



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CIVIL SUIT NO. 119 OF 2012**

**1. TABARNO BUSIENEI alias Martha Jepkimo Busienei**

**2. MOSES THUKU MWANGI.....PLAINTIFFS**

**VERSUS**

**SUSAN KIPRONO.....DEFENDANT**

**J U D G E M E N T**

**INTRODUCTION**

1. The Plaintiffs brought this suit against the defendant claiming the following reliefs;-

*(a) An order that the registration of the defendant as owner of the land comprised in Title No. Trans-Nzoia/Sinyerere/36 on the 23/8/2012 be cancelled.*

*(b) An order be made that eleven acres and ten acres respectively being part of the land comprised in Title No. Trans-Nzoia/Sinyerere/36 be transferred to the first and second plaintiffs respectively in terms with the subsisting previous court judgements in Eldoret HCCC No. 170 of 1991, Kitale SPMC Land Case No. 30 of 1996 and Kitale CMC Land Case No. 13 of 2004.*

*(c) Temporary and permanent injunctions.*

*(d) Costs.*

*(e) Interest.*

*(f) Any other relief that this Honourable court may deem fit to grant.*

2. The defendant filed her defence and raised a counter-claim in which she seeks the following reliefs;-

*(a) Dismissal of the plaintiffs suit.*

*(b) A declaration that the defendant is the registered and absolute owner of land parcel No. Trans-Nzoia/Sinyerere/36.*

*(c) An order of eviction ordering the removal of the plaintiffs, their assigns, agents, servants and/or any other persons acting on their behalf and their property from land parcel number*

*Trans- Nzoia/Sinyerere/36.*

*(d) A permanent injunction restraining the plaintiffs from entering or trespassing into, cultivating, leasing, selling and/or dealing in any manner with land parcel No. Trans-Nzoia/Sinyerere/36.*

*(e) Mesne profits from 1991.*

*(f) Costs of the counter-claim.*

3. The second plaintiff Moses Thuku Mwangi was substituted in place of his deceased father Joseph Ikegu Thuku who was the original second plaintiff.

### **PLAINTIFFS CASE**

4. The first plaintiff testified that she is 87 years old and has been staying on the suit land since 1970. She testified that she was brought to the suit land by Kiprono Tanui who has since died. In 1970 she bought the suit land from Kiprono Tanui. The payment of the purchase price was made through his brother Kimutai Arap Bii. Kiprono Tanui later moved from the suit land and went to work at the farm of one Robert. Before Kiprono Tanui moved out, he sold his grass thatched house and a small store to her.

5. The first plaintiff later heard that Kiprono Tanui had become sick and moved to Nandi where he died, in 1988. Two of Kiprono Tanui's brothers visited her at Sinyerere and told her that they wanted their brother's land. The two brothers of Kiprono Tanui were Kipngetich Arap Kirui and Sambai Arap Koskei. The first plaintiff later learnt that Kiprono Tanui's two brothers had taken out letters of administration in respect of the estate of their later brother. The two were in the process of having the suit land registered in their name when she moved to Eldoret High Court and filed Civil Case No. 170 of 1991(OS). She was seeking to be declared owner of the suit land by adverse possession. The case was heard and concluded. She was given 22 acres out of the 32 acres. The administrators of the estate of Kiprono Tanui were given 10 acres. The administrators of the estate of Kiprono Tanui sold their portion to one Kimaiyo Siratei who in turn sold the land to Joseph Ikegu Thuku the father to the second plaintiff.

6. The first plaintiff's brother Kimutai Arap Bii sued the first plaintiff before Kipsaina Land Disputes Tribunal claiming a share of the 22 acres which the High Court at Eldoret had given to the first plaintiff. The elders at Kipsaina Tribunal ruled that the plaintiff and his brother share the 22 acres equally. The verdict of the Tribunal was adopted as judgement of the court vide Kitale Senior Principal Magistrate's Court Land Case No. 30 of 1996. Each of the two got 11 acres.

7. As the first plaintiff was trying to process title for her 11 acres, she learnt that the defendant had obtained grant of letters of administration in respect of the estate of Kiprono Arap Tanui. She filed objection proceedings in High Court Succession Cause No. 237 of 2009 at Kitale. The objection was dismissed on grounds that it had not been proved that Kiprono Arap Tanui, Kiprono Tanui Kipngetich and Kiprono Tanui referred to one and the same person.

8. The first plaintiff testified that Kiprono Arap Tanui was not married and that he did not have any children. That Kiprono Arap Tanui died and was buried in Nandi. That Kiprono Tanui died on 10/3/1988. A certificate of death was issued to that effect. This is the certificate which was used by Kiprono Arap Tanui's brothers to obtain grant of letters of administration at Kitale vide Kitale Succession Cause No. 24 of 1988.

