



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

**AT ELDORET**

**E & L CASE NO. 491 OF 2013**

**MARK KIPROTICH SIRMA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SOSTEN KIPLAGAT SINGOEI.....APPLICANT/DEFENDANT**

**JUDGMENT**

**Mark Kiprotich Sirma** (*hereinafter referred to as the plaintiff*) has sued **Sosten Kiplagat Singoei** (*hereinafter referred to as the defendant*), claiming that the plaintiff is the sole registered owner of all that parcel of land known as **Nandi/Kokwet/688** having purchased the suit land parcel from one Jemaiyo Kogo (now deceased) way back in the year 1990. That upon purchasing the said suit land, the plaintiff lawfully caused the same to be transferred and to be registered in his name and consequently the plaintiff was issued with a title deed on 5<sup>th</sup> August, 1994. That the plaintiff is therefore the lawful registered owner of all that parcel of land known as Nandi/Kokwet/688 vesting in him the absolute ownership thereof together with all rights and privileges appurtenant thereto.

It is the plaintiff's case that out of humanitarian ground, he discretionally, willfully and temporarily permitted the defendant who is his brother to occupy the suit land as the defendant was to seek for an alternative place of his own and/or plan to acquire his own land since he was still growing and developing. That it is further the plaintiff's case that the defendant was to occupy the suit land while arranging for his own alternative means of abode and/or occupation. The defendant has since declared that he shall not vacate and move from the suit land despite the plaintiff's numerous requests and demands being made for vacant possession of the suit land despite having become stable with acquisition of various parcels of lands registered in his own name/title.

The plaintiff avers that it was his conditional term of the memorandum of mutual understanding with the defendant that the defendant would give/relinquish the plaintiff's suit and give vacant, quiet, peaceful and unconditional possession and occupation of the subject suit land upon required so to do and upon demanded to which the plaintiff made good his demand in 1998.

The plaintiff has been frustrated by the defendant's conduct on several occasions who appears intent at depriving the plaintiff his ownership rights to repossess, occupy and to absolutely own his parcel of land as he has refused, been adamant and/or ignored the demands to surrender/relinquish and give him vacant possession/occupation of the suit parcel of land aforesaid. The plaintiff contents that he has never sold nor granted the defendant or any other person the suit land or charged the same in favour of any institution for whatever consideration. The plaintiff further contends that the actions of the defendant in refusing to give him unconditional, vacant possession and occupation of the suit land at the instant demands of the plaintiff amounts to trespass breach of his appurtenant rights of ownership and

consequently denying him the right to exclusive possession, occupation, utilization and enjoyment of the suit land.

The plaintiff's claim against the defendant is therefore for a declaration that the plaintiff is the absolute registered owner of all that parcel of land known as Nandi/Kokwet/688 and therefore entitled to it to occupy, possess and all that is legally appurtenant to his rightful ownership. The plaintiff prays for a declaration that the defendant is a trespasser onto his subject suit land as from the time of demand 1998 hence illegally on the suit land since the issuance and/or demand for vacant possession. The plaintiff's claim is also for an order of eviction and a permanent injunction restraining the defendant, his agents and/or servants from trespassing onto the suit land. The plaintiff prays for mesne profits from 1998 when he commenced demanding for vacant possession of the suit land and loss of user from the date the vacant possession ought to have been given to the plaintiff on demand. He further prays for an order of permanent injunction to restrain the defendant from further intermeddling, interfering and/or in any way dealing with the suit land plus costs of this suit.

The defendant filed defence admitting that the plaintiff is the registered proprietor of the suit land save that he has been in peaceful occupation of the suit land and that he does not know how the plaintiff obtained title and yet they contributed jointly towards the purchase consideration and entrusted the plaintiff to present on his behalf. They jointly purchased several other parcels of land but the plaintiff and defendant mutually agreed that the defendant do occupy the suit parcel. He has been in possession long before the plaintiff was registered.

When the matter came for hearing, the plaintiff testified that he is the registered owner of the whole of that parcel of land known as NANDI/KOKWET/ 688 hereinafter referred to as the suit parcel. That he obtained ownership of the suit parcel having purchased in from one JEMAIYO KOGO now deceased. That upon purchase of the suit parcel, he lawfully caused the same to be transferred and registered in his names. On the 5<sup>th</sup> of August, 1994, he was issued with a title deed to the suit parcel. Upon taking possession, requested his younger brother, the defendant to help him with taking care of cattle which he had brought on the suit parcel. He agreed to the arrangement which was of a temporary duration as he had other plans of commencing developments on the suit parcel. In the year 1998, having made up his mind to undertake construction work on the suit parcel, he approached the Defendant and informed him of his plans and that it was time to move out as per their prior arrangement.

