



**REPUBLIC OF KENYA**

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

**AT KERICHO**

**ELC CASE NO. 2 OF 2013**

**ESTHER CHEROP.....PLAINTIFF**

**VERSUS**

**GEOFFREY KEMEL.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff instituted this suit in her capacity as the widow and administrator of the estate of Kipyegon Terer- Deceased. In her Plaint dated 16<sup>th</sup> January 2013 she claims that the Defendant has illegally occupied her land parcel number KERICHO/KIPTUGUMO/227 and tried to evict James Ngeno, one of her step-sons therefrom. She therefore seeks the following reliefs:

- a) *A declaration that land parcel number KERICHO/KIPTUGUMO/227 does not belong to the defendant*
- b) *An eviction order against the defendant from land parcel number KERICHO/KIPTUGUMO/227*
- c) *A permanent injunction to issue restraining the defendant from entering and trespassing on the said parcel of land*
- d) *Mesne profits since 2006*
- e) *Costs of the suit and interest thereon at court rates*
- f) *Any other relief that the Honourable court may deem fit to grant.*

2. In his Defence dated 11<sup>th</sup> March 2013 the Defendant denies the Plaintiff's claim against him and in particular states that land parcel number KERICHO/KIPTUGUMO/227 does not exist as it was sub-divided by the late Kibiegon Terer into five portions during his lifetime and the defendant is lawfully occupying a portion known as land parcel no. KERICHO/KIPTUGUMO/1096.

3. The suit was set down for hearing and both parties testified and called their witnesses.

**Plaintiff's case**

4. The Plaintiff who testified as PW2 stated that the defendant had trespassed on land parcel number KERICHO/KIPTUGUMO/227 which is registered in the name of her late husband Kipyegon Terer. She produced a certificate of official search dated 15<sup>th</sup> October 2012 as Plaintiff's exhibit 1. The said certificate indicates that the suit property is registered in the name of the deceased. It was her testimony that her late husband had apportioned his land between her and her co-wife and that she got a portion measuring two and a half acres while her co-wife got ten acres although he had not transferred the said portions to their names. She stated that she lives on a separate parcel of land at Kapsuser. She testified that the defendant had trespassed onto her portion measuring two and half acres.

5. Upon cross-examination she stated that the Defendant encroached on her land when her husband was still alive. She said she did not know if her husband had sold the said portion of land to the Defendant though the Defendant had been living on the suit land for more than ten years. She said she was not aware of any case at the Tribunal. Pressed further, she said that her husband had promised to sell his land to the Defendant but he did not sell it to him.

6. PW1 James Kipkorir Ngeno testified that he is the Plaintiff's step son. He said that he stays on the suit land which is registered in the name of his late father and that the defendant has encroached on one acre thereof. He stated that the Plaintiff is entitled to 2 acres of the suit land.

7. He denied that the Defendant had purchased the suit from his late sister Hellen Chebii.

8. Upon cross-examination he stated that according to the documents shown to him by the defendant's counsel, the suit property had been sub-divided into five portions and given the numbers 1095, 1096, 1097, 1098 and 1099. He said the defendant had taken possession of one of the five portions and fenced it off in 2010. He denied having participated in the case at the Land Disputes Tribunal.

9. In re-examination he stated that no titles were issued after the sub-division and the land was still registered in his late father's name.

10. PW3 Dinah Cheptanui Korgoren who is the Plaintiff's daughter corroborated the plaintiff's evidence that her father sub-divided the suit land between her mother and her step-mother though he did not transfer his land to anyone before his death. She stated that she was not aware that her step sister had sold a portion of land to the Defendant but if she sold it during their father's lifetime then he was entitled to a share of the portion belonging to her step-mother.

#### **Defendant's case**

11. The Defendant relied on his witness statement filed on 13<sup>th</sup> March 2013 and produced the 9 documents in his list of documents as exhibits 1 to 9. In his oral testimony he stated that he purchased a portion of land parcel no. KERICHO/KIPTUGUMO/227 which was registered in the name of Kipyegon Arap Terer. The said Kipyegon Terer sub-divided his land into 5 portions known as KERICHO/KIPUTUGUMO 1095, 1096,1097, 1098 and 1099. He produced a copy of the application for consent of the Land Control Board, Consent letter and mutation forms as well as the map containing the new parcel of land. He stated that after the sub-division, the deceased gave his daughter Hellen Chebii, one of the resultant parcels of land known as KERICHO/KIPTUGUMO/1096. The said Hellen Chebii sold the said parcel of land to the Defendant during the lifetime and with the blessings of her father. He said that he has been in occupation of parcel no. 1096 since 2005.

