



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**E & L CASE NO. 140 OF 2017**

**MARGARET JEPKURGAT SIMOTWA.....1<sup>ST</sup> APPLICANT**

**CHRISTOPHER KIPRUGUT YEGO.....2<sup>ND</sup> APPLICANT**

**VS**

**REUBEN KIPTARBEI TANUI.....1<sup>ST</sup> RESPONDENT**

**LEAH JEROBET KIPTANUI.....2<sup>ND</sup> RESPONDENT**

**COUNTY LAND REGISTRAR,**

**UASIN GISHU COUNTY.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

The plaintiffs filed this Originating Summons on 29<sup>th</sup> March 2017 seeking, in a nutshell, orders that this court makes a declaration as to :-

- a) Whether or not as at 12.5.2010 LR No. **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** was registered in the name of **KIPTANUI SIMATWA(DECEASED)**
- b) Whether LR No. **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** was validly/legally transferred into the names of **REUBEN KIPTARBEI TANUI** and **LEAH JEROBET KIPTANUI**
- c) Whether Land reference numbers **LR No. ELDORRET MUNICIPALITY BLOCK 23 (KINGONGO)/1996, 1997 and 1998** hived from LR No. **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** were legally created and transferred into the names of **REUBEN KIPTARBEI TANUI** and **LEAH JEROBET KIPTANUI**
- d) Rectification of the register in respect of **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1996, 1997 and 1998** by cancelling or revoking the entries of the titles and restoring the original title **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** into the name of the deceased pending distribution and transmission of the same to the rightful beneficiaries.

**BRIEF FACTS**

The 1<sup>st</sup> plaintiff married the deceased in 1964 under Nandi customary law. One year later the deceased married the 2<sup>nd</sup> respondent as a second wife. The deceased acquired a property known as **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/295** which was further subdivided and resulted in **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439**. The second wife then deserted the deceased for 15 years and returned with 3 children born out of wedlock including the 1<sup>st</sup> respondent.

The deceased passed away on 9<sup>th</sup> June 2010 and died intestate leaving the estate namely LR No. **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** registered in his name.

On 6<sup>th</sup> April 2011, the 1<sup>st</sup> and 2<sup>nd</sup> respondents registered themselves as proprietors of the estate. They then subdivided the property on 10<sup>th</sup>

October 2013 and there were new parcel numbers issued with the 2 respondents as the proprietors; ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1996-1998.

### **PLAINTIFFS CASE**

The Plaintiffs contend that the 1<sup>st</sup> and 2<sup>nd</sup> respondents registered themselves as proprietors of the suit land one year after the deceased had passed on. Further, she submitted that the transfer was obtained without the consent of any of the beneficiaries of the estate. She obtained letters of grant of letters of administration on Eldoret HC Succession cause no. 28 of 2016. She submitted that upon the demise of the deceased the property was subject to the law of succession act and the transfer of the property was to be based on the same.

They maintain that the property could not have been transferred due to the fact that the deceased had passed on for almost a year when the transfer was effected. Further, the 3<sup>rd</sup> respondent was a party to the transactions. The respondents did not provide the prerequisite documents to prove that the property was indeed transferred to them as a gift inter vivos.

They relied on section 45 of the law of succession act which required a grant of representation before dealing with the property of a deceased person in the absence of which the respondents are guilty of intermeddling.

She submitted that the court should revoke the titles or the rectification of the same and restoring the original title.

### **RESPONDENTS' CASE**

The respondents maintain that the 1<sup>st</sup> plaintiff was not married to the deceased. Further, they contend that the parcel LR. No. ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439 was given to them as a gift inter vivos by the deceased. They stated that he had signed all the necessary consents that were required to transfer the property to them. Further, that the deceased transferred the property to them before he died. They further stated in their witness statements that the deceased never owned 1439 in his lifetime.

### **ISSUES FOR DETERMINATION**

This matter proceeded for hearing whereby PW1 testified and later parties agreed that the matter to proceed by way of submissions. The plaintiffs filed submissions. Notably, the respondents have not filed submissions.

The following are the issues for determination that emerge from the application.

- a) Whether ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439 was transferred to the respondents as a gift inter vivos
- b) Whether the court should order for revocation/rectification of the titles that were subdivided.

### **WHETHER ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439 WAS LEGALLY TRANSFERRED TO THE RESPONDENTS AS A GIFT INTER VIVOS**

This will enable the court to determine whether the respondents had good title to the property. It has been proven on a balance of probabilities that the 1st plaintiff was a wife to the deceased as per testimonies from the witnesses in the suit and witnesses' statements filed. The respondents' witness even admitted the same in cross examination therefore that particular issue has been dealt with.

In her decision in **Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR** relied on by the petitioners, Nyamweya J stated as follows:

**“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the Law of Succession Act provides as follows with respect to gifts made in contemplation of death:**

**...For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”**

The respondents' have not provided any documentary evidence to prove that the property was transferred as a gift inter vivos. This is further buttressed by the fact that the property was registered in their names a year after the deceased had passed on, thereby defeating the basic meaning of a gift between living persons. Therefore, this court finds that there is no evidence that the property was gifted to them during the lifetime of the deceased.

### **WHETHER THE COURT SHOULD ORDER FOR RECTIFICATION/REVOCATION**

Under section 80 of the land registration act;

**(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be**

cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

**(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**

Taking into consideration the submissions and affidavits filed, and the testimony of the witnesses, it is clear that there was fraud involved in the transfer of the property. This court finds that as at 12.5.2010 LR No. **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** was registered in the name of **KIPTANUI SIMATWA(DECEASED)**

That LR No. **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** was not validly/legally transferred into the names of **REUBEN KIPTARBEI TANUI** and **LEAH JEROBET KIPTANUI**

That Land reference numbers **LR No. ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1996, 1997** and **1998** hived from LR No. **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** were not legally created and transferred into the names of **REUBEN KIPTARBEI TANUI** and **LEAH JEROBET KIPTANUI**

This court does order Rectification of the register in respect of **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1996, 1997** and **1998** by cancelling and or revoking the entries of the titles and restoring the original title **ELDORET MUNICIPALITY BLOCK 23 (KINGONGO)/1439** into the name of the deceased pending distribution and transmission of the same to the rightful beneficiaries. There be no orders as to costs. Orders accordingly.

**Dated and delivered at Eldoret this 21<sup>st</sup> day of February, 2019.**

**A. OMBWAYO**

**JUDGE**