



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**E.L.C CASE NO. NO. 14 OF 2018**

**LEONARD KIPLANGAT.....1<sup>ST</sup> PLAINTIFF**

**ANNA CHEPKURUI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMUEL ROTICH.....1<sup>ST</sup> DEFENDANT**

**GEORGE CHERUIYOT.....2<sup>ND</sup> DEFENDANT**

**MARIKO TERNGECH.....3<sup>RD</sup> DEFENDANT**

**DANIEL TERER.....4<sup>TH</sup> DEFENDANT**

**SALLY KAPTICH.....5<sup>TH</sup> DEFENDANT**

**GEOFFREY MUTAI.....6<sup>TH</sup> DEFENDANT**

**ROBERT MUTAI.....7<sup>TH</sup> DEFENDANT**

**CHARLES SIGEL.....8<sup>TH</sup> DEFENDANT**

**SAMUEL CHEPKEMOI.....9<sup>TH</sup> DEFENDANT**

**COSMAS RONO.....10<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a Plaint dated 17<sup>th</sup> March 2016 and filed on the same date, the plaintiff filed suit against the defendants for trespass upon land parcel no. KERICHO/KABARTEGAN/565 (suit property) registered in the name of MUNAYI who is the 1<sup>st</sup> Plaintiff's late grandfather. The plaintiff's case is based on the ground that his uncles who purported to have sold portions of the suit property to the defendants had no capacity to do so as no letters of administration had been taken out in respect of the estate of the late Chepkwony Arap Munyai. The alleged sales were therefore in contravention of section 45 of the Law of Succession Act. Furthermore, even though the defendants had been put in possession of the suit property for different periods of time, they never obtained the consent of the Land Control Board and the plaintiff therefore maintains that the alleged sales are void for all purposes in terms of section 6 (1) of the Land Control Act.

2. The 10 defendants filed their joint statement of defence and counterclaim dated 4<sup>th</sup> April 2016 in which they claim that they purchased portions of the suit property from the 1<sup>st</sup> defendants' uncles on different dates. They were subsequently put in possession and they have been staying on the suit property for varying periods of time. They pray for an injunction restraining the plaintiffs from interfering with the portions of the suit land that they claim to have purchased.

3. The hearing was commenced on 8<sup>th</sup> May 2017 and was concluded on 7<sup>th</sup> May 2018.

4. The 1<sup>st</sup> Plaintiff testified that he was the grandson and legal representative of the estate of Chepkwony Arap Munayi-deceased by virtue of a Grant of Letters of Administration Ad litem issued on 22.12. 2015. He stated that the suit property is registered in the name of his late grandfather. He testified that the defendants have been occupying portions of the suit land totaling to 7 acres out of the aggregate 12 acres. He stated that the defendants had occupied the suit property since he was a young boy. He denied that the defendants had purchased portions of the suit land and maintained that they had no claim over the suit land. He stated that he demanded that they leave the land after obtaining the Limited Grant.

5. Upon cross-examination the 1<sup>st</sup> Plaintiff stated that his grandmother Mary Tongoi was still alive and that she authorized him to apply for the Limited Grant in respect of his grandfather's estate. He stated that his father William Sitienei was dead and his mother who is the 2<sup>nd</sup> defendant was now sickly and he was representing the interests of his grandmother as well as his mother. He admitted that he had paternal uncles but they were drunkards and they are the ones who allegedly sold portions of the suit land to the defendants. He stated that since his grandfather died in 1975, the suit land had not been sub-divided.

6. He stated that the defendants had made some developments on the suit land including the construction of structures, planting of tea bushes and trees. He stated that all the defendants left the suit property in 2016. He maintained that the defendants had been occupying the suit land illegally and were therefore not entitled to any compensation. He prayed for an eviction order against them.

7. The defendants each testified that they had purchased portions of the suit land from the 1<sup>st</sup> plaintiff's uncles between 1995 and 2013. They stated that after paying the agreed purchase price, the plaintiff's uncles put them in possession of their respective portions of the suit land and they made various developments including the construction of permanent houses and other structures, fencing of their respective portions, planting of tree bushes, trees and food crops. They each produced sale agreements for the portions they had purchased while some produced photos of the property that was destroyed. They however admitted that at the time the land was sold to them, Chepkwony Arap Munayi who was the registered owner thereof had died and no Letters of Administration had been taken out in respect of his estate.