9. The first plaintiff testified that there was another death certificate which shows that Kiprono Arap Tanui died on 1/3/1990. This is the certificate which the defendant used to obtain letters of administration in respect of the estate of Kiprono Arap Tanui. She contends that this death certificate was obtained by the defendant through concealment of material facts. She testified that the certificate showing that Kiprono Tanui died on 1/3/1990 has since been cancelled on the grounds that the same was obtained fraudulently for ulterior motives.

10. The first plaintiff testified that the defendant was aware that there was a succession cause which had been commenced earlier on but she decided to go ahead and commenced another succession cause using a death certificate obtained illegally. The first plaintiff also contended that the defendant did not disclose that there were other cases which had been concluded before the succession cause which she undertook in 2009. She testified that the defendant has since obtained title in respect of the entire plot No. 36. The registration was based on the grant which was obtained based on a succession cause where a death certificate which was used, has since been cancelled.

11. The first plaintiff testified that no appeals have been preferred against the Judgements in Eldoret HCCC No. 170 of 1991, Kitale SPM Land Case No. 30 of 1996 and Kitale C.M. Land Case No. 13 of 2004.

### **DEFENDANT'S CASE**

12. The defendant testified in this case through her son William Kipkosgey Serem to whom she had granted a power of attorney. This is because she is said to have sustained severe burns which interfered with her voice. The defendant's son testified that the defendant is wife of Kiprono Arap Tanui who died in 1990 and was buried at Sinyerere. The defendant's son testified that after the death of his father there was an incident in 1991 where the first plaintiff hit a tin lamp which was lit in the defendant's house at Sinyerere. This caused the tin lamp to burn the defendant. That after this incident, the first plaintiff and her brother Kimutai Arap Bii started residing on the suit land.

13. The defendant's son testified that he attempted to come back to the suit land but was chased away by the first plaintiff and her brother. The two then went to Eldoret where they filed a succession cause in respect of the estate of Kiprono Tanui Ngetich who is alleged to have died in 1988. When he got wind of what was happening, he went and lodged a caution against the title for plot 36, Sinyerere.

14. The defendant's son testified that he filed a case in Eldoret which resulted in the nullification of the grant issued. His mother then filed a Succession cause where she was granted letters of administration. After the grant was confirmed, her mother became the registered owner of the suit land by way of transmission. As they were preparing to take possession of their land, they were served with summons in this case. He testified that he was advised that if he wanted to get the land, he should change the certificate of death of his father. He was given forms to fill but as at the time he was concluding his evidence he had not filled the succession forms.

### **ISSUES FOR DETERMINATION**

15. I have carefully gone through the pleadings herein, the evidence as well as the submissions filed herein. The issues which have emerged for determination are as follows.-

***(a) Whether the registration of the defendant as the owner of the suit land was obtained fraudulently, with concealment and misrepresentation of material facts.***

***(b) Whether Kiprono Arap Tanui and Kiprono Tanui are one and the same person.***

***(c) Whether the first and second plaintiffs are occupying 11 and 10 acres of the suit land legally and whether orders of eviction should issue against them.***

### **ANALYSIS OF EVIDENCE**

16. What prompted the plaintiffs to bring this suit against the defendant is that the defendant had herself registered as owner of the suit land based on transmission following the death of Kiprono Arap Tanui who is alleged to have died on 1/3/1990. The plaintiffs contend that the death certificate which shows that Kiprono Arap Tanui died on 1/3/1990 was fraudulently obtained and that the same has since been cancelled. PW1 Tabarno Busienei produced this certificate as exhibit 14. This witness also produced another death certificate as exhibit 13. This certificate shows that Kiprono Tanui died on 10/3/1988. The

plaintiffs called PW3 Zakayo Rotich. This is the County Registrar of Births and Deaths at Trans-Nzoia. He testified that he has been a Registrar at Trans-Nzoia since 2009. He testified that there are two types of registrations carried out. These are current registrations which are registered within 6 months of the occurrence of either a birth or death and late registrations which are registered after six months from the occurrence of a birth or death.

17. PW3 testified that in 2009 William Kipkosgey Serem the donee of Power of attorney by the defendant went to the registry and applied for a death certificate in respect of the death of Kiprono Arap Tanui. He was issued with a certificate of death which showed that Kiprono Arap Tanui died at Sinyerere Sub-location. The defendant's son later went to the same Registry and complained that there was another death certificate which had been issued in respect of the same person who is said to have died at Nandi. This made the Registrar to start investigations. The Registrar's investigations revealed that a current registration had been made regarding the same deceased who had died while at Nandi. He made a decision to write a letter dated 30/5/2012 cancelling the certificate of death which he had issued to William Kipkosgey Serem. He produced the letter as exhibit 15. The first death was registered on 26/7/1988 in respect of Kiprono Tanui who died on 10/3/1988. The second death was registered on 28/10/2009 in respect of Kiprono Arap Tanui who died on 1/3/1990. Whereas in the first registration it is indicated that the deceased died at Itigo Sub-location of Lelmokwo location, the second registration indicates that the deceased died at Sinyerere Sub-location.

