



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 60 OF 2015**

**KIBAGENGE FARMERS CO-OPERATIVE**

**SOCIETY LIMITED.....1<sup>ST</sup> PLAINTIFF**

**PHILIP KIPKORIR LEITICH.....2<sup>ND</sup> PLAINTIFF**

**STEPHEN KIPCHIRCHIR MAIYO.....3<sup>RD</sup> PLAINTIFF**

**DANIEL BARNGETUNY SEUREI.....4<sup>TH</sup> PLAINTIFF**

**DANIEL KIPTANUI TARUS.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**ISAAC KIPLETING MAIYO.....1<sup>ST</sup> DEFENDANT**

**DAVID KIPTARUS LELEI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This is a suit in which a Co-operative Society (hereinafter also “the Society”) and its 4 officials have sued some two individuals who have allegedly in conjunction with the local Constituency Development Fund (hereinafter “CDF”) officials expressed the intention to subdivide the society’s land comprised in **Title No. Waitaluk/Mabonde Block 7/Koiyo/22** (hereinafter “the suit land”) in order to establish a health centre upon a portion thereof.

2. In an amended plaint dated 22/9/2015, the plaintiffs sought the following orders against the defendants jointly and severally:-

(a) **An order of declaration that the 1<sup>st</sup> plaintiff is registered owner of Land Parcel No. Waitaluk /Mabonde Block 7/ Koiyo/22 and the defendants are trespassers.**

(b) **An order of permanent injunction to be issued to restrain the defendants, their agents and/or servants or anyone acting under their instructions from claiming, subdividing, transferring, cultivating, leasing, developing, selling, trespassing into and or dealing in any manner with Land Parcel No. Waitaluk/Mabonde Block 7/Koiyo/22.**

(c) **An order to be issued by the Court directing the Land Registrar Trans-Nzoia County to remove the caution lodged by the Defendants against Title Number Waitaluk/Mabonde Block 7/Koiyo/22.**

(d) **Costs of the suit.**

(e) **Any other relief this Honourable court may deem just to fit to grant.**

3. According to the amended plaint the 1<sup>st</sup> plaintiff is a Co-operative Society Limited and it is the registered owner of all that parcel of land known as **Land Title No. Waitaluk/Mabonde Block 7/Koiyo/22** which is reserved for Kibagenge Cattle Dip, a dip that serves members of the 1<sup>st</sup> Plaintiff, residents of Kibagenge and its environs.

4. The plaintiffs aver that the defendants in conjunction with the Constituency Development Fund (CDF) officials have expressed intention

of subdividing Land parcel No. **Waitaluk/Mabonde Block 7/Koiyo/22**.

5. The plaintiffs further state that the 1<sup>st</sup> plaintiff and its members have opposed the proposed change of user because the land comprised in Land parcel No. **Waitaluk /Mabonde Block 7/ Koiyo/22** was donated by members of the 1<sup>st</sup> plaintiff during land adjudication and registration purposely for the cattle dip.

6. It is contended that if the defendants and those like-minded intended to establish a health centre in the area, they ought to have acquired land for that purpose.

7. The plaintiffs aver that all the officials of the 1<sup>st</sup> Plaintiff and those of the cattle dip are elected by a popular vote from time to time and are vested with the mandate of managing the affairs of the cattle dip and the 1<sup>st</sup> plaintiffs' other assets.

8. The plaintiffs' states that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have laid claim on ownership for Land parcel No. **Waitaluk /Mabonde Block 7/ Koiyo/22** and to further their claim, they lodged a caution against the title on **26/7/2013** at the Lands Registry, Kitale.

9. The defendants filed a joint defence and counterclaim dated **4/6/2015**. They denied having any claim over the title and averred that no action could lie against them as claimed.

10. The suit was then set down for hearing and was heard between **23/3/2016** and **13/5/2019**.

11. The 5<sup>th</sup> plaintiff testified as **PW1**. He averred that the suit land belongs to the 1<sup>st</sup> plaintiff; that the suit land is used as a cattle dip having been set aside sometime in **1970** by members of Kibagenge; that on **27/5/2000**, the members of Kibagenge cattle dip held a meeting and they resolved to form a co-operative through which they would manage all assets of the society and the land was registered; that the defendants participated in the meetings and the 1<sup>st</sup> defendant was the then treasurer; that members were in consensus over the resolutions made as evidenced by the minutes which **PW1** produced as **P. Exhibit 3**; that the defendants lodged a caution on the suit land after members refused their plea to have the suit land subdivided.

