



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 75 OF 2015**

**(FORMERLY ELC 792 OF 2013)**

**(FORMERLY EMBU CC NO.256 OF 1991)**

**HORIDA WANJUKI NGARI.....PLAINTIFF**

**VERSUS**

**EDWIN NJERU IRERI.....DEFENDANT**

**JUDGEMENT**

1. The original Plaintiff herein filed suit against the original Defendant seeking the following reliefs;

*a. Judgement against the Defendant for the transfer the said parcels of land Nos. Nthawa/Riandu/1947 and 1948 as granted by clan elders and the Chief and his elders. (sic)*

*b. The costs of this suit be provided for.*

*c. Any other relief that this honourable court may deem fit to grant.*

d. The Plaintiff pleaded that sometime in 1984, he was allocated a parcel of land by his clan which land was comprised in *Title No. Nthawa/Riandu/1800* (herein after known as “parcel No. 1800”). It was further pleaded that the clan chairman one Timotheo Makenge, was to facilitate transfer of his portion to him but he died before finalizing the process.

e. It was the Plaintiff’s case that upon the demise of the said chairman, his son, Obadiah Ireri (the original defendant), took over as chairman of Kere clan. It was pleaded that when parcel No. 1800 was sub-divided into 6 parcels in 1989, the Plaintiff was to get *Title No. Nthawa/Riandu/1947 and 1948* (hereinafter known as “the suit properties”) but the Defendant allegedly obtained title deeds for the suit properties through fraudulent means.

f. The Plaintiff further pleaded that sometime in 1989 he referred the matter to the Location Chief and some elders who resolved the dispute in his favour but the Defendant had, nonetheless, refused to transfer the suit properties to him.

g. The Defendant filed a defence and counterclaim in which he refuted the Plaintiff’s claim and counterclaimed for an order of eviction against the Defendant and for removal of the caution placed against the suit properties. The Defendant denied, in particular, that he was ever chairman of Kere clan as alleged by the Plaintiff.

h. The record shows that over the years, both the original Plaintiff and the original Defendant died and the Plaintiff was substituted with his wife Horida Wanjuki Ngari as his personal representative whereas the Defendant was substituted with Bertha Mbuya Ileri. Later on, Bertha Ileri was substituted with her son Edwin Njeru Ileri.

i. The parties do not appear to have agreed on the issues for determination. Consequently, the Plaintiff filed her version of issues on 21<sup>st</sup> February 2017 whereas the Defendant filed his version on 29<sup>th</sup> May 2017. The court will, therefore, frame the issues for determination as they appear from the pleadings, sworn statements and documents filed by the parties.

j. The Plaintiff testified that her late husband, Silvester Kimotho, (hereinafter known as “Kimotho”) was a member of Kere clan and as such was entitled to allocation of clan land. According to her, before land demarcation was concluded the clan chairman, Timotheo Makenge, (hereinafter simply known as “Timotheo”) showed Kimotho a portion of land to cultivate and develop. It was her further evidence that Timotheo died before he could transfer the land to Kimotho.

k. The Plaintiff’s case was that upon the death of Timotheo his son, Obadiah Ileri (hereinafter simply known as “Obadiah”) secretly transferred to himself the land they were to receive. It was her case that they were entitled to parcel Nos 1947 and 1948. When the Defendant refused to transfer the suit properties to her, they cautioned the land.

l. It was the Plaintiff’s case that when the dispute was referred to the location Chief and the elders, the dispute was resolved in their favour and the Defendant directed to transfer the suit properties. However, when the dispute was later on referred to a panel of Elders chaired by the D.O Siakago, it was decided that the land belonged to Obadiah.

m. The Plaintiff’s second witness was Alexander Nyaga (PW 2) who stated that he was a member of Kere clan just like Kimotho. He testified that as a member of the clan, Kimotho was entitled to a share of clan land. He stated that Timotheo had shown him a parcel of land during his lifetime but that Timotheo died before he could transfer the land to Kimotho. It was his evidence that upon the demise of Timotheo, his son, Obadiah, transferred all the remaining parcels into his name without the knowledge of the clan.