18. It is clear from the evidence on record and documents that the defendant was aware that there was an existing death certificate in respect of Kiprono Tanui. This is clear from a letter dated 8/9/2009 from the chief of Sinyerere location who wrote that the deceased died at the home of his relatives in Nandi and that some people used a death certificate to do a Succession cause in 1991. The defendant obtained this letter to enable her commence a Succession cause at Kitale. The certificate of death which she obtained indicated that the deceased died at Sinyerere. This is not true because even the letter which enabled her get a death certificate and commence Succession indicated that the deceased died in Nandi. The certificate of death which she obtained indicated that the place of death was Sinyerere Sub-location. This was obviously not the case as the deceased died in Nandi. William Kipkosgey Serem who testified on behalf of his mother the defendant herein admitted in cross-examination that his father died in Nandi at the home of one of his relatives. He stated that he brought the body of his father from Nandi for burial at Sinyerere. It is therefore clear that the defendant's son was not being truthful when he claimed that the death of Kiprono Kiptanui occurred at Sinyerere Sub-location.

19. There is a contention by the defendant that the name Kiprono Tanui and Kiprono Arap Tanui do not refer to the same person. This contention is without basis. It is common knowledge that "Arap" means son of. The inclusion of "Arap" between Kiprono and Tanui does not make any difference. The two names refer to one person who was the owner of plot No. 36 at Sinyerere Settlement Scheme. The first plaintiff had filed Eldoret High Court Civil Case No. 170 of 1990 (OS). This case was against the two administrators of the estate of the late Kiprono Tanui. The two administrators had gone to the then Chief of Sinyerere location and obtained a letter which enabled them to start Succession proceedings in respect of the estate of Kiprono Tanui. The then chief of Sinyerere location was PW4 Joel Wycliffe Mwimali. He testified that he knew Kiprono Tanui as owner of Plot No 36 Sinyerere Scheme. He testified that throughout the time he was chief of Sinyerere, he did not see Kiprono Tanui with a wife. This witness testified that he even accompanied a Mr Ochieng to the funeral of Kiprono Tanui at Nandi. Ochieng was a neighbour of Kiprono Tanui. When Kiprono Tanui's brothers came for a letter to enable them commence Succession, he wrote the letter for them. This is the letter which enabled them to obtain a grant in respect of the estate of Kiprono Tanui. He testified that he has never seen the defendant at Sinyerere and that he never heard of any incident involving the defendant where she alleges to have been burned in a house at Sinyerere.

20. In the proceedings before Eldoret High Court, Kiprono Tanui was variously referred to as Kiprono Arap Tanui, Kiprono A. Kiptanui, Kiprono Kiptanui, Kiprono Kiptanui Kipngetch, Kiprono A. Tanui. All these names are mentioned in a Judgement which was delivered on 5/10/1995. All these names were referring to one person who was the owner of Plot 36 Sinyerere Settlement Scheme. For instance in the plaintiff's first exhibit which is a settlers invoice, Mr Kimutai Arap Bii provided three cows and a heifer.

The amount from the sale of the cows was to go to the account of Kiprono Arap Kiptanui. This is an invoice which was from the settlement office. The invoice refers to Kiprono Arap Kiptanui of Plot No. 36 Sinyerere. This same exhibit is referred to in the judgement from Eldoret at page 10. This judgement was produced as exhibit 7 (a). At page 12 of the judgement, the plaintiff in the Eldoret case is said to have filed objection proceedings. In these proceedings, the deceased is referred to as Kiprono Kiptanui Kipngetich. This is the same person who was owner of Plot 36 Sinyerere Settlement Scheme. It is therefor clear that all these names referred to one person and this is the one who owned plot No 36.

21. PW5 Josiah Kariuki Kamau was called by the plaintiff as a witness. He testified that he knew Kiprono Tanui and that Kiprono Tanui sold his land to the first plaintiff and went to work at the farm of a Settler called Robert. He testified that Kiprono Tanui had no wife. PW5 was also a witness in Eldoret High Court Civil Case No. 170 of 1990(OS). From the judgement in the Eldoret case there was no dispute that Kiprono Tanui had no wife or children. The The defendant's son had stated in his evidence that the first plaintiff and her brother Kimtai Arap Bii obtained letters of administration in respect of his father's estate at Eldoret. He went on to state that he filed an objection and that the succession proceedings were nullified. He did not produce any document in support of his claim. The only persons who obtained letters of administration in respect of the estate of Kiprono Tanui were Kipngetich Arap Kirui and Sambai Arap Koske.

