CHELANG'A.....DEFENDANT**

**JUDGMENT**

1. **John Chepkwony Chebii** and **Timothy Kiprotich Chebii**, the Plaintiffs, suing as administrators of the estate of Chepkurui Keture, the deceased, commenced these proceedings through the Plaint dated 20<sup>th</sup> March, 2012 seeking for permanent injunction, eviction, and refund of Shs.130,000 with his Counsel, less costs and damages they incurred surrendering the half acre. They also pray for costs and interest. The Plaintiffs aver that they are cousin and grandson of the deceased who passed on the 18<sup>th</sup> July, 1978. That the deceased was the registered owner of ***Elgeyo Marakwet/Kapsowar/394***, suit land, measuring 0.9 hectares and that they were issued with letters of administration Ad Litem on the 29<sup>th</sup> February, 2012 in ***Eldoret High Court Ad Litem Succession Cause No. 19 of 2012*** in respect of the deceased's estate. That the Defendant unlawfully or without consent trespassed onto a portion of half acre of the suit land alleging that it had been sold to him by **David Boit** for Kshs.130,000. That efforts by the Plaintiffs to refund to the Defendant Kshs.130,000 he had allegedly paid David Boit did not succeed, and hence this suit.

2. The Plaintiffs' claim is denied by the Defendant through the defence dated the 8<sup>th</sup> July, 2012. The Defendant disputes that the Plaintiffs are administrators of the deceased's estate and that he had trespassed onto the suit land. He also denied being requested to accept refund of Shs.130,000 and being served with a demand notice. The Defendant prays for the suit to be dismissed with costs.

3. The 1<sup>st</sup> Plaintiff testified as **PW1**. He told the Court that about twenty years ago, one David Boit (**PW2**) was allowed by the deceased to stay on the half acre of the suit land. That about 2011, PW1 was notified by the 2<sup>nd</sup> Plaintiff that David Boit was selling the portion of the land to the Defendant. PW1 travelled home and was shown the sale agreement dated 5<sup>th</sup> August, 2011 for half acre at Kshs.130,000. That David Boit admitted making a mistake in selling the land, and he wrote a letter dated 24<sup>th</sup> August, 2011 nullifying the sale agreement but the Defendant refused to accept the nullification. That the Defendant wrote through his advocate the letter dated 26<sup>th</sup> August, 2011 demanding refund of the Shs.130,000 plus interest. That they asked David Boit to refund the money but he claimed he had used it, and asked the Plaintiffs' family to refund. That the Plaintiffs deposited the Shs.130,000 with their advocate, to forward to the Defendant's advocate. That the Advocate for the Defendant informed them that the Defendant was far away and later stopped responding to their advocate's correspondence on the matter. The Plaintiffs then obtained the letter of administration Ad Litem dated 29<sup>th</sup> February, 2012 and filed the suit seeking for Defendant to be evicted from the suit land, and costs of the suit. That the money they deposited with their Advocate be released to the Defendant, less their costs. During cross examination, PW1 confirmed that they had sold one acre of land to the Defendant from the suit land and that transaction has no dispute. That David Boit had lived on the half acre now in dispute for about 15 (fifteen) years, before selling it to the Defendant who has been in occupation for about three (3) years. That the Defendant had not indicated that he was amenable to a refund of the purchase price when David Boit wrote the document nullifying the sale agreement. The Plaintiffs called David Boit who testified as PW2. He told the Court that he had sold the Defendant the half acre land and developments for Shs.130,000 on the 5<sup>th</sup> August, 2011 but the family of the deceased declined to sanction the sale. That the family decided to refund the purchase price. That he later learnt that Defendant had declined to receive it. The 2<sup>nd</sup> Plaintiff testified as PW3 adopting his statement dated 20<sup>th</sup> March, 2012 more or less confirming what PW1 and PW2 had told the Court in their testimonies. That by consent of both Counsel, Alunga Advocate's letter dated the 15<sup>th</sup> September, 2015 and marked **MFIP.6** was admitted as Plaintiff's **exhibit P6** without calling the author on the 7<sup>th</sup> November, 2019 after which the Plaintiffs closed their case.