12. **PW2**, the 2<sup>nd</sup> plaintiff testified and identified himself as the current chairman of the 1<sup>st</sup> plaintiff. He reiterated what **PW1** had stated in his testimony and confirmed that as per **P. Exhibit 3**, the 1<sup>st</sup> defendant attended the meeting at which a resolution was arrived at to have the cattle dip registered as a co-operative society. He averred that as per the wishes of the founders of the farm, the suit land had remained as a public utility and that there was some other land which had been utilized for use of a health facility and the same had its own title.

13. **PW3** and **PW4** were the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs respectively and they testified in furtherance of their claim by reiterating the testimonies of the **PW1** and **PW2**.

14. The plaintiffs then closed their case.

15. The defendants called **John Kiptabut Korir (DW1)** who testified and stated that he was among the members who formed **Kibagenge Estate** in **1971**; that Kibagenge Estate was subdivided into blocks comprising of, among others, **Koiyo Farm** where the suit land is situated; that there was a proposal by the members of Koiyo Farm to surrender part of their respective shares of the land to put up public utilities, amongst others a cattle dip; that the cattle dip was indeed constructed for the benefit of all members of the public; that in the year **2000** some members formed the 1<sup>st</sup> plaintiff and registered the public utilities as part of the 1<sup>st</sup> plaintiff's property; that the defendants do not lay claim on the suit land.

16. **DW2** was **Isaac Leting Maiyo** the 1<sup>st</sup> defendant who in his evidence reiterated the testimony of **DW1**. In cross-examination, **DW2** acknowledged that he was present in the meeting where it was resolved that the cattle dip was to be registered under a cooperative society; that the suit land was indeed registered and its title was later issued. He admitted to having lodged a caution against the land after members of the society wanted to subdivide the suit land and create shares.

17. The 2<sup>nd</sup> defendant passed on during the subsistence of this matter and the suit was withdrawn against him.

18. After the close of evidence, the court ordered the parties to file written final submission. The plaintiffs filed their submissions on **12/2/2020**. I have perused the court record and found no submissions filed by the 2<sup>nd</sup> defendant, who was the sole surviving defendant, the 1<sup>st</sup> defendant having met his demise during the pendency of the suit.

19. I have considered the pleadings the evidence and the submissions of the parties. The issues that arise in this suit are as follows:-

*(1) Who is the lawful owner of Land Parcel No. Waitaluk/Mabonde Block 7/Koiyo/22?*

*(2) What orders should issue?*

20. It is not disputed that in accordance with **P. Exhibit 1** the 1<sup>st</sup> plaintiff is currently the registered proprietor of Land Parcel No. **Waitaluk/Mabonde Block 7/Koiyo/22**. The defendants have alleged that the suit land is not the plaintiffs' as it had been reserved as a public utility by members of Kibagenge Estate sometimes in **1971**. It is the defendants' contention that the registration of the suit land in favour of the 1<sup>st</sup> plaintiff is erroneous.

21. Section 26 of the **Land Registration Act** provides for indefeasibility of title and protection of title holders but it also provides for impeachment of titles that have been procured fraudulently, by mistake or by misrepresentation. The Section provides as follows:-

**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-**

**(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme**

22. The import of the above provision is to the effect that a court is required to consider a title document as *prima facie* evidence of ownership of land and a conclusive evidence of proprietorship of land that can only be challenged on grounds stipulated as above. In the present case the title produced by the Plaintiff shows that the suit land is registered in names of the 1<sup>st</sup> plaintiff.

23. There is evidence on record that at the meeting held on 27/5/2000 in the presence of the 2<sup>nd</sup> defendant, it was resolved by the members of Kibagenge Cattle Dip to register the same as a co-operative society and obtain a title for the same. This was confirmed by DW2 when he took to the stand.

24. The defendants have stated that they do not lay claim on the land. Their main bone of contention is that the land is a *public utility* which was donated by members to be utilized as a cattle dip and therefore it should not have been registered in the 1<sup>st</sup> plaintiff's name. This is baffling considering the fact that the 1<sup>st</sup> defendant conceded to having been present in the meeting where it was resolved that the 1<sup>st</sup> plaintiff was to be registered and a title issued in its name.

25. A perusal of the amended plaint filed in court shows that the plaintiffs' claim is for the caution to be removed and the suit land to be utilized purposely for the cattle dip. It is not clear to this court how the caution may have hindered the physical use of the land for the purposes of a cattle dip. However, the defendants' version is that they meant to protect the land from subdivision and distribution amongst the 1<sup>st</sup> plaintiff's members, it having been previously reserved for a public purpose. In that case this court can find no wrong in the defendants' attempt to protect public utility land by lodging a caution over the suit land.

