



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L APPEAL NO. 10 OF 2018

[Formerly Eldoret Hcca No. 132 of 2013]

KENNETH KIBET CHERUTICH.....APPELLANT

VERSUS

THE COMMITTEE KIPKAA PRIMARY SCHOOL.....1ST RESPONDENT

HEADMASTER, KIPKAA PRIMARY SCHOOL.....2ND RESPONDENT

JUDGMENT

1. **Kenneth Kibet Cherutich**, the Appellant, being dissatisfied with the judgment of the Hon. Mary Gorreti Chepseba, the learned trial Magistrate in Iten RMCC No. 20 of 2007 delivered on the 13th September, 2013 preferred this appeal raising the following ten (10) grounds vide the Memorandum of Appeal dated the 10th October, 2013;

“1. That the learned trial Magistrate erred in law and fact by dismissing the plaintiff’s case.

2. The learned trial Magistrate erred in law and fact by dismissing the plaintiff’s case for want of the plaintiff’s capacity.

3. The learned trial Magistrate erred in law and fact in failing to find that the plaintiff’s acquisition of grant of letters of administration was sufficient to institute proceedings on behalf of the Estate of the deceased.

4. The learned trial Magistrate erred in law and fact by failing to find that the plaintiff had capacity to sue and had proved his case on a balance of probability.

5. The learned trial Magistrate erred in law and fact by failing to consider the totality of the evidence presented in support of the plaintiff’s case.

6. That the learned trial Magistrate erred in law and fact by failing to consider the submission of the plaintiff.

7. The learned trial Magistrate erred in law and fact by finding that the land was compulsorily acquired and by wrongly applying the principles of law.

8. The learned trial Magistrate erred in law and fact by finding that the prayers sought by the plaintiff were not available to her.

9. The Honourable learned trial Magistrate erred in law and fact by finding that the prayers sought by the plaintiff were not available to her.

10. The Honourable learned trial Magistrate erred in law and fact by awarding costs to the defendants.”

The appellant seeks for the Judgment of the learned trial Magistrate to be set aside. The court notes from the onset that ground 9 is a repetition of ground 8.

2. The appeal had been filed at the High Court Registry as Eldoret HCCA No. 132 of 2013 and later transferred to this court on the 7th

September, 2018 and registered as Eldoret ELCA No. 10 of 2018. That during the mention of the 16th October, 2018 directions were given on filing and exchanging written submissions. That thereafter, the learned counsel for the Appellant and Respondents filed the written submissions dated the 25th February, 2019 and 23rd July, 2019 respectively.

3. The learned counsel for the Appellant submitted that the Appellant, who was the Plaintiff in the Lower Court case, had instituted the suit as the legal administrator and representative of his late father, Cherutich Chepkeitany alias Chebugoi Cherutich Chepkeitany, both on his behalf and for the benefit of the Estate. That the Appellant had obtained a grant in Eldoret High Court Succession Cause No. 237 of 2004 before filing the suit but the trial Court dismissed it on the ground that he lacked capacity, and that the letters of administration had expired. That the learned trial Magistrate's finding was based on wrong application of the law and the Court should set the judgment aside for the following reasons;

(a) That the Appellant had capacity to file and prosecute the suit as he had procedurally obtained a grant of letters of administration for the estate of his late father. That the Appellant had produced a copy of the grant through Wycliffe Muyale (PW3) as exhibit P6. The learned counsel referred the Court to pages 68 to 69 of the record of appeal. The learned counsel also referred the Court to **Section 2 of the Civil Procedure Act and Section 3 of the Law of Succession Act** on the definition of legal and personal representative respectively. The counsel also referred to **Section 82 of the Law of Succession Act** on the powers of a personal representative, and submitted that the Appellant had the locus, as a personal representative, to file and prosecute the suit before the Lower Court and that the grant issued to him had not been challenged. The learned counsel referred to the case of *Isaya Masira Momanyi Vs Daniel Omwoyo & Another [2017] eKLR*, where it was held that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. That only a person who has been issued with grant of letters of administration has capacity to represent the estate of a deceased person.

(b) That the failure of the Appellant to have the grant confirmed within six (6) months did not strip him of the capacity to institute the suit as the grant had not been annulled or revoked.

