



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL CASE NO.91 OF 2005

ANDREW KETER KIRUI.....PLAINTIFF

VERSUS

ALI HASSAN KETER.....DEFENDANT

JUDGMENT

In the Complaint dated 30th August 2005, **Andrew Keter Kirui**, the Plaintiff herein, whereof he sought for judgment against **Ali Hassan Keter**, the defendant herein, in the following terms:

- a. **An eviction order issued against the defendant and/or any other person using, cultivating or occupying land parcel L.R.no. Kericho/Kipchimchim/2366 under the authority of the defendant together with a further order of a permanent injunction restraining the defendant from interfering with the Plaintiff's quiet use, Possession and occupation of the suit land.**
- b. **Costs of this suit together with interests.**
- c. **Any other and/or further relief deemed fit and just to grant by this honourable court.**

The Defendant, resisted the Plaintiff's claim alleging that the Plaintiff obtained title in respect of the aforesaid parcel of land fraudulently. The evidence relating to this case were substantially taken before the Hon. Mr. Justice L. Kimaru and completed by Lady Justice Ang'awa. The honourable Judges have since then been transferred from this station. Pursuant to the Provisions of Civil Procedure Act, learned counsels appearing in this case recorded a consent order to have this court write and deliver judgment based on the evidence taken before the Hon. Justice L. Kimaru and Lady Justice M. Ang'awa.

The Plaintiff's case is supported by the evidence of four witnesses. Andrew Keter Kirui (P.W.1) told this court that his late grandmother, Tapnyole Chepkirui Maritim alias Tapnyole w/o Chabali, gave him L.R.Kericho/Kipchimchim/2366 as a gift in appreciation of P.W.1's care for her. P.W.1 explained in detail the steps taken to have the aforesaid parcel excised from parcel no. Kericho/Kipchimchim/552. It is the evidence of P.W.1 that the late Tapnyole w/o Chabali being the registered proprietor of L.R.no.Kericho/Kipchimchim/552, duly applied for consent and attended the Land Control Board meeting and obtained consent to subdivide the aforesaid land into three equal portions vizly:

- i. **L.R.no. Kericho/Kipchimchim/2366**
- ii. **L.R.no. Kericho/Kipchimchim/2367**
- iii. **L.R.no. Kericho/Kipchimchim/2368**

P.W.1 identified the application for consent forms, the letter of consent and transfer forms which were duly executed by the late Tapnyole w/o Chabali. From the evidence tendered by P.W.1 it is apparent that

the aforesaid parcels were given out as follows:

- i. **L.R.no.Kericho/Kipchimchim/2366-Andrew Keter Kirui.**
- ii. **L.R.no.Kericho/Kipchimchim/2367-Yusuf Kiprono Kirui.**
- iii. **L.R.no.Kericho/Kipchimchim/2368-Ibrahim Kimabwai Kirui.**