22. In the Eldoret case, the court found that the first plaintiff was in the process of buying plot No 36 Sinyerere Settlement Scheme but that the same did not go through because Kiprono Tanui died before the transfer. The first plaintiff had wanted to be declared owner of the land by way of adverse possession. Since she could not be declared owner of the land by way of adverse possession for reasons well spelt out in the judgement, the Judge nevertheless went ahead to give her 22 acres. The remaining 10 acres were given to the administrators of Kiprono Tanui's estate.

23. There is evidence on record that the administrators sold their 10 acres to Kimaiyo Siratei. In 2004 the father of the second plaintiff filed a suit against Kimaiyo Siratei at Kaplamai Land Disputes Tribunal. The Tribunal ruled that Kimaiyo Siratei gives 9 acres to the second plaintiff's father. The verdict of the Tribunal was adopted as judgement of the court on 10/6/2005 vide Kitale Senior Principal Magistrate's Land Case No. 13 of 2004. Kimaiyo Siratei later sold the remaining one acre to the second plaintiff's father at Kshs.138,000/=. The sale agreement was witnessed by a magistrate at Kitale on 9/5/2005.

24. The first plaintiff was given 22 acres. Her brother later went to Kipsaina Land Disputes Tribunal and filed a suit against her. The Tribunal ruled that each of the two get 11 acres each. The verdict was adopted as judgement of the court in Kitale Senior Principal Magistrate's Land case No. 30 of 1996. The decrees in all the three cases have never been appealed against. They still stand to-date.

25. The defendant was aware that there was an earlier Succession Cause in respect of Kiprono Tanui. She was aware that a death certificate had been issued. Despite this knowledge, she went a head to obtain another death certificate by concealing the fact that there was another certificate of death which had been issued. In the certificate which was obtained, the place of death and date of death were not correct. This certificate has since been cancelled. The defendant's son in his defence stated that he was advised that if he wanted to get the land, he should change the death certificate. He was even given fresh forms to fill. This was an admission on his part that there was something wrong in the certificate of death. The defendant's son struck me as a person who cannot speak the truth. He claimed that when his mother was allegedly burned in her house, he was present and is the one who rescued his mother. However in the statement he filed, he stated that he was in Nairobi when the incident happened. He even alleged in his defence testimony that he participated in proceedings in Eldoret whereby he managed to have the grant issued to the first plaintiff and his brother Kimutai Arap Bii nullified. This is not true. There was nothing like this and if there was anything to that effect he should have produced evidence to that effect.

26. The defendant went ahead to have the suit land registered in her name without revealing that the land had already been given to the first plaintiff and two others. There have been no appeals from those judgements. The defendant did not disclose that the first plaintiff was in the suit property since 1970. The defendant claimed that she was removed from the land in 1991 after she was allegedly burned by the

first plaintiff. If at all the defendant was burned, why was there no report made? Why was there no criminal prosecution filed against the assailant? The defendant claimed that the first plaintiff moved into the suit land in 1991 after the alleged burning incident. This is not true because evidence which came out in the Eldoret High Court Case shows that the first plaintiff was on the suit property since 1970.

27. The plaintiffs are occupying 11 and 10 acres respectively through legal means. The evidence which was adduced shows that the defendant commenced a Succession Cause based on a death certificate which was obtained with concealment of material facts. The place of death and the date of death were not correct. The said certificate of death has since been cancelled. The defendant obtained title in respect of a fraudulently obtained death certificate which was used to conduct a succession through which she was registered as proprietor by transmission.

## **FINDINGS**

28. I find that the plaintiffs have proved their case against the defendant on a balance of probabilities. On the other hand, I find that the defendant's counter-claim is not proved as against the plaintiffs. The plaintiffs are on the suit land based on valid judgements which are in force to-date. The plaintiffs cannot be evicted from what is lawfully theirs.

## **DECISION**

29. As the evidence has showed that the defendant obtained her title fraudulently, the same cannot be allowed to stand, I make the following orders;-

*(A) An order is hereby issued cancelling title No Trans-Nzoia/Sinyerere/36.*

*(B) An order is hereby issued that 11 (eleven) acres thereof be registered in the name of the first plaintiff and 10 (ten) acres be registered in the name of the second plaintiff.*

*(C) A permanent injunction is issued restraining the defendant from interfering with the plaintiffs parcels.*

*(D) The defendant's counter-claim is dismissed.*

*(E) Each party to bear his/her own costs.*

**Dated, signed and delivered at Kitale on this 6th day of October, 2014.**

**E. OBAGA**

**JUDGE**

**In the presence of Mr Kiarie for plaintiffs and Defendant in person. Court Clerk Kassachoon.**

**E. OBAGA**

**JUDGE**

**6/10/2014**