(c) That the Appellant had proved his claim on a balance of probabilities for and on behalf of his late father's estate over L. R. Elgeyo Marakwet/1774, the suit land. That the Appellant had produced a copy of title deed and certificate of official Search as proof that the suit land was still registered in his late father's name. That the Land Registrar named David Dunya Omollo, who testified as PW2, had in his testimony confirmed that the records held at the registry indicated the suit land was in the name of the Appellant's late father. That as that evidence was unchallenged, then the learned trial Magistrate erred in dismissing the Appellant's claim as under the Land Act No. 6 of 2012 the title deed is sufficient evidence of ownership.

(d) That the Appellant had demonstrated that his late father's estate was entitled to compensation for the suit land by the defendants at Kshs.400,000 per year or alternatively orders of vacant possession, eviction and injunction be issued. That portion of their evidence was not challenged but the learned trial Magistrate failed to consider the weight of the evidence tendered and dismissed the suit on the ground of capacity only. The learned counsel also referred the court to the case of *Troustik Union International & Another Vs Jane Mbeya & Another [2008] eKLR (G&F) 730*, which is however, not annexed to the submissions.

4. The learned counsel for the Respondents submitted that the appeal is unmerited and untenable as the suit was statute time barred by virtue of **Section 7 of the Limitation of Actions Act**, having been filed after 27 years from the time the cause of action arose in 1980, when the respondents took possession of the suit land. The learned counsel referred to the cases of *Rawal Vs Rawal [1990] KLR 2*, *Lilian Njeri Muranja & John Maranja Mahinda Vs Virginia Nyambura Ndiba & Kajiado County Government [2014] eKLR*. The learned counsel further submitted that the act of the Appellant to withdraw the case against the Attorney General through the notice dated 10th November, 2008 made his case incompetent and unsustainable as the Respondent is a public school and the Attorney General has the mandate to defend it. The counsel made reference to **Section 43 of the Basic Education Act, 2013, Article 156(4) and (6) of the Constitution, Section 12 of the Government Proceedings Act Chapter 40 of Laws of Kenya and Sections 6(2) and 7 of the Attorney General Act, 2012**. The learned counsel further submitted that the claim for mesne profits was not proved as no evidence to support the Kshs.400,000 claimed was presented. That no valuation reports were presented to prove the value of Kshs.150,000 per acre claimed. The counsel referred to the case of *Patricia Bini Vs Melina Investments Ltd & 3 Others [2015] eKLR*. That it was the learned counsel's submissions that as the deceased had disposed of his interest over the suit land to Barnabas Chepkoiywo who testified as DW2 in the year 1977, who then surrendered it to the respondent upon compensation being made, then the appeal has no merit. The learned counsel referred to the Court of Appeal decision in *Willy Kimutai Kitilit Vs Michael Kibet [2018] eKLR*, where the court held that the Appellant was in constructive trust of the (2) two acres he had sold to the respondent in 2008, but had not transferred it before registering the whole land in his name on 4th December, 2012 after which he filed suit seeking for eviction order. The counsel also referred to the case of *Felix Kipchoge Limo Langat Vs Robinson Kiplagat Tuwei [2018] eKLR* on the same issue of constructive trust.

5. The issues for determination set out in the Memorandum of Appeal are as summarized herein below;

(a) **Whether the learned trial Magistrate erred in law and fact by finding that the Appellant was without capacity to institute the proceedings on behalf of the deceased's estate while he had a grant of letters of administration.**

(b) **Whether the learned trial Magistrate erred in law and fact by making a finding that the suit land had been compulsorily acquired.**

(c) **Whether the learned trial Magistrate's judgment was against the weight of the evidence tendered.**

(d) **Whether the appeal has merit and what order to issue.**

6. This being the first appeal, the Court is obligated to consider afresh the evidence tendered before the trial court and come up with its own findings while warning itself that it did not hear or see the witnesses testify. The pleadings in the record of appeal shows that the Lower

Court suit was commenced by the Appellant as the plaintiff through the plaint dated the 29th September, 2005 and amended plaint dated the 18th August, 2009 through which the Attorney General was added as the 3rd defendant. That also added through the amended plaint are the prayers for general damages and mesne profits of Kshs.400,000. That the suit against the 3rd defendant was subsequently withdrawn vide the notice dated the 10th November, 2009. That the respondents, who were the 1st and 2nd Defendants, opposed the claim through their defence dated the 15th October, 2005 after which the Appellant filed his reply to the defence dated the 28th December, 2005.

