



**REPUBLIC OF KENYA**

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

**AT KERICHO**

**ELC NO. 23 OF 2015**

**ANDREW KIPKOECH BON.....1<sup>ST</sup> PLAINTIFF**

**HELLEN CHEPKIRUI BON.....2<sup>ND</sup> PLAINTIFF**

**RAYMOND KIPYEGON BON.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ELIZABETH KORIR.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a plaint dated 10<sup>th</sup> June 2015 the Plaintiffs instituted this suit against the defendant seeking following Orders;
  - a) An order of eviction against the defendant by herself, her agents, servants, employees or otherwise to immediately vacate that parcel of land known as LR NO. KERICHO/KAPSUSER/61.
  - b) General damages.
  - c) Costs of the suit
  - d) Any other relief the court may deem fit and just to grant.
2. The Defendant filed a Defence on 14<sup>th</sup> August 2015 in which she denies that she has trespassed on the suit land.
3. The case was set down for hearing and the 1<sup>st</sup> plaintiff testified and called two witnesses. The defendant also testified and called 7 witnesses in support of her defence. The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs never testified nor attended court.

**Plaintiffs' case**

4. The Plaintiffs who are siblings were brought up on land parcel number **KERICHO/KAPSUSER/61**. PW1 testified that he is a cousin to the defendant. He stated that the land parcel number KERICHO/KAPSUSER/61 was registered in the sole name of Kibon Cheriro who was his late father. He said that the land was transferred to the plaintiffs jointly after obtaining a Grant of Letters of Administration in respect of the estate of Kebon Cheriro (deceased) through Kericho HC Succession Cause No. 235 of 2006.
5. He testified that the defendant who was married to the plaintiff's paternal uncle came to their home with the intention of taking care of them while they were young, after their parents died in 1993. However, she later chased them away and they went to live with their grandmother. He claimed that he and his siblings never completed school. He testified that the plaintiffs occupy 50% of the suit land in line with the court order issued earlier in the suit. Even though he said that he did not know when his paternal grandparents died, he confirmed that they were all buried on the suit land. He stated that the land originally belonged to his grandparents who in turn bequeathed it to his father. He testified that the defendant has refused to vacate the suit land hence denying the plaintiffs the use and occupation of their land. He stated that the defendant had her own parcel of land being **KERICHO/KAPSUSER/190**.
6. PW2 who is the plaintiffs' maternal grandmother testified that she took care of the plaintiffs but could not remember other issues relating

to the suit land. She was emphatic that the plaintiffs are entitled to the suit property as it belongs to their late father.

### **Defendant's case**

7. The defendant testified that the plaintiffs were her cousins as their fathers were brothers. She stated that she was married to the late Daniel Korir in 1975. Soon thereafter, they moved to the suit land. She stated that during the lifetime of the plaintiffs' parents they lived harmoniously on the suit land until the plaintiff's parents died. She stated that the plaintiffs left home and went to live with their grandmother and only returned as adults to claim the suit land after which they filed this suit seeking her eviction from the suit land.

8. She testified that the plaintiffs' father Kibon Cheriro (deceased) found her on the suit land when he married the plaintiffs' mother and she is the one who welcomed them into the home. She confirmed that upon the death of the plaintiffs' parents she took care of them. She denied that she is a trespasser.

9. DW, DW3, DW4 and DW5 all testified that the suit land is ancestral land which ought to be shared equally between the family of Kipkorir Cheriro and Kibon Cheriro. DW3 and DW4 confirmed that they were present and participated during the land adjudication process. It was their evidence that Kibon Cheriro was registered as the owner of the suit land as he was the only surviving adult son of Cheriro Arap Bon. They stated that by the time land adjudication took place Kibon Cheriro's brother Kipkorir Bon and his father had already died and his mother was very old. This prompted them to register Kibon Cheriro as the proprietor of the suit land in trust for his late brother's children. They testified that land parcel number Kericho/Kapsuser/61 is ancestral land and is not the exclusive property of the late Kibon Cheriro as alleged by the plaintiffs. This is confirmed by the minutes of Kamoek clan dated 14/05/2015 which were produced as the defendant's exhibit.

