



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CIVIL SUIT NUMBER 23 OF 2017(O.S)

RUTH CHEPKEMOI CHESIMET.....1ST APPLICANT

RODHA CHEMELI SIGIRA.....2ND APPLICANT

VERSUS

KIPKURUI ARAP CHEPWONY..... RESPONDENT

JUDGMENT

Background

1. This ruling determines the suit herein filed by way of Originating Summons by the Applicants against the Respondent. The Applicants herein are the widows of one Chepotungo Arap Sigira (deceased) who was a close friend to the Respondent herein. At the core of this case are two parcels of land known as L.R No. 8839/50 (situated at Litein Town, Kericho County) and L.R. Number 631/35/IV within Kericho Municipality. The Applicants claim that they have a right to both properties as a result of an alleged partnership that existed between the Respondent and their late husband.

2. In his response the Respondent denies that he ever entered into any partnership with the Applicants' deceased husband. However, the Respondent admits that the property known as L.R No. 8839/50 (situate at Litein Town, Kericho County) was jointly acquired with the deceased who was his great friend.

3. On 28th February 2017, the Applicants filed an Originating Summons brought under Order 37 Rule 1 and 10 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act, CAP 21 Laws of Kenya and Article 159(2) of the Constitution. The Applicants seek a determination of the following questions:

1. What is the nature and value of both the movable and immovable assets of the partnership?
2. What is the nature and the value of liabilities of the partnership?
3. In what proportion should the Applicants on the one part and the Respondent on the other part share both the assets and liabilities of the partnerships as established from the answers to (i) and (ii) above?
4. What is the extent of the indebtedness of the parties hereto to the partnership and vice versa?
5. What are the net savings or other cash at the Bank of the partnership if any and how should these be apportioned?
5. In what time frame should the dissolution of the partnership, taking of accounts and sharing of profits and losses as well as assets and liabilities therefore be concluded?
7. Who should oversee the winding up of the partnership in the event of a disagreement among the parties hereto?
8. Who should bear the costs of the suit?

4. The Originating Summons was supported by the applicant's Affidavit of the 1st Applicant's affidavit sworn on 29th February, 2017.

Applicants' Case

5. The 1st Applicant aver that their late husband, one Chepotungo Arap Sigira (deceased) jointly acquired property know as L.R No. 8839/50 (situate at Litein Town) and L.R. Number 631/35/IV within Kericho Municipality with Kipkirui Arap Chepkwony, the Respondent herein.

6. The 1st Applicant claims that L.R No. 8839/50 was acquired while the deceased and the Respondent were operating a bar business at the Kericho Administration Police Line. The 1st Applicant further avers that the deceased and the Respondent later acquired the property known as L.R. Number 631/35/IV for a consideration of Kshs 35,000/- using the title in respect of the property known as L.R No. 8839/50 as security for a loan from Kenya Commercial Bank to settle the purchase price.

7. The Applicants claim that the Respondent illegally transferred and registered the property known as L.R. Number 631/35/IV in his name. In view of the alleged illegal transfer and registration by the Respondent, deliberations were conducted on the issue and it was agreed that the property known as L.R No. 8839/50 would be solely registered in the name of Chepotungo Arap Sigira (deceased). They further claim that the Respondent insisted that the property known as L.R No. 8839/50 should instead be equally divided between the Respondent and the deceased.

8. The 1st Applicant avers that their deceased husband used to collect the rent accruing from the property until the year 1978 when the Respondent took over collection of the rent. Subsequently, the rent was collected by both the Respondent and the Applicants (as legal representatives of the deceased).

9. The Applicants further aver that the Respondent is currently putting up structures and demolishing buildings currently occupied by their tenants and that the Respondent has also been collecting rent proceeds and applying the same for his personal use to their exclusion.

10. The 1st Applicant reiterates the foregoing in her supplementary affidavit filed on 21st November 2017.

Respondent's Case

11. The Respondent through his replying affidavit filed on 24th April 2017 contests the assertions made by the Applicants. He admits knowing the Applicants who are the widows of one Chepotungo Arap Sigira (deceased) who, until his demise in 1978, was a very good friend of his.

12. The Respondent further avers that he never entered into any sort of partnership and in fact never registered nor ran any business with the deceased as their relationship was merely that of friends. The Respondent avers that sometime in the month of April, 1968, he together with the deceased jointly purchased the property known as L.R No. 8839/50.

13. The Respondent avers that the property known as L.R. Number 631/35/IV which he solely acquired for a consideration of Kshs 50,000/- and subsequently registered in his name was fraudulently included among the properties of the deceased during the succession process and as a result misled the court with regard to the distribution of the deceased's estate.