n. The third witness was Peterson Kimotho (PW 3) who stated that he was the son of the late Kimotho. He testified that he was brought up on the suit property and that he did not know of any other home. He stated that during his father’s lifetime some elders used to visit to discuss on how they would be given their land.

o. The 4<sup>th</sup> witness, was Jackson Kimotho (PW 4). He stated that he was the 7<sup>th</sup> son of the late Kimotho and that he was born on the suit properties in 1990. He further stated that if they were evicted, they would become homeless.

p. The 5<sup>th</sup> witness was Anjelimo Mbanda (PW 5) who was the location Chief for Nthawa Location between 1987 and 1999. He testified that both Kimotho and Obadiah were his cousins. His evidence was that the land dispute was reported to him in February 1990 and he teamed up with 4 elders to resolve the dispute. It was resolved that Obadiah should transfer the suit properties to the Plaintiff. He produced a copy of the verdict in court.

q. It was also the evidence of PW 5 that upon the demise of Timotheo, his son, Obadiah, took over the chairmanship. He was supposed to transfer some parcels of land to deserving clan members but instead he started selling some parcels to third parties.

r. The defence called 4 witnesses. The first to testify was Edwin Ileri as PW 1. It was his testimony that when land was being demarcated and allocated to clan members, Mr Kimotho was allocated Nthawa/Riandu/1449 by Timotheo but he declined the allocation. He was later on given

alternative land being Nthawa/Riandu/271 which he declined again. Finally, he was offered parcel No. 1378 which he was to share with one Shadrack Ngari but he declined to take it once more.

s. It was the evidence of the Defendant that parcel No. 1800 was given to Obadiah by Timotheo and he obtained a title for it on 9<sup>th</sup> Jan 1989. He further stated that all members of the clan were given land openly and publicly through the Land Control Board and that his father Obadiah obtained the land through the same process. His father later on subdivided parcel 1800 into six portions and that the suit properties (i.e. parcel Nos. 1947 and 1948) were sub-divisions thereof. He, therefore, asked the court to dismiss the Plaintiff's suit.

t. The 2<sup>nd</sup> defence witness was Justino Mbogo (PW 2) who stated that he was a member of Kere clan. He stated that the Plaintiff's husband was allocated parcel No. 1449 by the clan but he refused to accept it. He further testified that parcel No. 1800 was allocated to Obadiah Ileri through the Land Control Board. The allocation was done by the clan chairman, Timotheo.

u. The 3<sup>rd</sup> defence witness was Johnson Njiru Kaumbuthu (PW 3). He was a member of the Kere clan and he gave evidence similar in every respect to PW 2. According to his evidence, parcel 1800 belonged to Obadiah whereas the Plaintiff's husband was offered parcel No. 1449 which he declined to take.

v. The 4<sup>th</sup> defence witness was John Mwaniki Makenge (PW 4). He was the uncle of the Defendant herein and brother of Obadiah. His evidence was essentially a copycat of the evidence of PW 1. Like PW 1, he stated that the late Kimotho rejected three different allocations of clan land by Timotheo. He also testified that parcel No. 1800 was solely allocated to his elder brother, Obadiah.

w. Having considered the pleadings, documents and evidence of the parties, I am of the view that the following issues fall for determination;

- a. Whether the Plaintiff's late husband, Silvester Kimotho, was allocated the suit properties as his share of clan land.
- b. Whether the original Defendant, Obadiah Ileri, was fraudulently registered as proprietor of the suit properties.
- c. Whether the original Defendant, Obadiah Ileri, took over the chairmanship of Kere clan upon the death of his father.
- d. Whether the dispute was referred to other dispute resolution mechanisms and, if so, what is the consequence thereof.
- e. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
- f. Whether the Defendant is entitled to the reliefs sought in the counterclaim.
- g. Who shall bear the costs of the suit and counterclaim.
- h. The first issue is really the main question in controversy in this suit. The Plaintiff's case was that Kimotho was allocated the two parcels of land in dispute as part of his share of clan land. According to the Plaintiff's evidence, the late Kimotho was 'shown' the portion of land by the clan chairman Timotheo. That was around 1984, before the larger block No. 265 was sub-divided.
- i. The Defendant's case all along was that the suit properties were sub-divisions of parcel No. 1800 which was allocated to Obadiah by Timotheo chairman during his lifetime. The Defendant maintained that Kimotho was allocated different parcels of land by Timotheo which he allegedly

rejected.