4. The Defendant testified as **DW1**. He adopted his statement dated 14<sup>th</sup> August, 2012. He told the Court that he bought the first portion of

the suit land on 2<sup>nd</sup> April, 2011. The land measured 15 by 25 metres and the seller was **Joshua Kanago Chebii**, a grandson to the deceased. That the witnesses included the 2<sup>nd</sup> Plaintiff (**PW3**). That the second portion of the suit land he bought was on 5<sup>th</sup> August, 2011 and was from PW2 for Kshs.130,000. The land was half an acre. That he had on 2<sup>nd</sup> June, 2003 bought another portion from **Tapmining Kimoi Chebii** for Shs.35,000. That he obtained a letter of consent dated the 22<sup>nd</sup> December, 2010 to subdivide the suit land. That the land dispute Tribunal case had ruled that parcel 407 had encroached onto the suit land by ¼ (a quarter) acre. He denied trespassing onto the suit land. That even though the suit land belonged to the deceased, he had entered into sale agreements with those who sold the portions to him, and was therefore not a trespasser. That during cross examination, DW1 agreed that the deceased, who is still the registered proprietor of the suit land, died on the 18<sup>th</sup> July, 1978 before his birth. That the deceased family had not done succession of the estate by the time he bought the three portions under the three agreements detailed above. That he declined the refund of the Shs.130,000 as it had not catered for the developments thereon. That the letter of consent should have read subdivision of parcel 407 and not parcel 394. That by the time the said letter of consent was issued, the owner of parcel 394 had passed on.

5. That the learned Counsel for the Plaintiffs and Defendant filed their written submissions dated 27<sup>th</sup> July, 2020 and 26<sup>th</sup> May, 2020 respectively.

6. The following are the issues for the Court's determinations;

**(a) Whether the agreement of 2<sup>nd</sup> August, 2011 over sale of ½ acre of the suit land for Kshs.130,000 between PW2 and the Defendant is enforceable.**

**(b) Whether the Defendant is a trespasser on the said land.**

**(c) Whether eviction and permanent injunction order should issue.**

**(d) Who pays the costs:**

7. The Court has carefully considered the pleadings by both parties, the oral and documentary evidence by **PW1** to **PW3** and **DW1**, the written submissions by both learned Counsel for the parties, the superior court's decisions cited therein and come to the following determinations;

(a) That both the Plaintiffs and the Defendant have admitted that land parcel **Elgeyo Marakwet/Kapsowar/394**, which was first registered on the 29<sup>th</sup> March, 1977 is owned by the **Chepkurui Keture** who passed on the 18<sup>th</sup> July, 1978. That the certificate of official search produced as **exhibit-P1** by PW1 confirms that indeed, the said land was and is still registered in the name of Chepkurui Keture, the deceased. That it further confirms that Simon Chelang'a, who the Court takes as the Defendant herein, had filed a restriction, claiming beneficiary's interests on the 7<sup>th</sup> September, 2011.

(b) That though the Defendant had in his statement of defence disputed that the Plaintiffs are administrators of the estate of the deceased, there was no objection to the production as exhibit-P4 of the Limited Grant of Letters of Administration Ad Litem dated the 29<sup>th</sup> February, 2012 issued in **Eldoret High Court Ad Litem Succession Cause No. 19 of 2012**. That the Plaintiffs filed this proceedings on the 20<sup>th</sup> March, 2012 which is less than one month from the date of issuance of the said letters of administration. That as there is no evidence that the appointment of the Plaintiffs under the said letters of administration has been successfully challenged before the succession court that issued it or on appeal, the Court finds and holds that the Plaintiffs are with capacity to file and prosecute this suit in the name and on behalf of the estate of the deceased.