26. In his written witness statement DW1 avers that the Land Registry Kitale was uncomfortable with the registration of the land as part of the Society's land since the Registry was aware of the land's public utility status. This averment by the defendants is substantiated by the plaintiffs' own documentary evidence in the form of minutes of a meeting apparently held on 15/11/2014 in which **Minute No. 03 15/11/2014** states that one Eliud Maiyo, Chairman had received a letter from the Land Registrar demanding surrender of the title deeds which demand he had declined to comply with ostensibly because members had not authorized such surrender. DW1 stated that he prefers to have the land retained as a public utility for the benefit of all members of the public as opposed to the same being registered as a Society's property.

27. The suit land is part of land that was distributed in the 1970s. It is agreed by all the parties that it was reserved as a public utility. A cattle dip was erected on it. From the certificate of registration in the record the 1<sup>st</sup> plaintiff was registered on **11<sup>th</sup> September 2000**. The title to the suit land was issued in the 1<sup>st</sup> plaintiff's name on **19/12/2000**. On **24/7/2013** the defendants lodged a caution over the suit land claiming interest as beneficiaries. Was the registration of the 1<sup>st</sup> plaintiff as absolute proprietor of the suit land proper?

28. In the statutory declaration in support of the registration of the caution the defendants stated that they were the supervisory chairman and original member respectively of Kibagenge Farmers Co-operative Society; that the land is community land and a public utility plot for the entire community and the members of Kibagenge Farmers Co-operative Society, majorly used as a cattle dip by the members; that it was within their knowledge that some unnamed members were pushing for the subdivision of the suit land amongst themselves to the detriment of the entire community and members of the Society; that the land having been allocated for a public purpose should be used only for that purpose; that it is only fair that it be used for a public purpose; that in the interests of justice a caution should be lodged over the land as the defendants pursue other means of dealing with the issue.

29. The contents of that declaration which is in the public domain do not give the impression that the defendants in this suit were pursuing their private agenda while lodging the caution. The averment by the defendants that they intended to protect the public user of the land is substantiated by the plaintiffs' own documentary evidence in the form of minutes of a meeting apparently held on 15/11/2014 in which **Minute No. 03 15/11/2014** states that the two members who had lodged a caution over the suit land (which is understandably a reference to the defendants in this case) had sought to collect members signatures authorizing the subdivision of the suit land into two portions for use as a dispensary and a cattle dip respectively, which, given the circumstances of this case, this court safely concludes would be still for public purposes. However it appears that the Society was not comfortable with that proposal. On its part the Society officially registered itself in the race to lodge cautions over the suit land which it apparently owned, and applied on 14/1/2015 to have one caution registered. Interestingly enough the declaration supporting the intended registration of caution this time round was made by **Stephen Kipchirchir Maiyo and Daniel Kiptanui Tarus** who also described themselves as the "*vice chairman*" and "*supervisory member*" of "*Kibagenge Farmers Co-operative Society Cattle Dip*" which was alleged to be the owner of the suit land. The declaration alleged a plot by a section of the members of the society, also unnamed, to subdivide the suit land and dispose of some of it to raise money for the purchase of land for the construction of a dispensary. The application was, not surprisingly, rejected by the Land Registrar on the basis that the land is already registered in the Society's name and the interest claimed by it is not registrable. Given the role the Land Registrar played in this matter he would have been a proper witness but he was not called to testify though Mr. Wanyama for the defendants had indicated an intention to call him.

30. A further scrutiny of the record reveals that after the abortive caution registration attempt another meeting was held about one month later on 14/2/2015. In the minutes of this meeting (**P. Exhibit 9**) there is palpable discontent over a proposal from certain quarters, apparently

having sufficient leverage to occasion the 1<sup>st</sup> respondent's members jitters, to the effect that the Society donate land for a dispensary. The minutes narrate how one of the Society's members was summoned by the local District Officer (hereinafter "DO") who sought to know the Society's stand on the issue of land for the dispensary.

31. In their evidence **PW1** and **PW2** stated that the Society does not intend to subdivide the land; that the defendants had brought the DO into the matter and after hearing the dispute he stated that he would not oversee the subdivision of the land; that there was a plan to subdivide the land and use the CDF resources to develop a hospital on a portion thereof; that some other different land parcel had been set apart elsewhere for a hospital and a title had been issued in that regard and that their prayer is for the land to remain intact and they do not want a hospital to be built on the land.

