



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**E & L CASE NO. 1 OF 2014**

**GILBERT KIPTOO**

*(Suing on behalf of the Estate of the late*

**KIPKOECH ARAP YATOR).....PLAINTIFF**

**VERSUS**

**BERNARD KIPROTICH SAMBU.....DEFENDANT**

**JUDGMENT**

**Gilbert Kiptoo (Suing on behalf of the Estate of the late Kipkoech Arap Yator, hereinafter referred to as the plaintiff)** has sued **Bernard Kiprotich Sambu** hereinafter referred to as the defendant claiming to be a brother in-law to the defendant and son of Kipkoech Yator now deceased who was partner of the defendant in the acquisition of that parcel of land that came to be known as Meteitei/Meteitei/Block 4/100 measuring 4.128 Ha and situate in Nandi.

The plaintiff contends that his late father had acquired user and possession of his 4.0 acres before his demise and in fact had a house on his portion of the parcel. The plaintiff further adds that the partnership between his father and the defendant acquired the suit land Meteitei/Meteitei/Block 4/100 in shares of 4.0 acres for Sylvester Biwott his brother, 5.1 acres for the defendant Bernard Kiprotich Sambu and 1.0 acres subsequently acquired by Paulina Saina through a purchase from the defendant.

The plaintiff avers that through fraud, misrepresentation and concealment of material facts, the defendant caused himself to be registered of the sole proprietor of the whole of the suit land and subsequently acquired the title in his sole name. The allegations of fraud are particularized as follows:

- (i) Presenting himself to the District Lands Registrar, Nandi as the *bonafide* owner of the whole of parcel Meteitei/Meteitei/Block 4/100 while aware that the plaintiff was his co-owner.**
- (ii) Appearing and presenting himself as the Registered Owner of the whole of parcel Meteitei/Meteitei/Block 4/100.**
- (iii) Fraudulently acquiring the title deed of parcel Meteitei/Meteitei/Block 4/100 in his name only.**
- (iv) Misrepresenting to the Land Registrar, Nandi that he was the sole proprietor of the land while aware that the plaintiff and another person had shares on the land.**

The plaintiff further states that as a result of the defendant's fraud and misrepresentation, the plaintiff Estate of the late Kipkoech Arap Yator has been denied a title for their share of the property. The plaintiff adds that the user, occupation and possession of the deceased's estate of the late Kipkoech Arap Yator has been curtailed by the defendant through force, threat of violence and the denial of a continued user, occupation and possession of that portion of 4.0 acres.

The plaintiff's claim therefore against the defendant is for an order of declaration that the plaintiff on behalf of the Estate of the deceased is entitled to 4.0 acres of Meteitei/Meteitei/Block 4/100 on as of right and an order compelling the defendant to subdivide and transfer those 4.0 acres of Meteitei/Meteitei/Block 4/100 possessed by the Estate of the late Kipkoech Arap Yator and in default, the Honourable court through its Deputy Registrar do execute all documents necessary to effect a subdivision and transfer in favour of the plaintiff.

Moreover, the plaintiff prays for an injunction restraining the defendant whether by himself or through his agents, servants' nominees and whomsoever acting on his instructions from moving into occupying, possessing and doing anything or act detrimental to the plaintiff's possession and occupation of that 4.0 acres of Meteitei/Meteitei/Block 4/100. Lastly, the defendant prays for costs of the suit.

The defendant filed a defence in which he denies all allegations by the plaintiff. He states that the plaintiff is not entitled to the orders sought.

When the matter came up for hearing of the plaintiff's case, PW1, Sylvester K Biwott, now deceased stated that on 2<sup>nd</sup> September 1980, his late father Kipkoech Yator gave him Ksh 3000 after selling his two oxen for the purchase of the one share of Katanzi farm at Meteitei worth Ksh 2500 and an additional 500 to make it Kshs. 3000/= which was paid to the owner Kiptarus Too. Mr. Bernard Sambu was entrusted with the receipt to present to the farm leaders for registration in the name of the plaintiff's father.