12. Upon cross-examination he confirmed that land parcel number KERICHO/KIPTUGUMO/227 belonged to Kipyegon Terer. He said Hellen had not yet obtained a title deed to land parcel no. 1096 although the process of issuance of the title deed had commenced but she died before it was completed. He confirmed that Judith Chebet Byegon and the plaintiff had placed cautions on land parcel no. KERICHO/KIPTUGUMO/227.

13. DW2 Isaiah Kipchrichir Ngeno who is the Plaintiff's step-son testified that his father never gave the Plaintiff a share of land parcel no. KERICHO/KIPTUGUMO/227. He stated that his father had sub-divided the suit land into five portions and given Hellen land parcel no. 1096. He said he was the custodian of all the documents relating to the suit land.

14. Upon cross-examination, he stated that he did not have the title deed in respect of the suit property as it was surrendered to the Lands registry in 2004 to facilitate its sub-division. He confirmed that no title deed had been issued for land parcel no. 1096. He said that he is the one who had charged the mother title to the bank but he had since discharged it. He corroborated the evidence of the PW1 and PW2 that the Defendant had been occupying the suit property even before his father died. The evidence of DW2 marked the close of the Defendant's case after which the parties were granted time to file their submissions.

#### **Issues for determination:**

15. Having considered the pleadings, evidence and written submissions, the following issues emerge for determination.

1. Whether land parcel no. KERICHO/KIPTUGUMO/227 exists and if so, who is the registered owner thereof.
2. Whether the land parcel no. KERICHO/KIPTUGUMO/227 was divided into five portions
3. Whether the Defendant has trespassed on the suit property
4. Whether the decision of the Soin Land Disputes Tribunal was valid
5. Whether the Plaintiff is entitled to the reliefs sought.

#### **Analysis and Determination**

16. It is common ground that land parcel no. KERICHO/KIPTUGUMO/227 was registered in the name of Kipyegon Arap Terer-deceased. It is however the Defendant's contention that prior to his demise the said Kipyegon Terer had sub-divided the suit land into five portions which had been given numbers KERICHO/ KIPTUGUMO/1095 to 1099 although the titles for the five portions had not yet been issued. This evidence was corroborated by PW1 and DW2. PW1 confirmed that the Defendant is occupying one of the resultant sub-divisions. The certificate of official search dated 15<sup>th</sup> October, 2012 that was produced by the Plaintiff indicates that the suit land is still registered in the name of the deceased.

17. On whether the suit land was sub-divided into five portions, the defendant produced an application for consent of the Land Control Board, a Letter of Consent and Mutation forms as well as a map indicating that the suit land was divided into five portions and given the numbers KERICHO/KIPTUGUMO/1095, 1096,1097,1098 and 1099. The said sub-division was done in 2004 during the lifetime of

Kipyegon Terer and the application for consent and mutation forms were duly executed by him. This was confirmed by DW2 who is one of the sons of the deceased and who said he was the custodian of the documents relating to the suit property. He stated that the title deed for the suit property was handed over to the Lands Registry to facilitate the sub-division and issuance of new title deeds. This is in line with section 22(2) of the Land Registration Act which provides as follows:

*“S.22(2) Upon the application of a proprietor of a parcel for the division of that parcel into two or more parcels, and authentication of the cadastral map, the Registrar shall effect the division by closing the register relating to the parcel and opening new registers in respect of the new parcels resulting from the division, and recording in the new registers all subsisting entries appearing in the closed register.”*

18. Counsel for the Plaintiff has submitted that if the sub-division was effected by the Land Registrar, a search at the Lands Registry would have revealed the closure of the old title upon registration of the resultant titles. However, in his testimony, the Defendant explained that the process of transfer of the titles was not completed as the defendant had not paid for it and after the death of Kipyegon Terer, there was a dispute at the Land Disputes Tribunal between him and Hellen Chebii and James Ngeno. It is therefore my finding that sub-division of the suit property into 5 portions is still incomplete as no new titles have been issued.