32. The defence witnesses alleged that the plaintiffs employed trickery to make members sign their approval to the registration of the land in the 1<sup>st</sup> defendant's name and that the members realised that the plaintiffs had some other ulterior motives too late in the day. The defendants alleged that it was at this juncture that they sought to restore the land as a public utility and the society was allegedly "rejected". They alleged in their evidence that the alleged members of the Society are not from Koiyo Farm. Upon his cross-examination by Mr. Murgor for the plaintiffs **DW1** admitted knowledge of an intent to subdivide the suit land into two portions and stated that he is not aware of any objection to that plan. He also admitted that there was other land set aside for a health centre in Mabonde.

33. **DW1** also admitted upon cross-examination that a group of members came to him and asked that he contribute land for a health centre and that title deed was issued. This title turned out to be **Title Number Waitaluk/Mabonde/280**, which document he was shown during cross-examination. However he alleged that he was not paid for the land and so he could not release the land for a dispensary. That evidence was corroborated by **DW2** who stated that a process had been commenced to revert that land parcel into **DW1's** name for want of payment. **DW1** would therefore, according to the evidence like to retain his land, for he was not paid. It would appear that this is the source of the entire dispute herein, but it is not clear from the evidence herein who was obliged to pay **DW1** for the land he gave out for a health centre, the Society or the CDF? If the CDF was obliged to do so where are the records and where did the funds for land purchase and construction of the health centre, if any, disappear to after **DW1** refused to cede the land despite the land title having been secured for a health centre? If the Society, where is the evidence that the society was so obliged? There is no immediate answer to these questions which are not for this court and which this court hopes that relevant authorities out there can get to the bottom of.

34. The evidence of **DW2** was categorical that the suit land should have been registered as a public utility under the Government of Kenya and not under the 1<sup>st</sup> plaintiff's name. Further in **DW2's** view, members of the Society are not members of the Koiyo Farm and are only intent on using the name of the Society to grab the suit land he testified that a portion of the suit land had been fenced off and closed to the public. The evidence of whether or not they were members of Koiyo can not however be properly addressed while relying on the scarce evidence given in this suit.

35. This is a strange case where both parties claim to be championing public interest by protecting the suit land which is admittedly a public utility parcel. I have before me two sets of cherubic-faced litigants professing to be guardian angels in respect of a tantalizing asset said to be a public utility plot whose words aim at persuading me that their interest in the asset is well-intended, but who, through occasional verbal slips and admitted actions lead to be conclusion that only the spirit within them may know of their true intentions regarding the suit land. The land is already registered in the name of the 1<sup>st</sup> plaintiff. The surprising thing is that the 1<sup>st</sup> plaintiff came into existence in the year 2000 while the parcel in question is part of land that was administered by Kibagenge Kalenjini Estates Limited and which was reserved as a public utility while that company was distributing the land.

36. It has not been explained why the land was not registered in the name of that company, or why, if both parties had good intentions, the land was registered in the name of the 1<sup>st</sup> plaintiff. I use the term "*both parties*" deliberately because **DW2** was present when the resolution to form the Society was made, and that they had a confluence of interest at least until the instant dispute arose.

37. There is dearth of concrete evidence from both sides of the divide that the suit land is intended to be subdivided amongst members of the co-operative or for the purposes of accommodating a dispensary. However, in this court's view the complaints raised in the 1<sup>st</sup> plaintiff's minutes of the meeting of **14/2/2015** appear to be a genuine grievance by the members of the Society who relied on the land for various purposes including control of animal diseases by use of the dip. It can not therefore be ruled out that an allocation of resources to build a dispensary may have raised the question of where the dispensary was to be built, and that CDF officials operating behind the scenes tried to influence the use of the land for the purpose of a dispensary. The rigmarole of who was to pay and what happened to funds meant to pay **DW1** for his land excised for a dispensary and issued with a title can only be within the knowledge of the CDF officials and **DW1** himself who must have been deeply involved in the surrender of his own land for the purpose. From the evidence on the record the court is convinced that there were inchoate attempts by the defendants to have the suit land subdivided.

38. However whether the land is subdivided amongst members of the 1<sup>st</sup> plaintiff or converted to the use of a dispensary, that action would go against its original user as a cattle dip which may considerably affect for the worse the community living around the suit land.

39. The finding of this court is that the suit land is public land and any purported registered owner can only hold the title in trust for the public.

40. This is a suit by those in control against those who are not in control of the Society at the moment. It may be as well that the remaining defendant and his protégé or cohorts or even other differently minded persons may in future attain the position the plaintiffs hold currently, signifying a game of musical chairs. In that event and given the prevailing registration of ownership of the suit land, suspicion would still reign as to the intention of the power holders.