8. At the end of the hearing both counsels filed their submissions.

9. In his submissions Mr. W.K Ngeno, learned counsel for the Plaintiffs raises two main legal issues; that the defendants' contracts of sale of the suit land before the issuance of a confirmed Grant of Letters of Administration in respect of the estate of Chepkwony Arap Munayi-deceased was in contravention of section 45 of the Law of Succession Act and amounted to intermeddling with the deceased's estate. He submits that the purported sale agreements were therefore null and void and could not be enforced. He relies on the case of **Mcfoy V United Africa Co. Ltd 1967 3 ALL ER 1169**.

10. The second legal point raised by the plaintiff's counsel is that purported transactions between the defendants and the 1<sup>st</sup> plaintiff's uncles, being the sale of agricultural land, are void for all purposes for failure to obtain the consent of the Land Control Board within six months in accordance with section 6 of the Land Control Act. Counsel has relied on the case of **Leonard Njonjo Kariuki V Njoroge Kariuki. Nbi Civil Appeal No. 26 of 1079**.

11. On the other hand, Mr. V. K Bii, learned counsel for the defendants has submitted that the defendants are entitled to the portions of land they purchased from the beneficiaries of the late Chepkwony Arap Munayi. He submits that the defendants produced sale agreements that meet the requirements of section 38 of the Land Act and they were put in possession of the suit land for varying periods of time based on the date of purchase. He therefore maintains that they have proved their counterclaims and therefore entitled to the reliefs sought.

#### **Issues for Determination**

12. I have considered the pleadings, oral and documentary evidence as well as the counsels' rival submissions and the following issues arise for determination:

- i. Whether the sale agreements entered into between the beneficiaries of the late Chepkwony Arap Munayi and the defendants were valid and enforceable?
- ii. Whether the plaintiffs are entitled to the reliefs sought in the Plaint
- iii. Whether the defendants are entitled to the reliefs sought in the Counterclaim
- iv. Who should bear the costs of the suit and Counterclaim

#### **Analysis and Determination**

13. With regard to the first issue Section 45 of the Law of Succession Act stipulates as follows:

*S. 45 (1) "Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession of, or dispose of or otherwise intermeddle with any free property of a deceased person.*

*(2) Any person who contravenes the provisions of this section shall be*

*(a) guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or both such fine and imprisonment;*

***(b) Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in due course of administration”***

14. The above provision of the law is not a mere technicality but a point of law that goes to the root of the validity or otherwise of the sale agreements. The law takes very serious view of any intermeddling with the property of a deceased person. The section is clear that the status quo at the time of death of the deceased person ought to be maintained until such time as a grant has been issued by the court.

15. It is clear from the above legal provision that whoever sold the suit land to the defendants had no legal capacity to do so as they had not yet obtained a Grant of Letters of Administration and are in fact guilty of intermeddling with the estate of the late Chepkwony Arap Munyai. On this ground alone the defendants’ Defence and Counterclaim fails.

16. Furthermore, the defendants have an additional hurdle to surmount as they did not obtain the consent of the Land Control Board within 6 months after the purported sale as required by the provisions of section 6 (1) of the Land Control Act Cap 302 of the Laws of Kenya thus rendering the sale void for all purposes. The said section provides as follows:

***Each of the following transactions\_***

***(a) The sale, transfer, lease, mortgage, exchange partition or other disposal of or dealing with any agricultural land which is situated within a land controlled area;***

***(b) The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in a area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;***

***(c) The use, sale, transfer lease, mortgage exchange, partition or other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act;***

As per the Mcfoy case (supra)

***“ If an act is void, then in law it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside, it is automatically null and void without more ado though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”***

17. From the above legal analysis, it is my finding that the sale agreements entered into by the defendants are invalid and incapable of enforcement. I therefore find no merit in the defendants’ Counterclaim and I dismiss it with costs to the Plaintiffs.

18. On the other hand, the plaintiffs have proved their case on a balance of probabilities. Accordingly, I enter judgment for the plaintiffs and make the following final orders:

(a) A declaration is hereby issued that land parcel number KERICHO/KABARTEGAN/565 is the property of Chepkwony Arap Munyai – deceased and should devolve to his lawful beneficiaries.

(b) That the defendants have no lawful claim to any part of land parcel number KERICHO/KABARTEGAN/565 and having vacated the same, are permanently restrained from re-entering therein or interfering with the plaintiffs’ quiet use, possession and occupation thereof.

(c) The costs of the suit and the Counterclaim shall be borne by the defendants jointly and severally.

**Dated, signed and delivered at Kericho this 27<sup>th</sup> day of June 2018**

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**J. M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Ngeno for the Plaintiffs

2. Mr. Bii for the Defendant

3. Court clerk - Rotich