19. The third issue for determination is whether the Defendant has trespassed on the suit property. It is not in dispute that the Defendant has been in occupation of a portion of the suit property since 2005. What is in dispute is whether he is lawfully occupying the said portion. While the Plaintiff contends that the Defendant is a trespasser, the Defendant testified that he purchased a portion of the suit property which had been bequeathed to one of the deceased's daughters- Hellen Chebii who passed away 2014. The said portion had been given the no. 1096. He produced a sale agreement in respect of land parcel no. 1096 showing that the payments were made between November 2005 and January 2007. The Plaintiff disputed the said sale agreement and expressed misgivings on whether it was sanctioned by the deceased.

20. In his submissions, counsel for the Plaintiff took issue with the the application for consent of the Land Control Board as it refers to land parcel no. Kericho/Kiptugumo 1096 and not 227. He submitted that even if there was a sale, the same was void for lack of consent of the Land Control Board. The Plaintiff however concedes that the Defendant started occupying a portion of the suit property during the lifetime of Kipyegon Terer. If indeed the Defendant was a trespasser, he would have been sued by the late Kipyegon Terer. The fact that the deceased allowed the Defendant to stay on a portion of the suit property implies that he consented to the sale thereof by his daughter Hellen Chebii and I would not consider the Defendant a trespasser in the strict sense of the word. However, the legal challenge that arises is that the said Hellen Chebii sold her portion of land to the Defendant before she acquired her title to the land and was therefore incapable of passing any interest in the land to the defendant. In the circumstances, I agree with the submissions of counsel for the Plaintiff that the sale is not valid and the Defendant's only recourse is to sue the estate of the late Hellen Chebii for recovery of the purchase price under the provisions of section 36(2) of the Land Registration Act. I must however point out that this is not a case of fraud, and the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR** which counsel for the Plaintiff has cited is distinguishable from the instant case as the Arthi case deals with transfer of land by a fraudsters which is not the case here.

21. On whether the decision of the Soin Land Disputes Tribunal was valid, it is noteworthy that at the time the late Hellen Chebii instituted the suit, at the Land Disputes Tribunal she neither had a title to the suit property nor had she not obtained Grant of letters of administration in respect of her late father's estate and she therefore had no capacity to sue. In the case of **Joshua Kamoing v Simon Barchok & 2 Others (2016) eKLR** the court made it clear that only a person who is the legal representative of a deceased can sue or be sued in respect of the estate of a deceased person. Furthermore the, Tribunal acted in excess its jurisdiction by purporting to determine ownership of registered land yet its jurisdiction under section 3 (1) of the Land Disputes Tribunal Act Cap 303A (Repealed) was limited to determining cases touching on boundaries and claims to occupy or work land. I agree with the decision of **Sitonik Cherose Arap Lasi v Richard Soi & Another Kericho HC ELC Case No. 81 of 2016** cited by Counsel for Defendant, which held that the existence of a judgment awarding a party land which judgment was never set aside, reviewed or appealed cannot be ignored. However, that case is distinguishable from the instant case where the decision of the Land Disputes Tribunal was in excess of its jurisdiction and is therefore not valid.

22. The fifth and last issue for determination is whether the Plaintiff is entitled to the reliefs sought. In his Plaint the Plaintiff seeks several remedies all of which are aimed at ensuring that the defendant is removed from the suit property. In view of my findings hereinabove the plaintiff has to a large extent proved his case on a balance of probabilities. The prayer for mesne profits is however not merited. Furthermore, given the circumstances of the case, where the Defendant occupied the suit land with the acquiescence of the registered owner, I will not award costs to the Plaintiff. I therefore enter judgment in favour of the Plaintiff and make the following final orders.

- a) A declaration is hereby issued that land parcel number KERICHO/KIPTUGUMO/227 does not belong to the Defendant.
- b) The Defendant is hereby ordered to vacate the suit land within 90 days from the date hereof.
- c) After the period of 90 days stated in (b) above, a permanent injunction shall issue restraining the Defendant from entering or trespassing on the suit land.
- d) Each party shall bear their own costs.

**Dated, signed and delivered at Kericho this 18<sup>th</sup> day of June, 2019.**

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Miss Wilbey for the Plaintiff
2. Miss Chepkirui for Mr. Koko for the Defendant
3. Court Assistant - Rotich