(c) That though the Defendant had entered into three (3) sale agreements, over three different portions of the suit land, with different sellers including David Boit (**PW2**), the finding in (a) above leads to the conclusion that the portions subject matter of the three sale agreements were not registered in the names of the alleged sellers (vendors). The land subject matter of the three sale agreements was, and still is registered in the name of Chepkurui Keture who had passed on the 18<sup>th</sup> July, 1978. That the provisions of **Section 2, and 45 of the Law of Succession Act Chapter 160 of Laws of Kenya** outlaws the taking of possession, disposing or otherwise intermeddling with the property of a deceased person without a grant of representation or outside the provisions of the Act or other written law. That as David Boit (**PW2**) had not been appointed the administrator of the estate of the deceased, and did not hold a confirmed grant issued under the Law of Succession Act, the sale agreement he entered into to sell a half acre of the suit land that is registered in the name of the deceased to the Defendant was for all intents void ab initio and incapable of conferring any proprietary rights to the Defendant.

(d) That flowing from (c) above, and the admission of PW2 that he had sold the half acre of land to the Defendant that he had occupied for many years, which was confirmed by PW1 and PW3, and the sale agreement produced as exhibit, the entry by the Defendant onto the said portion of land did not however amount to trespass. The Defendant had paid Kshs.130,000 to PW2 believing he had capacity to sell the said land to him, the same way the two other grandchildren to the deceased had sold to him two other portions. That the claim that Defendant was a trespasser therefore fails.

(e) The Plaintiffs had demonstrated their determination and preparedness to refund the purchase price the Defendant had paid PW2 for the half acre by depositing the Kshs.130,000 with their advocates. That the Defendant however, declined to receive the refund and in his evidence in Court, he indicated that he is **"ready to receive the purchase price of Kshs.130,000 and developments thereon"**. That the value of the developments done by the Defendant if any, was not given by the Defendant or the Plaintiffs. The Defendant confirmed in his evidence that he had not done any valuation for the developments on the said portion. That there being no counterclaim by the Defendant, the Court is unable to pronounce itself on whether or not the Defendant is entitled to any compensation for the alleged developments on the said portion of the suit land.

(f) That in view of the fact that PW2, the Vendor, was treated as a witness for the Plaintiffs, instead of a co-defendant to the Defendant for his role in selling the land of the deceased, and considering that the Defendant's two other transactions over portions of the said land appear not to have been challenged by the Plaintiffs, the Court is of the view that each party bears their own costs in this suit.

8. That the Court therefore finds that the Plaintiffs have proved their case against the Defendant on a balance of probabilities. The court enters judgment for the Plaintiffs against the Defendant and orders as follows;

*(a) That the sale agreement under which the Defendant bought half acre of **Elgeyo Marakwet/Kapsowar/394** from David Boit on the 2<sup>nd</sup> August, 2011 was void ab initio for failure by the alleged Vendor to comply with the provisions of the **Law of Succession Act Chapter 160 of Laws of Kenya and Land Control Act Chapter 302 of Laws of Kenya.***

*(b) That as the basis upon which the Defendant took possession of the said portion of the suit land has been declared void ab initio, the Defendant is hereby ordered to give vacant possession of the said portion of land back to the estate of the deceased within the next 90 (ninety) days or be evicted in accordance with the law.*

*(c) That upon the Defendant giving vacant possession of that portion or being evicted, he is to remain permanently enjoined from interfering with that portion of the suit land without the permission or consent of the administrators of the estate of the deceased.*

*(d) That each party bears their own costs in the suit.*

Orders accordingly.

**Delivered virtually and signed at Eldoret this 30<sup>th</sup> day of September, 2020**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiffs: No appearance.

Defendants: No appearance.

Counsel: M/s Kiptoo for Defendant

Court Assistant: Christine

and the judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.