j. The court has carefully considered the entire oral and documentary evidence on record, bearing in mind that the burden of proof rests upon the Plaintiff. There is no doubt that Kimotho as a member of Kere clan was entitled to a share of the clan land. The only issue is whether he was actually allocated the two parcels being claimed. In my view, there is no evidence on record to demonstrate that Kimotho was actually allocated parcel Nos 1947 and 1948. On the contrary, the evidence on record, including the land register, indicates that these two parcels were a result of subdivision of parcel No. 1800 which was registered in the name of Obadiah even before the subdivision was undertaken. It would, therefore, follow that upon sub-division, the resultant sub-divisions all belonged to the same proprietor.

k. Even if the Plaintiff's husband was shown that portion in dispute by Timotheo in 1984 that was long before sub-division and demarcation of the larger block No. 265 hence parcel Nos 1947 and 1948 did not exist then. There is also evidence on record that Kimotho rejected some allocations of clan land as given by Timotheo. So, if the chairman had already allocated Mr Kimotho clan land way back in 1984, why would he make additional allocations and offer alternative land to him? That would be very curious.

l. The court finds that there is evidence on record to the effect that clan members were allocated land and transfers made to them with the approval of the Land Control Board. The Land Control Board was apparently giving approvals for mass transfers. So, if the Plaintiff was allocated parcel Nos 1947 and 1948, how come they did not appear before the Land Control Board for consent to transfer? The court, therefore, finds that the Plaintiff has failed to demonstrate that the suit properties were allocated to the late Kimotho.

m. The 2<sup>nd</sup> issue is whether Obadiah was fraudulently registered as proprietor of the suit properties. As indicated hereinbefore and borne out by the documentary evidence on record, the suit properties are sub-divisions of parcel No. 1800. The said parcel was registered in the name of Obadiah on 9<sup>th</sup> January 1989. The said parcel was on 2<sup>nd</sup> October 1989 sub-divided into 6 parcels i.e. Nos 1943, 1944, 1945, 1946, 1947 and 1948 and the title closed.

n. It was alleged that the original Defendant secretly registered himself as proprietor of parcel No. 1800 after the death of Timotheo, instead of distributing the land to deserving clan members. The court finds no evidence on record to support such allegation. First, there is no indication on record that parcel No. 1800 was transferred to Obadiah through succession proceedings. On the contrary, the green card shows that the parcel No. 1800 was transferred from Timotheo to Obadiah on 9<sup>th</sup> January 1989. The evidence of the parties shows that Timotheo died in May 1989. It would, therefore, appear that Timotheo allocated and transferred the land to his son during his lifetime. There is no evidence of foul play or fraud on record.

o. It may be the case that the late Kimotho was expecting an allocation of clan land on the same site which he had cultivated and settled. However, I do not think there was any legal obligation on the part of the clan chairman or allocation committee to allocate every clan member the particular portion they had cultivated or settled on. The court has no reason to doubt that the transfer of parcel No. 1800 to Obadiah was sanctioned by the Land Control Board. There was really no evidence of secrecy or fraud about the transfer.

p. The 3<sup>rd</sup> issue is whether the original Defendant, Obadiah, ever took over as chairman of Kere clan upon the death of his father, Timotheo. Although the Plaintiff and PW 5 stated that he did, there was no credible evidence on record to demonstrate it. On the contrary, the panel of elders who considered the land dispute in 1993 concluded that there was evidence that somebody else may have taken over as clan chairman. In my view, even if the late Obadiah had taken over as clan chairman, it would not have been of much significance since he obtained the suit properties before the death of his father.