Upon obtaining title, P.W.1 said he proceeded to fence the land but allowed his late father Kipketer Arap Kirui to continue cultivating the same. Upon the death of his father PW1 said, that his brother Ali Hassan Keter, the defendant herein, prevented him from taking possession and occupation. It is alleged that the defendant chased the Plaintiff threatening to cut him using a panga. The Plaintiff issued a demand notice but the Plaintiff was forced to file this suit when the Defendant persisted in his acts of defiance. P.W.1 summoned Grace Korir (P.W.2) the former Land Registrar to testify in support of his case. P.W.2 stated that the application for consent to transfer by Tapnyole Chepkirui Maritim to Andrew Keter Kirui of L.R.no. Kericho/Kipchimchim/2366 was approved on 2nd August 1991. P.W.2 produced the application for consent forms, the letter of consent and the transfer as exhibits in evidence. P.W.2 further stated that the caution lodged by Kipketer Arap Kirui was later removed. P.W.2 confirmed that the land was eventually transferred and registered in the name of the Plaintiff in 1997. P.W.2 confirmed that the transfer was properly done according to law on the basis of a properly issued consent. Irene Maiyo (P.W.3), the then Secretary to the Land Control Board was also summoned to testify in support of the Plaintiff's case. P.W.3 produced in evidence as exhibits minutes of the Belgut Land Control Board showing that consent transfer L.R.no. Kericho/Kipchimchim/2366 to the Plaintiff was given on 2nd August 1991. She also produced minutes in which the Land Control Board had approved the subdivision of L.R.no. Kericho/Kipchimchim/552 into three equal portions. P.W.3 further gave evidence of minutes showing correction of names and duly signed to acknowledge those corrections. Yusuf Kirui (P.W.4), an uncle to P.W.1, also testified in support of the Plaintiff's case. It is the evidence of P.W.4 that his late mother Tapnyole w/o Chabali subdivided her land i.e L.R.no. Kericho/Kipchimchim/552 into three equal portions, gave a portion each to him, his late brother Ibrahim and the Plaintiff. P.W.4 clearly stated that the transfers were done openly, properly and hence legitimately given to the Plaintiff with no objection. On the basis of the above evidence the Plaintiff beseeched this court to give him judgment as prayed in the Plaintiff.

A total of four witnesses also testified in support of the defence case. Stephen Kambaga (D.W.1), a land registrar for Kericho-Bureti Districts produced the green card relating to L.R.no. Kericho/Kipchimchim/552. The aforesaid document indicated that title was issued to Tapnyolei w/o Chabali on 13/08/1973 and title closed on 15/01/1992 upon sub-division. D.W.3 stated that before subdivision, there was a caution registered by Kipketer Arap Kirui claiming beneficial interest lodged on 28/06/1991 but was removed on 15/01/1992 by an order of the land registrar pursuant to **Section 133(2) (b) of the Registered Land Act**. Ali Hassan Keter (D.W.2), the defendant herein, confirmed that he resides on L.R.no. Kericho/Kipchimchim/2366, the suit land with his brothers and their families. He claimed he was born on the land where he grew up and settled. D.W.2 further stated that his mother and father were buried on the land in question.

He alleged that he thought the land was registered in the name of their later father Kipketer Arap Kirui but he has now learnt that it is actually registered in the name of his step-brother the Plaintiff. D.W.2 said the land belongs to the family hence the title should be cancelled and be reissued to the beneficiaries. He claimed the portion which was registered in the name of the Plaintiff was meant to be a share of their late father hence the same should revert back to him to enable him and his siblings share. In cross-examination the Defendant admitted that the land was registered in the name of Tapnyole w/o Chabali.

D.W.2 claimed his grandmother gave the land to his father before she died. D.W.2 further admitted that L.R.no. Kericho/Kipchimchim/2366 was transferred to the Plaintiff during the life time of their father. The defendant also said that he currently resides in the house previously occupied by his late father. He claimed his father had objected to the land being transferred to the Plaintiff. Though the defendant initially claimed he had no land, he admitted in cross-examination that he inherited a portion of

L.R.NO.Kericho/Kipchimchim /694 after subdivision upon the death of their father. He also admitted that most of those subdivisions arising from L.R. NO. Kericho/Kipchimchim/694 have already been sold. He further admitted that he executed some of those agreement and transfers.

Betty Cherop (DW3) confirmed that she and her siblings reside on the suit land which she claims they grew up. DW3 further admitted in her evidence that she had another land which she sold so that she can built on the land in dispute. DW3 the land is family land. She also confirmed that their father owned other parcels of land. Stephen Arap Rop (DW4) confirmed that the land in dispute was subdivided from a parcel of land originally owned by their late grandmother. DW4 claimed the land is family land but also acknowledged that it was given to the plaintiff.

