



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**ELC CASE NO. 28 OF 2014**

**BERNARD KIBET RONO (Suing as the personal representative**

**of the estate of EUNICE CHEPNGETICH NGASURA-Deceased).....PLAINTIFF**

**VERSUS**

**TAPNYOBII CHEBII NGASURA.....1<sup>ST</sup> DEFENDANT**

**PHILEMON ROTICH ALIAS DAVID.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. This suit was filed by the late Eunice Chepngetich Ngasura who was the daughter to the 1<sup>st</sup> defendant and sister to the 2<sup>nd</sup> defendant. In the said suit she was claiming her share of the family land which is registered in the name of the 1<sup>st</sup> defendant. Eunice died in June 2014, barely three months after filing the case. Thereafter her son Bernard Kibet Rono obtained a Limited Grant of Letters of Administration and was substituted as the Plaintiff in place of his late mother.
2. In her plaint dated 13<sup>th</sup> June 2014 the late Eunice pleaded that the 1<sup>st</sup> defendant is the registered proprietor of all that parcel of land known as L.R No. KERICHO/SILIBWET/33 measuring 6.5 acres and hold the same in trust for the plaintiff and the 2<sup>nd</sup> defendant.
3. She further pleaded that the defendants unlawfully evicted her from the suit property and demolished her house when she was ailing. The 2<sup>nd</sup> defendant then placed a caution on the suit property with the intention of preventing any sub-division and transfer of a portion to the plaintiff. She prayed for a permanent injunction to restrain the defendant from evicting her from the suit property and an order for the removal of the caution placed by the 2<sup>nd</sup> defendant. She also prayed for a share of the suit property measuring two acres.
4. In the 2<sup>nd</sup> defendant's defence incorrectly labelled as Reply to Supporting Affidavit dated 28<sup>th</sup> July 2014 concedes that his late sister Eunice was entitled to one acre of the suit property. He denies that they evicted her from the suit property and he states that she demolished her own house as she was mentally unstable. He admits having placed a caution on the suit property in order to prevent it from being sold by the deceased. He claims that the deceased filed this suit in bad faith in order to claim a bigger share than she was entitled to. The 1<sup>st</sup> defendant did not file any defence.
5. When the case came up for hearing the plaintiff testified and called one witness, while the defendant also testified and called three witnesses.
6. The Plaintiff testified the suit property is family land held by the 1<sup>st</sup> defendant in trust for the plaintiff and other members of the family. He stated that his late mother was sent away by the defendants in 2007 as she was suffering from HIV/AIDS and her house was demolished. The Plaintiff testified that the elders resolved that his late mother be given two acres out of the suit property. He stated that the 1<sup>st</sup> defendant had initially agreed to give her 2 acres but she later changed her mind. The 2<sup>nd</sup> defendant thereafter placed a caution on the land to stop his late mother from disposing of it. PW 2 who is a village elder corroborated the plaintiff's testimony that the elders decided that the plaintiff's mother be given her share of land comprising of one acre.
7. The 1<sup>st</sup> defendant admitted that the suit property is family land and that the plaintiff's late mother was entitled to a portion thereof since she was not married. She denied having sent away the deceased and stated that she is willing to give the plaintiff a portion of the suit land as long as he comes back home.
8. The evidence of DW2 was of little relevance to the case while DW3 's testimony suggested that the defendants contributed to the purchase

of the suit property. This evidence is at variance with the 1<sup>st</sup> defendant's evidence and I will therefore disregard it.

9. In his submissions learned counsel for the plaintiff submitted that as an unmarried daughter of the 1<sup>st</sup> defendant, the deceased was entitled to a portion of the suit property. He urged the court to declare that the 1<sup>st</sup> defendant holds the land in trust for the plaintiff and the 2<sup>nd</sup> defendant. Since the land measures 6.5 acres, he urged that the plaintiff be given 2 acres being his late mother's share.

10. Learned counsel for the defendant relied on section 25 of the Land Registration Act and submitted that the 1<sup>st</sup> defendant being a registered proprietor of the suit property has a right to choose whether or not to give a portion to the plaintiff. She urged the court to dismiss the plaintiff's suit.

### **ISSUES FOR DETERMINATION**

11. There are 2 main issues for determination:

- i. Whether the 1<sup>st</sup> defendant holds the suit property in trust for the plaintiff
- ii. Whether the plaintiff being the son of the 1<sup>st</sup> defendant's unmarried daughter is entitled to a share of the 1<sup>st</sup> defendant's land.

### **ANALYSIS AND DETERMINATION**

12. I shall address the 2 issues together.

13. From the 1<sup>st</sup> defendant's own testimony, she admits that the suit property is family land and that the plaintiff's late mother who was her daughter is entitled to a portion thereof since she was not married. The Plaintiff therefore recognizes that she holds the land in trust for her children including the plaintiff's late mother.

14. Section 25 of the Land Registration Act provides as follows:

*“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided for in 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, but subject*

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

*b) 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.*

*2) Nothing in this section shall be taken to relieve a proprietor from any obligation to which the person is subject as a trustee.”*

15. Section 28 of the Act recognizes trusts including customary trusts and provides as follows:

*“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:*

*a) .....*

*b) Trusts including customary trusts”*

16. I therefore find and hold that the 1<sup>st</sup> defendant holds the suit property in trust for her children including the plaintiff's late mother, Eunice Chepnetich Ngasura.

17. Flowing from the above finding, the 1<sup>st</sup> defendant ought to sub-divide and transfer 2 acres of the suit land to the plaintiff on behalf of the estate of the late Eunice Chepnetich Ngasura. The Plaintiff shall in turn hold it in trust for his siblings. In order to facilitate the said transfer, the 2<sup>nd</sup> defendant shall remove the caution he placed on the suit property with immediate effect failing which the same shall be removed by the Land Registrar, Kericho.

18. It is therefore my finding that the plaintiff has proved his case on a balance of probabilities and I make the following final orders:

a) A declaration is hereby issued that the 1<sup>st</sup> defendant holds all that parcel of land known as KERICHO.SILIBWET/33 in trust of the Plaintiff.

b) The 1<sup>st</sup> defendant shall transfer 2 acres of L.R No KERICHO/SILIBWET/33 to the plaintiff on behalf of the estate of the late EUNICE CHEPNETICH NGASURA-(deceased).

c) An order of injunction is hereby granted restraining the defendants either by themselves, their agents, servants, employees or anyone acting on their behalf from evicting or interfering with the plaintiff's quiet possession and occupation of the 2 acres of land comprised in L.R No. KERICHO/SILIBWET/33.

d) An order is hereby issued directing the 2<sup>nd</sup> defendant to remove the caution placed on L.R NO KERICHO/SILIBWET/33 with immediate effect failing which the same shall be removed by the District Land Registrar, Kericho.

e) Even though this suit involves members of the same family I have considered the fact that the defendants have treated the plaintiff and his late mother in a most inhumane and callous manner and I therefore award costs of the suit to the plaintiff.

**Dated, signed and delivered at Kericho this 16<sup>th</sup> day of May, 2018.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Orina for the Defendants
2. N/A for the Plaintiff
3. Court Assistant - Faith