In 1986, the land was demarcated by the leaders and the plaintiff's father was allowed to construct a hut in his share but unfortunately, he died in the same year when the hut was half way. The land was later entrusted to the plaintiff who registered it into his name and fenced the whole land.

As a brother in law, they trusted him and before the demise of his mother in June, 2010, she summoned BERNARD SAMBU and told him to surrender METEITEI farm to them. In mid-2011, he visited BARNARD SAMBU with the request to allow him to plough the farm then subdivide the Title Deed which he vehemently rejected.

On 5<sup>th</sup> November, 2011, they held a dispute resolution meeting headed by the village elder, Mr. CHERUS together with the neighbours and farm officials who knew about the existence of their farm. Among them included the village elder, Mr. JOSEPH KIPROTICH KOGO, ERNEST KAPLELACH, ERICK BUSIENEI, KIPROTICH ARAP TIONY, DAVID MUGE, AREA ASSISTANT CHIEF, PHILEMON KIPKORIR, son to BERNAD SAMBU, former Village Elder, Mzee TONU among others.

The team above directed BARNAD SAMBU to surrender out portion of the Shamba and they agreed to give them 3.2 acres which he agreed and later appealed against it.

That on 30<sup>th</sup> November, 2011, the appeal was heard chaired by area assistant Chief and other village members as per the list stated in the Minutes together with the resolution that BERNAD SAMBU should surrender the agreed 3.2 acres.

The surveyor came to subdivide for them the farm on 10<sup>th</sup> February, 2012; the bacons were fixed but BERNARD SAMBU later uprooted them and declared that he had registered the farm in his name and was final. They felt cheated hence the move to seek court intervention to direct BERNARD SAMBU to give them their share of 4 acres in full as opposed to 3.2 acres initially agreed.

**PW2, Gilbert Kiptoo Biwott** stated that he went to Meteitei farm in the year 1987 after his father's death to stay with Mr. Bernard Sambu to fence the shamba and in late 1988, went back home and he went to work in the city of Nairobi. That he surrendered his ID Card No.55779556 so that the shamba could be registered in his name and he told Mr. Bernard Sambu if anything was needed, he could lease out the shamba to get the money to be paid in case any need arises.

Unfortunately, they later found that Mr. Bernard Sambu didn't register the share of the shamba in his name but instead he registered his name alone. In late 2011, he and the eldest brother Mr. S. Biwott went to seek village elders for assistance.

**Ernest Arap Keino** states that he knew the late Kipkoech Yator all along as he was his neighbor at home including his son Sylvester Biwott. That in 1983, they started construction of houses when they used to stay together. That the late Kipkoech constructed his hut upto  $\frac{3}{4}$  through when he left behind Mr. Bernard Sambu and went back home but became sick and later died in 1986. That his son Gilbert Biwott in early 1987, came to joint with Bernard Sambu in fencing the shamba who later surrender his ID NO. 5577956 incase land registration could start while he was land registration, Bernard registered only his name without considering Gilbert. That he then demolished the hut and removed the fence and started leasing out farm.

That from 1992, he was elected as a cashier for survey collection and maize for feeding the officers.

The farm of Mzee Yator where he constructed his hut is just 20 meters from their boundary.

In late 2011, Mr. Biwott requested village elders' assistance for arbitration on land dispute between him and Sambu. The dispute was heard on 5.11.2011 and Bernard was asked to surrender 4 acres to the son of the late Yator.

In attendance, was his late son Philemon who confirmed seeing the hut of the late Mzee Yator and confirmed that the fencing wire was removed by their father (Benard).

Bernard later appealed after 14 days to area assistant chief, Mr. Muge who chaired the arbitration date to be on 30.11.2011.

The verdict was that, Bernard was asked to surrender 3.2 acres to the son of Yator and 0.8 points were to be rewarded to Sambu for taking care of the shamba.

The surveyor was brought in February, 2012 where the beacons were fixed but Bernard shortly removed them. Mr. Biwott opted to seek court assistance.