After considering the evidence presented to this court, the following issues have arising for my determination:

- i. **Whether or not the parcel of land known as L.R.NO. Kericho/Kipchimchim/2366 is family land.**
- ii. **Whether or not the aforesaid parcel of land formed part of the Estate of Kipketer Arap Kirui, deceased.**
- iii. **Whether or not Andrew Keter Kirui fraudulently acquired the land.**
- iv. **Whether or not the plaintiff is entitled to the orders sought.**

Let me start with the first issue as to whether or not the parcel of land known as L.R.NO.Kericho /Kipchimchim/2366 is family land?There is no dispute that the aforesaid parcel of land is a subdivision of L.R.NO. Kericho/Kipchimchim/552. The mother title was registered in the name of Tapnyole w/o Chabali who subdivided it into three equal portions. During her life time, the late Tapnyole w/o Chabali gave her two sons namely: Yusuf Kirui and Ibrahim Mabwai a portion each. She then gave the land now in question to the Plaintiff. It cannot therefore be said that L.R.NO.Kericho/ Kipchimchim/2366 is family land. The late Tapnyole w/o Chabali meant to give the aforesaid parcel to the plaintiff as his own and not to hold it in trust for the family. Therefore my answer to first question is that the land in dispute is not family land.

The second question is whether the parcel of land formed part of the Estate of Kipketer Arap Kirui, deceased. It is clear from the evidence tendered that the late Tapnyole w/o Chebali transferred proprietorship of the suit land to the plaintiff intervivos and at that time the late Kipketer Arap Kirui was alive. At the time of his death, L.R.NO. Kericho/Kipchimchim/2366 was registered in the name of the Plaintiff. In short, the suit land did not form part of the Estate of Kipketer Arap Kirui, deceased.

The third issue is whether or not the plaintiff fraudulently acquired the suit land. I have carefully considered the evidence tendered. The evidence of PW1, PW2, PW3 and PW4 are in agreement that all the necessary procedures were followed by the Plaintiff to have the land in question registered in his name. There is no iota of evidence tendered by the defendant and his witnesses to prove the allegation of fraud. The only piece of evidence which purported to show that probably the plaintiff committed fraud is the fact that the land control board consent was obtained when there was a caution registered against the title by the late Kipketer Arap Kirui. What is not in dispute is that transfer was not done before the removal of the caution. According to the evidence of DW1, the caution was removed by the Land Registrar pursuant to the provisions of **Section 133** of the **Registered Land Act**. In my humble view, it cannot therefore be said that the plaintiff fraudulently obtained title. I concur with evidence of PW1,PW2,PW3 and PW4 that the plaintiff was properly registered as the proprietor of the suit land.

The last question is whether or not the plaintiff is entitled to the orders sought. Having been found to be the lawful registered proprietor of L.R.NO. Kericho /Kipchimchim/2366, the Plaintiff is obviously entitled to the rights of a registered proprietor. The Defendant has purported to present himself as landless yet there was clear evidence that he was given the inheritance of his late father. He is not entitled by land

to lay a claim over the land in question whose proprietary interest was passed to the plaintiff way back in 1991. The Defendant moved in to reside in the house left behind by their late father. He has no claim over the suit land known in land. He remains a mere trespasser hence he should give way. In the end, I enter judgment in favour of the Plaintiff and against the Defendant as prayed in the Plaint in the following terms:

- i. The Defendant and or any other person using, cultivating or occupying L.R.NO. Kericho/ Kipchimchim/2366 is/are ordered to vacate the aforesaid parcel within a period of 45 days in default the Plaintiff to be at liberty to have them forcefully evicted without further reference to this court.**
- ii. A permanent injunction is issued to restrain the Defendant from further interfering with Plaintiff's quiet possession, use and occupation of the suit land.**
- iii. The Defendant to pay costs of the suit.**

Dated, Signed and delivered in open court this 14th day of March, 2014.

.....

J.K.SERGON

JUDGE

In the absence of parties but with Notice.