To his shock and disbelief, the defendant blatantly refused to vacate the suit land and insisted on staying on despite the fact that he had no legal justification, right or claim over the suit parcel. His kind gesture of allowing the defendant to occupy the suit parcel was to allow him temporary abode and that at no one point in time during his stay on the suit parcel did he ever claim any form rent or monetary gain from him in regard to the suit parcel. The Defendants occupation of the suit parcel was based on a memorandum of understanding that he would vacate and give vacant possession as and when demanded. According to the plaintiff, being the lawful registered owner of the suit parcel, he is vested with absolute ownership thereof together with all rights and privileges appurtenant thereto. Accordingly, the defendants continued unlawful stay and occupation of the suit parcel is a violation of his legally entitled rights and a callous act calculated to deprive him of the suit parcel. He prays to this Honourable Court to enter Judgement against the defendant as prayed in his Plaint.

He called Marcella Jepchumba Moso who testified that she knows Mark Sirma, the plaintiff herein. That he is her neighbor since 1990. She resides in land parcel known as NANDI/KOKWET/624. They both bought land from one initial large parcel from Musa Kiprotich Mugai who was a legal beneficiary of the estate of the late Jemaiyo Kogo. That the said Sirma resided in the said land until 1997 when he brought his brother Sosten (the defendant herein) when he was a young man and introduced her to him saying he would be residing in the suit land parcel for a while until further notice.

She therefore knows the said Mark Sirma as the lawful and registered owner of the suit parcel of land from her own personal knowledge and she is surprised that the defendant is claiming ownership. She is further aware that the plaintiff had established a dwelling house and other structures prior to the defendant moving. The plaintiff had informed her, just prior to the institution of this suit that he wanted to return to

his land to begin utilizing it and to carry out further developments.

In 1992, they went through succession and were listed as the estate's liabilities, the deceased's estate owing them the various respective parcels of lands that they purchased. That she remembers they were three individuals who were purchasers. The third purchaser sold his portion of land to the plaintiff herein on 22.3.1993 making the plaintiffs acreages to be three acres (3) which acreages were duly transferred to the plaintiff. She was a witness to the sale agreement thereof. That was the close of the plaintiff's case

The defendant opened his case by testifying on oath and stating that he lives at Koswet. He is a businessman dealing with buying and selling cattle. He has bought land. He used milk to buy land for himself. The plaintiff was their elder brother. They used to contribute money to buy the land in 1993. He gave the defendant money to buy the land in dispute. He has bought him several parcels of land but has constructed on the suit land where he has lived with his wife since 1992. They have tried to resolve the dispute but the plaintiff has refused to go home. Land No. 688 was obtained through succession. They bought the land through family efforts.

On cross examination by Omusundi, learned counsel for plaintiff, he states that he was born in 1972 has been a dealer in cattle since 1988. He does have his National Identity Card. He lives on 3 acres whilst his land is 2 acres. Sirma's is 1 acre. He bought the land in 1993 from Moses Kiprotich Muge for Kshs.80,000/= and entered the in 1994. He was not party to the succession. He earned his money from farming and trading. He did not do any agreement because he trusted his brother.

DW2, is the mother to the plaintiff and defendant and lives in Kosirai. She testified under oath that she is small scale farmer. She knows her two children Mark and Sosten the former being her eldest son whereas Sosten is the sixth child. According to DW2, the land was bought by the plaintiff but he was given money by Sosten who stays in the parcel of land. Mark has never stayed in the land. The house on the parcel of land was done by Sosten. DW2 lives on the land with Sosten with her husband. She tried to bring her children together but Mark said that he cannot talk to a person who never went to school. Sosten sold maize and gave money to Mark. They used to live well before this happening. Mark was trusted because he had gone to school. On cross examination, she states that she has 7 children; four boys. Her other son called Musa stays on another parcel of land. She moved to Sosten in April, 2016. Where Musa stays was bought by the family. The land she stays with Sosten was bought by the two of them. Sosten gave Mark money towards the purchase of the suitland.