41. Public utility resources must be protected from adverse actions of those likely to misuse them at will. I find the structures of the Society to be not so well defined as to convince me that the public utility land subject of this suit is safe from any illegal disposal for private purposes if it remains registered in the 1<sup>st</sup> plaintiff's name. Indeed the certificate of official search (**P. Exh 2**) that was produced by the plaintiffs in the

matter has no warning entries indicating that the suit land is public utility land. This omission leaves the gateway open for possible disposal of the suit land to unsuspecting persons by any future leadership of the Society that may be minded to do so, leading to possible further disputes.

42. However, the fact remains that depending on whoever comes into control of the Society's leadership, both the plaintiffs and the defendants having publicly confessed so in these proceedings, are bound to retain the public user of the suit land as a cattle dip and the same having been originally reserved for a public purpose, it should not be reallocated to any private use by any of the Society's members at will. There is no evidence before court that the residents of Kibagenge and in particular Koiyo Farm and the surroundings are about to surrender the age-old practice of animal husbandry in favour of a livelihood that may not require utilization of the suit land, or evidence that their herds will be so reduced as not to require expansion of the existing cattle dip, which according to evidence, is in use till now. The suit land is indeed a remarkable heritage that needs to be preserved for future generations based on the principle of inter-generational equity, if only to ensure that grandchildren and great grandchildren of the original members and shareholders of Kibagenge Kalenjin Estates Limited partake of the benefits of the wisdom and foresight of their forefathers engendered in preserving the suit land as a public utility. Besides, any change of user of land that may affect the livelihood of an amorphous mass of persons should not be conducted willy nilly without a comprehensive study of its consequences on the community. This can be catered for under **Section 58 of the Environment Management and Coordination Act (E.M.C.A)**.

43. The main apprehension of the defendant is that the land may be disposed of by the plaintiffs for non-public purposes if it is not registered in the name of the government and the suspicion is not entirely misplaced, although the plaintiffs also suspect the defendants of an intention to deal with the land in a manner conflicting with its original purpose! Given the possible future changes in leadership, attitudes and intentions within the Society and the likely forays of external interests into the dispute, I find it agreeable that retaining the registration of the land in the name of the Society is a risk that should not be taken at all. The land ought to be registered under an entity that would instill more public confidence that the land is safe from personal interest and in this court's opinion this is the office of the Permanent Secretary to the Treasury of Kenya under the **Permanent Secretary to the Treasury (Incorporation) Act, CAP 101**.

44. Based on the foregoing, I am satisfied that both the plaintiffs and the defendants have partially proved their respective cases on a balance of probabilities and I therefore issue the following:-

**(a) A declaration that the registration of the plaintiff as the absolute owner of Land Parcel No. Waitaluk/Mabonde Block 7/Koiyo/22 was erroneous and is therefore illegal.**

**(b) A permanent injunction is hereby issued restraining the plaintiffs, the defendants, their agents and/or servants or anyone acting under their instructions from claiming, subdividing, transferring, leasing, selling, wasting and or disposing in any manner of any interest in Land Parcel No. Waitaluk/Mabonde Block 7/Koiyo/22.**

**(c) A declaration that the Title Number Waitaluk/Mabonde Block 7/Koiyo/22 is public utility land reserved for the purposes of a cattle dip and related purposes only.**

**(d) An order is hereby issued directing the Land Registrar Trans-Nzoia County to cancel the registration of the 1<sup>st</sup> plaintiff as absolute proprietor of Title Number Waitaluk/Mabonde Block 7/Koiyo/22 and in lieu thereof register the title in the name of the Permanent Secretary to the Treasury of Kenya, to hold the title to the land comprised in Waitaluk/Mabonde Block 7/Koiyo/22 as the Trustee on behalf of the members of Public ordinarily at any material time residing in Kibagenge and in particular in Koiyo Farm and the Land Registrar shall expressly endorse on the Land register for Waitaluk/Mabonde Block 7/Koiyo/22 that beneficiaries' interest and the Title deed so issued shall be transmitted to the office of the Permanent Secretary to the Treasury of Kenya for safe custody.**

**(e) An order is hereby issued directing the Land Registrar Trans-Nzoia County to retain the caution lodged by the Defendants against Land Parcel No. Waitaluk /Mabonde Block 7/Koiyo/22 and the same shall only be finally removed to facilitate the registration ordered in Order No (d) hereinabove.**

**(d) Each party shall bear their own costs of this suit.**

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 14<sup>th</sup> day of October, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**