q. The plaint as framed sought that judgement be entered for the Plaintiff as per the decision or award of the local Chief and the elders. That is a curious prayer given that the resolution of the land dispute by the Chief and the elders was not at the behest or sanction of the court. So, the 4<sup>th</sup> issue is to determine what alternative dispute resolution mechanisms were applied and the consequence thereof.

r. It would appear from the material on record that Kimotho had reported the land dispute with Obadiah to the Chief of Nthawa Location who together with some 4 elders made a decision which they styled as “judgement” in favour of Kimotho. However, the said decision by the Chief and elders was, in my opinion, purely informal. It was not backed by a legal framework and a mechanism for its enforcement. The said decision did not result from a court sanctioned Alternative Dispute Resolution (ADR) process as provided for under **section 46 of the Civil Procedure Rules**. In my opinion, therefore, that process was of no legal consequence hence it died a natural death. No party can rely on such a decision and seek judgement on it.

s. The record also indicates that while the suit was pending before the magistrate’s court, the dispute was referred to a panel of elders for arbitration pursuant to a court order. The panel was chaired by the District Officer, Siakago. The parties were heard and an award was made against the late Kimotho. However, the award could not be adopted due to various reasons including the filing of the award out of time. So, although the arbitration through a panel of elders was conducted within a legal framework, the decision of the panel was never adopted. That ADR process did not materialize. In my opinion, nothing really turns on that process because it became a stillborn. It is, therefore, of no legal consequence and no party can seek to rely on it.

t. The 5<sup>th</sup> issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. For the reasons given above, the Plaintiff has failed to prove her case on a balance of probabilities as required by law. She did not establish allocation of the suit properties to her late husband and she did not establish that Obadiah fraudulently acquired the suit properties. In those circumstances, the Plaintiff would not be entitled to the reliefs sought or any one of them.

u. The 6<sup>th</sup> issue is whether the Defendant is entitled to the reliefs sought in the counterclaim. For the reasons given herein, it is evident that the Plaintiff has no cause of action against the Defendant. The evidence on record shows that the original Defendant lawfully acquired the suit properties. The Defendant is entitled to quiet possession and to enjoy all the rights of a proprietor. The court, therefore, holds that the Defendant is entitled to the reliefs sought in the counterclaim.

v. The 7<sup>th</sup> and final issue is on costs of the suit and counterclaim. The general rule is that costs of an action follow the event as provided for in **section 27 of the Civil Procedure Act (Cap 21)** unless, for good reason, the court orders otherwise. There is no good reason why the successful party should not be awarded costs in this matter.

w. The Plaintiff’s counsel submitted on customary law trust in her written submissions. The issue of trust was never raised in the plaint, defence, amended defence and counterclaim, or any other pleading on record hence it cannot be a legitimate issue for determination in this suit.

x. In summary, the court makes the following findings and holdings on the 7 issues for determination.

a. There is no evidence on record to demonstrate that the Plaintiff’s late husband Kimotho was allocated the suit properties ie Nthawa/Riandu/1947 and 1948.

b. It was not established that the original Defendant, Obadiah, was fraudulently registered as proprietor of the suit properties.

c. It was not established that Obadiah took over the chairmanship of Kere clan upon the death of his

father, Timotheo.

d. The land dispute between the parties was referred to alternative dispute resolution mechanisms with varying decisions but they were of no legal consequence.

e. The Plaintiff is not entitled to the reliefs sought in the plaint or any of them.

f. The Defendant is entitled to the reliefs sought in the counterclaim.

g. The Defendant is entitled to the costs of the suit and counterclaim.

h. The upshot of the foregoing is that the Plaintiff's suit is hereby dismissed with costs whereas the Defendant's counterclaim is allowed with costs.

i. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 1<sup>st</sup> day of March 2018.**

In the presence of Ms. Muriuki holding brief for Ms. Rose Njeru for the plaintiff and Mr. Ombachi holding brief for Mr. Mogusu for the defendant.

The plaintiff's suit was dismissed with costs.

Court clerk Njue/Leadys.

**Y.M. ANGIMA**

**JUDGE.**

**01.03.2018.**