7. The record further shows that the Appellant testified as PW1 on the 7th April, 2010. His case is that the suit land was registered in the name of his late father who died in 1997. That the land had been taken over in 1980 with other parcels in the area and the school (1st Defendant) established thereon. That he got to know that the suit land was in his late father's name in 2004 and thereafter, commenced the process of recovering it, including filing Eldoret High Court Succession Cause No. 237 of 2004 in which he was appointed the administrator of his late father's estate and grant dated 12th July, 2005 issued. The Appellant called PW2, the Land Registrar who confirmed that the suit land was in the name of the late Cherutich Chepkeitany, and PW3 the Court Assistant Executive Officer, who produced the copy of the grant as exhibit.

For the defence, six witnesses testified as DW1 to DW6. The general thread of their defence is that the late Cherutich approached DW2 with an offer to sell him the suit land in 1977. That DW2 bought the land. That later, the members of the community wanted to establish a school in that area and the elders approached the people with land there. That among the elders, was DW5 who told how they approached the father of the plaintiff over the suit land. He told the court that the Plaintiff's father informed them that the land belonged to DW2 as he had surrendered to him. The elders then sent DW5 to go Kabarnet where DW2 was working and that DW2 gave the elders the green light to use the suit land for the school purposes. That the father to the plaintiff did not lodge any complaint with any government office over the use of the suit land for the school purposes from 1980, when the school was established on it, to 1997 when he passed on. That the father to the plaintiff was not entitled to the offer of alternative land or compensation as the suit land did not belong to him but to DW2. The court has considered the evidence tendered before the Lower Court by and on behalf of both sides and it is apparent the suit land described as Elgeyo Marakwet/Kapterik/1774 measuring 0.80 Hectares, was registered in the name of the Plaintiff's father as confirmed by the copy of the green card produced as exhibit by PW2. That the testimony of DW2 and DW5 on who surrendered the suit land for establishment of the school was not challenged or rebutted. That in any case, PW1 was about ten (10) years then, and the available evidence shows his late father died in 1997, about seventeen (17) years after the school was established on the suit land, without seeking to repossess the land from 1st defendant. The green card produced as exhibit by PW2 shows the title deed for the suit land has not been issued from the date the register was opened to the 22nd September, 2010 when the copy of the register was issued. That it would therefore, appear that the Plaintiff's father had no interest during his life time over the suit land which goes to confirm the evidence given by DW2 and DW5 that he had sold it to DW2. That the continued registration of the suit land in the name of the Plaintiff's late father can only be taken to be in trust for the 1st Respondent.

That on the issue of the plaintiff's capacity to file and prosecute the suit on his own behalf and on behalf of the estate of the late Cherutich Chepkeitany alias Chebugoi Cherutich Chepkeitany, there is no doubt that he exhibited the copy of the letters of administration intestate dated the 12th July, 2005 issued in Eldoret High Court Succession Cause No. 237 of 2004. That the grant clothed the Appellant with the powers of a personal representative as set out under **Section 82 of the Law of Succession Chapter 160 of Laws of Kenya**, which includes powers **"to enforce by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate."** That as under **Section 80(2) of the said Act**, the grant of letters of administration takes effect after the date of the grant, the appellant was therefore, with capacity to file and prosecute the suit in the Lower Court as it was filed after 12th July, 2005. That the expiry of six (6) months from the date of the grant without having the grant confirmed and certificate of confirmation issued, did not take away the Appellant's capacity as the administrator of the estate of the late father. That the Appellant could only have lost the capacity that he gained through the grant issued on the 12th July, 2005 through for example, upon it being revoked or annulled. That the finding of the learned trial Magistrate that the Appellant **"had no legal capacity to administer or sue on behalf of the estate of the late Chemugui Chemutei Chepkeitany with regard to this property"** was therefore a misdirection on her part as the only thing the Appellant could not do before confirmation of the estate is to distribute or dispose of the immovable property as dictated by proviso (ii) of **Section 82(b) of the Law of Succession Act**.