The plaintiff submits that he is the legal owner of the suit parcel of land duly registered as absolute properties of the land measuring 1.21 hectares and therefore deserving of all the rights and privileges appurtenant thereto together with the orders of eviction, a permanent injunction, mesne profits from the time thereof plus costs and interest.

The defendant on his part submits that the suit land was bought with the joint efforts of the plaintiff, defendant and his mother. The defendant and his mother contributed money to buy the land. The total acreage was 3 acres. One acre belonged to the plaintiff whilst 2 acres belonged to the defendant. The plaintiff has never resided on the land and holds the title to the land in trust for himself, defendant and their mother.

### **ANALYSIS AND DETERMINATION**

The evidence available indicates that the plaintiff moved to resident Magistrate's Court at Kapsabet in Succession Civil Suit No. 14 of 1992 in the matter of the Estate of Jemaiyo Kogo as a co-petitioner praying that letters of administration intestate in respect of the deceased be issued to the plaintiff, as Moses Kiprotich Muge and Marcellah Jepchumba Moso. It is not clear whether letters of administration were granted as there is no grant produced. The letters by the chief Kosirai location indicating that the plaintiff was the registered owner of the suit land and that he allowed his brother to occupy the suit land does not explain how the plaintiff obtained title. The sale agreement produced by the plaintiff is between Moses Kiprotich Muge as the Vendor and Peter Kirwa Cherwon as the purchaser and refers to parcel No. Nandi/Kokwet/396. The plaintiff is not party to the agreement and the subject parcel of land is not the

suit land. The plaintiff produced the certificate of official search which shows that the plaintiff was registered as proprietor of the suit land on 4.8.1994 and the title deed issued on 5.8.1994 and therefore, according to the documents, the plaintiff is the registered absolute proprietor of the suit property.

Article 40. of the constitution of Kenya 2010 provides;-

Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

of any description; and

in any part of Kenya.

Parliament shall not enact a law that permits the State or any person—

to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

to limit, or in any way restrict the enjoyment of any right

under this Article on the basis of any of the grounds specified

or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

results from an acquisition of land or an interest in land

or a conversion of an interest in land, or title to land, in

accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried

out in accordance with this Constitution and any Act of Parliament that—

requires prompt payment in full, of just compensation to the person; and

allows any person who has an interest in, or right over, that property a right of access to a court of law. Freedom of movement and residence.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property

that has been found to have been unlawfully acquired

1. Section 24 (a) of Land Registration (Act No.3 of 2012) provides that: -

“The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

2. Section 25 of the Act provides as follows;

**“The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject;**

**to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.**

3. Section 26 (1) of the Act provides;

**“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 and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –**

**On the ground of fraud or miss-representation to which the person is proved to be a party to;**

**Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

It is trite law that once a person is registered as a proprietor of land, he is to enjoy all rights and privileges appurtenant thereto. However, title can be challenged on the ground of fraud or miss-representation to which the person is proved to be a party to and where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The plaintiff testified that he sold cows gave money to the defendant to buy the property on his behalf. His mother also testified that the plaintiff and defendant are her children and that the defendant gave the plaintiff money to buy the suitland. The plaintiff is the eldest whilst the defendant is her 6<sup>th</sup> child. According to their mother, the plaintiff was given money to buy the land and that the house on the land was done by the defendant. She lives on the suit land with the defendant and her husband.

It is crystal clear that the parcel of land is registered in the name of the plaintiff, however, it is not clear how the plaintiff became registered. Nandi/Kokwet/623 was subdivided to create 688 according to the certificate of official search (PEX.5a), however, there is no evidence of any transaction that lead to plaintiff to be registered. DW1 and DW2 were very firm that the parcel of land was bought by the family but registered in the plaintiff’s name. In fact, the demeanor of the plaintiff’s mother was of a lady who had tried to settle the family dispute but came to court because she wanted to say the truth. I believe the DW2 is saying the truth. The plaintiff did not come out clearly as to how he obtained title. I do find that the facts herein depict an implied trust and therefore, I do declare that the plaintiff is holding title to the property in trust for the family. The defendant filed defence but did not file a counterclaim and therefore, the issue of the dissolution of the trust cannot be determined now. The upshot of the above is that the suit is dismissed with no order as to costs this being a family dispute. I do order that the status quo to be maintained.

**Dated and delivered at Eldoret this 25<sup>th</sup> day of January, 2018.**

**A. OMBWAYO**

**JUDGE**