### **Issues for determination**

10. The main issues for determination are as follows:

- i. Are the plaintiffs the only lawful proprietors of land parcel number KERICHO/KAPSUSER/61?
- ii. Did the late Kibon Cheriro hold the suit property in trust for the beneficiaries of the estate of the late Arap Bon, and in particular, the family of Kipkorir Bon?
- iii. Is the defendant a trespasser on the suit property?
- iv. Are the plaintiffs entitled to the orders sought?

11. From the evidence adduced in court, the plaintiffs acquired the suit property through transmission after they obtained a grant in respect of the estate of their late father Kibon Cheriro. There is evidence on record to show that the suit land was ancestral land which belonged to Arap Bon who was the father of Kibon Cheriro and Kipkorir Bon.

12. DW3 and DW4 explained that the only reason why Kibon Cheriro was registered as the sole proprietor of the suit land was because his only brother, Kipkorir Bon had died by the time of land adjudication. It was therefore understood that Kibon Cheriro would hold the land in trust for his late brother's family.

13. Additionally, it is common ground that the defendant has been in occupation of a portion the suit property for many years and has planted tea bushes on 4 acres thereof. It would be unconscionable to regard her as a trespasser to a parcel of land which her late husband was beneficially entitled to by virtue of being a grandson of the late Arap Bon.

14. Counsel for the defendant has submitted that the defendant is not a trespasser and therefore she cannot be evicted from the suit land. Even though the Defence could have been drafted better, in order to bring out the real issues in controversy, it is clear from the defendant's evidence that there is an inference of a customary trust.

15. In the case of **Odd Jobs V Mubia 1970 E.A 476** it was held that the Court may base its decision on an un-pleaded issue if it appears from the course followed at the trial that the issue was left to the Court to decide.

16. On the issue of customary trust, I am guided by the case of **Ralph Kivuti Njoka V Jesse Nyaga Karuagi (2017) eKLR** where the Court held as follows:

“It is however now well settled through precedent and the law itself that the registration of land in one's name does not relieve that person of his responsibility as a trustee. See for instance the following cases:

1. **Kanji v Muthiora 1984 K.LR 712**
2. **Gathiba V Gathiba 2002 2 EALR 342**
3. **Gatimu Kinguru V Muya Gathangi (1976 KLR 253**
4. **Mumo v Makau 2004 1 KLR 13**

## 5. Mukangu V Mbui 2004 2 KLR 256”

1. See also the case of **Mani Gichuru & Kamau Mani V Gitau Mani HCCC No 340 of 1977** where Muli J ordered the Defendant to transfer a portion of the disputed land to the 2<sup>nd</sup> Plaintiff and the Defendant and each was to maintain occupation of their respective portions as well as **Jason Gitimu Wangara –v- Martin Mwangara & others ELC case no. 278 of 2013, High court at Kerugoya**

17. While section 25 of the Land Registration Act makes it clear that the registration of land in one’s names entitles him to all the privileges and appurtenances thereto and free from all encumbrances and other rights except those noted in the register and any overriding interests recognized under section 25(1) of the same, there is a proviso in sub-section 2 in the following terms:

*“Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject as a trustee. A similar provision is found in section 28 of the Registered Land Act under which the title to the suit land was issued. It is clear from the above therefore that notwithstanding the registration of the suit land in the name of the defendant, that does not relieve him of the duty to which he is subject as a trustee.”*

18. Furthermore, Section 28 of the Act recognizes trusts including customary trusts and provides as follows:

19. 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*

20. I therefore find and hold that the plaintiffs hold the suit property in trust for the defendant.

21. Flowing from the above finding, the plaintiffs ought to sub-divide and transfer half of the suit land to the Defendant on behalf of the estate of the late Kipkorir Bon.

22. Ultimately, it is my finding that the plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it with costs to the defendant.

**Dated, signed and delivered at Kericho this 31<sup>st</sup> day of July 2018**

**J.M ONYANGO**

**JUDGE**

**In the presence of**

1. Mr. Orina for the Plaintiffs

2. N/A for the Defendant

3. Court assistant - Rotich