**Joseph Kiprotich Kogo** states that he has known the late Father of Sylvester Biwott Mr. Kipkoech Yator. Currently, he is a village elder of Kapkawa and neighbour to Bernard Sambu. That he has known the Late Kipkoech Yator from 1983 when land demarcation and construction of houses started. The late constructed his hut and roofed upto  $\frac{3}{4}$  through while Mr. Bernard Sambu was also constructing his.

The Late Yator went back home to collect food and left Bernard behind but Mzee became sick and later died in 1986. The family sent their son Mr. Gilbert Biwott to team up with Benard Sambu in construction and fencing of the Shamba who later surrendered a copy of his ID Card 5577956 to

Mr. Sambu to register the farm in his name. When land registration was going, Mzee Sambu registered his name alone and started demolishing the hut and the fence.

He then started to lease out the farm until later 2011 when Mr. Sylvester Biwott requested for assistance from the village elders and farm

officials which sat on

5.11.2011 and the members present asked Mr. Sambu to surrender the 4 acres of the late Kipkoech Yator.

Mr. Bernard thereafter appealed after 14 days and Area Assistant Chief, Mr. Muge who fixed 30.11.2011 for appeal which gave the same verdict that the land belonged to Mr. Kipkoech Yator in which the sons were entitled.

The surveyor was brought in February 10<sup>th</sup>, 2011 who separated 3.2 acres from Mr. Sambu's farm after members had requested the sons to surrender 0.8 points to Mzee Samba for taking care of the shamba.

Mr. Sambu later removed the beacons and Mr. Biwott decided to seek court support.

The defendant states that he is the registered owner of land known as Miteitei/Miteitei/Block 4/100 measuring 4.128 hectares having been registered as an owner on 2<sup>nd</sup> June, 2004. That the parcel of land he occupies was initially known as Kipkures Farm. That he bought the land at a total consideration of Kshs.20,000 vide receipt numbers 008 and 225 for Kshs.5,000 and Kshs.15,000 respectively.

That he is therefore the registered and absolute proprietor of the suit land. That the plaintiff's claim is far fetched and he does not have the locus standi to pursue this claim. The plaintiff's claim being a claim over land is also barred by limitation.

I have considered the pleadings, evidence on record and submissions on record and that the plaintiff's evidence is overwhelming that on 2.9.1980, Sylvester K. Biwott was given by his father cash Kshs.3000 for the purchase of 4 acres of land at Kaptanzi farm of Meteitei.

The plaintiff produced PEx4, which clearly indicates that the plaintiff's father paid Kshs.3000 for one share of the land in dispute. This parcel of land was later registered in the name of the defendant. PW1, PW3, PW4 confirmed that the deceased had an interest in the suit parcel and even constructed a hut in the suit land which was demolished.

Most importantly, the defendant in cross examination by M/s Tum states that he is ready to give the plaintiff's land in Kapkoros and not in Meteitei. This is an admission that he owes them land. On further cross examination by M/s Tum, he argues that the plaintiffs have a share of 4 acres at the land in the suit land in Meteitei but he cannot give them because of his family.

From the foregoing, I do find that the plaintiffs have established the existence of an implied and or constructive trust thus; that the defendant is holding land measuring 4 acres in Meteitei/Meteitei/Block 4/100 in trust for the plaintiff. It is hereby declared that the plaintiff is entitled to 4.0 acres of Meteitei/Meteitei/Block 4/100.

I do hereby grant an order compelling the defendant to subdivide and transfer those 4.0 acres of Meteitei/Meteitei/Block 4/100 to be registered in the Estate of the late Kipkoech Arap Yator and in default, the Honourable court through its Deputy Registrar do execute all documents necessary to effect a subdivision and transfer in favour of the plaintiff.

Furthermore, I do grant a permanent injunction restraining the defendant whether by himself or through his agents, servants' nominees and whomsoever acting on his instructions from moving into occupying, possessing and doing anything or act detrimental to the plaintiff's possession and occupation of that 4.0 acres of Meteitei/Meteitei/Block 4/100. No order as to costs as the parties are related. Orders accordingly.

**Dated and delivered at Eldoret this 22<sup>nd</sup> day of February, 2019.**

**A. OMBWAYO**

**JUDGE**