14. The Respondent further states that the charge claimed by the Applicants to have been registered against the title, in respect of the property known as L.R No. 8839/50, was meant to secure a loan facility that was to be extended to him and the Applicants' deceased husband. He states that this loan was never processed fully as the Applicants' husband passed away before the loan was disbursed.

15. The Respondent avers that he acquired the property known as L.R. Number 631/35/IV on 29th April 1974 from one **Karam Elahi**, on his own using his bank savings amounting to Kshs. 20,000/- held at Standard Chartered Bank Kericho and caused the same property to be charged to the said Standard Chartered Bank on 30th April 1974 to finance the difference of the purchase price of Kshs. 50,000/-.

Issues for Determination

16. The following issues emerge for determination:

i. Whether the claim herein is res-judicata

ii. Whether a partnership existed between the Applicants' deceased husband and the Respondent herein in regard to the properties known as L.R Number 8839/50 (situate at Litein Town, Kericho County) and L.R. Number 631/35/IV within Kericho Municipality

iii. If the answer to the foregoing issue is in the affirmative, what are the assets and liabilities of the partnership, if any and how should they be distributed?

Analysis and Determination

17. The first issue to be determined is whether the claim herein is res-judicata. The Respondent tendered evidence to show that there was a consent dated 31st March 2016 and filed in court on 17th May 2016 in Kericho HC Misc Application No 117 of 2005 (J.R) between the same parties in this suit which was adopted as an order of the court. I have taken the trouble to peruse the Court file in Kericho HC Misc Application No 117 of 2005 (J.R) and confirmed that the consent order was adopted as an order of the court on 20th June 2016 and it has not been set aside. The said consent sets out the manner in which the two suit properties ought to be shared out among the parties herein and states in part as follows:

“The *exparte* applicant and two interested parties shall retain tenancy in common of L.R No. 8839/50. The applicant shall retain sole proprietary rights over L.R.No. 631/35/IV.”

18. The doctrine of *res judicata* in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act CAP 21. This section provides as follows:-

“7. Res judicata

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

19. From the foregoing it is my finding that the claim herein is in *res-judicata*.

20. Even though this finding is sufficient to dispose of this suit I will nevertheless determine it on the other issues.

21. The second issue for determination is whether a partnership existed between the Respondent and the Applicants’ deceased husband. The applicable law is the **Partnership Act, CAP 29** which has since been repealed and in determining this issue, we must be guided by **Section 3 (1) of the Partnership Act, Cap 29 (repealed)** which defines the term ‘partnership’ as follows:

“Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.”

22. The evidence provided by both the Applicants and the Respondents alludes to the fact that a relationship existed between the Respondent and the Applicants’ deceased husband. Both parties in the matter also admit that the Respondent and the deceased acquired the property known as L.R No. 8839/50. However, there isn’t sufficient evidence to suggest that the relationship that existed between the Respondent and the deceased amounted to anything more than friends who jointly owned property.

23. **Section 4 of the Partnership CAP 29** (repealed) sets out the rules for determining the existence of a partnership and provides as follows:

In determining whether a partnership does or does not exist, regard shall be had to the following rules-

a. Joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof

b. The sharing of gross returns does not of itself create a partnership, whether the persons sharing those returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are divided

24. Additionally, partnerships need not be in writing only and may be established through an oral agreement between the parties. An oral partnership agreement has to be proved by a party claiming its existence. In *J K Kinoti -vs- G J Kibanga [2013]eKLR* the court cited the case of *Mworia & Another -vs- Kiambati (supra)* where the Court at page 668 expressed itself as follows:-

“In some cases, partners establish their business by entering into a deed. In many cases, the agreement is oral. In a verbal contract of partnership, a person has to prove the existence of it by proving material terms. These can be proved by their conduct, the mode they have dealt with each other and with other people.”

25. In view of the affidavit evidence provided, I conclude that there is no substantial evidence of an existing partnership between the Respondent and the Applicants’ deceased husband.

26. As a result of the foregoing conclusion, the issue of the assets and liabilities belonging to the partnership becomes moot.

27. Accordingly, the applicants have failed to prove their case and the same is dismissed with costs to the Respondent.

Dated and Delivered at Kericho this 9th day of May, 2018.

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J.M. ONYANGO

JUDGE

Amended and Signed on 25th June, 2018

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J.M.ONYANGO

JUDGE

In the presence of:

1. Mr. Bii holding brief for Mr. Ombui for the Applicants
2. Mr. Caleb Koech for Respondent
3. Court Assistant - Faith