8. The court has considered the learned trial Magistrate's judgment delivered on the 7th August 2013, the grounds on the Memorandum of Appeal, the learned counsel submission for and against the appeal, and come to the following conclusions;

(a) That though the learned trial Magistrate set out a summary of the parties' testimonies in the body of the judgment and the two issues which were for determination, the last two pages of the judgment leaves no doubt that the final decision was based entirely on the finding that the Appellant had no legal capacity to sustain the suit after the expiry of six (6) months from the date of the grant, as he had not obtained a confirmation. That as the grant had not been annulled or revoked, that finding by the learned trial Magistrate was not a misdirection of the law and was in error, in view of the express provision of **Section 82 of the Law of Succession Act**. The Appellant had capacity to sustain the suit he had filed in the Lower Court on the strength of the letters of administration obtained in Eldoret High Court Succession Cause No. 237 of 2004 on the 12th July, 2005.

(b) That this court while sitting as an appeal court has powers set out under **Section 78 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, to among others determine a case finally, remand a case, frame issues and refer them for trial, take additional evidence or require the evidence to be taken, and order a new trial. That having found that the learned trial Magistrate basis of dismissing the Appellant's suit was based on an error of the law, and as this court has already re-evaluated the evidence tendered before the trial court as shown in 7 above, it is in the best interest of the parties and justice for this court to make its determination on the suit on the evidence tendered.

(c) That as found in 7 above, the father of the Plaintiff, hereinafter referred to as the deceased, had fully divested his proprietary interest over the suit land, that upon registration became known as Elgeyo/Marakwet/Kapterik/1774 in the 1977. That is the gist of the evidence tendered by DW2 and DW5. That the deceased was not the one who surrendered the suit land to the community for the school use, as by then he had already sold it to DW2. That it follows that by the time the suit land was registered on the 1st September, 1993 in the name of the deceased, he was effectively so registered as trustee of DW2, who had already in turn

surrendered the same land to the community for establishment of 1st defendant. The finding in the Court of Appeal case of Willy Kimutai Kitilit Vs Michael Kibet [2018] eKLR and Felix Kipchoge Limo Langat Vs Robinson Kiplangat Tuwei [2018] eKLR on constructive trust are relevant to this case. That it follows that the suit land was therefore not part of the estate of the deceased by the time he died in 1997. That on that basis, the Appellant's suit in the Lower Court fails.

(d) That the available evidence from both sides confirmed that the 1st respondent took possession of the suit land without force in or about 1980 after it was established by the local community. That the 1st Respondent has since then continuously occupied the land and the deceased did not take any steps to recover the land by the time of his death in 1997. That **Section 7 of the Limitation of Actions Act Chapter 22 of Laws of Kenya** gives a window of twelve (12) years for one to commence an action for recovery of land from the date the cause of action arose. That in this case, the cause of action arose in 1980, and any action for recovery of the suit land ought to have been filed before the expiry of twelve (12) years, which is by 1992. That paragraph 3 and 7 of the Respondent's defence contained a Notice of Preliminary Objection to the Appellant's claim. That the objection was heard on the 1st April, 2009 as confirmed by the record from pages 46 to 50. The objection was on the ground of locus standi and the suit being statute time barred. That the learned trial Magistrate rejected the preliminary objection and stated as follows;

“I do find that the points of law raised are not pure points of law, they are contentious and can be determined at the hearing of the suit or an application. For the above reason, I do overrule the preliminary objection and order that the suit proceeds to its logical conclusion.”

That the issue of the suit being time barred was pursued by the Respondents in their testimony and through their learned counsel's written submissions before the trial court. That issue was however, not addressed and determined in the judgment delivered by the learned trial Magistrate. That it falls upon this court to pronounce itself on the matter. That the suit having been filed in 2005, which was about twenty-five (25) years from the year 1980 when the cause of action arose, the Appellant's claim was therefore filed outside the twelve (12) years window granted by **Section 7 of the Limitation of Actions Act** and hence statutory time barred.

(e) That on a total analysis of the evidence tendered before the trial court, the Appellant failed to prove his claim that he was entitled to any of the prayers set out in the amended plaint and his appeal therefore, fails.

9. That for the reasons set out above, the Appellant's appeal is without merit and is dismissed with costs.

Orders accordingly.

Dated and delivered at Eldoret this 6th day of November, 2019.

S. M. KIBUNJA

JUDGE

Judgment read in open court in the presence of:

M/s Kiplangat for Appellant.

Mr. Mitei for Respondents.

Christine: Court Assistant