



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 877 OF 2012

MICHAEL CHELIMO KIPKIRUI.....PLAINTIFF

VERSUS

JULIUS KIPROP KIPKIRUI.....1ST DEFENDANT

DAVID KIPKORIR KIPKURUI.....2ND DEFENDANT

JUDGMENT

By a plaint dated 2nd May 2012 the plaintiff herein sued the defendants seeking for the following orders:

- a) An order of permanent injunction restraining the defendants jointly and severally from interfering with the plaintiff's Land Reference No. MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/90 registered in the plaintiff's name.
- b) Costs and interest.
- c) Any other or further relief deemed fit in favour of the plaintiff.

The plaintiff filed an application for temporary injunction contemporaneously with the plaint whereby Counsel agreed by consent that the parties maintain the status quo pending the hearing and determination of the suit.

Plaintiff's Case.

The plaintiff gave evidence and stated that he is the registered proprietor of the suit land known as plot No. MOIBEN/MOIBEN BLOCK 3 (KAPSILIAT)/90 where he resides with his family. He produced a copy of the title deed as exhibit No. 1 It was the plaintiff's evidence that he acquired the suit land from the Kapsiliot Ranch Ltd through purchase and has been in occupation, possession and use since then. He also produced a copy of plot allocation card from Kapsiliot Ranch Ltd as an exhibit.

The plaintiff further testified that the suit land does not form part of ancestral land to be inherited by the defendants as he solely purchased the same. He stated that the defendants filed complaints at the Chief's office and at the District Commissioner's office but the matter was never resolved prompting the filing of this suit. The plaintiff stated that the dispute started in 2012 as per the exhibits of letters by the Chief and the District Commissioner Eldoret East which were produced in court. The plaintiff therefore urged the court to enter judgment as prayed in the plaint.

On cross examination by Counsel for the defendant the plaintiff stated that the suit land does not belong to his late parents as he is the one who bought the suit land. He further stated that his uncle's sons are cultivating 9 acres of which he does not have a problem with. It was further his testimony that he does not have an agreement or receipt to show that he bought the suit land. He denied that he was to share the suit land with the defendants and that he paid school fees for his children from the money he was paid as a clerk. He further stated that they have not had a dispute on the suit land with the defendants and that he is not agreeable to giving the defendants 6 acres.

On reexamination the plaintiff reiterated his evidence and stated that the suit land is not ancestral land and therefore not available for distribution to the defendants.

PW2 adopted his statement as evidence before the court and stated that the defendants are his uncles. He stated that the suit land belongs to the plaintiff who is his father. He gave evidence of the summons that were issued to the plaintiff by the Chief and the DC in respect of the dispute over the suit land and how they decided to file the current case.

On cross examination by the defendant's Counsel, he stated that the plaintiff owns 9 acres and 9 acres belongs to the late Chebore who is his uncle. That the suit land measures 18 acres and that the title deed is in the plaintiff's name. He however confirmed that he does not know

how the land was acquired or registered in the plaintiff's name.

PW3 also adopted his statement where he confirmed that the land belongs to the plaintiff. On cross examination he stated that the plaintiff owns 9 acres while the Chebore family owns the remaining 9 acres. He also stated that he does not know how the land was registered in the plaintiff's name.

PW 3 also stated that he has been staying on the suit land for more than 28 years and there has been no dispute until 2012 when the defendants filed complaints with the Chief and the DC. It was also his testimony that the defendants used the suit land for one year in 1985 with the plaintiff's permission and moved out. The plaintiff therefore closed his case after the testimony of PW3.

Defendant's Case

The 1st defendant gave evidence and stated that their father Chepkurui Kipkulei and their uncle Chebore bought the suit land together and that they were to share the land equally. It was his evidence that their father was incapacitated in 1969 and therefore appointed the plaintiff who is their elder brother to hold the land in trust together with their uncle Chebore for them.

DW1 further stated that the land measures 18 acres and was registered in the plaintiff's name whereby 9 acres belong to the Chebore family of which the plaintiff has no claim over. He stated that the plaintiff changed his mind in the year 2000 due to greed in total disregard of the family trust.

On cross examination, DW1 stated that there is no document to show that Chebore and Kipkurui bought the land together. He also stated that he does not have any medical records that their father was sick and unable to walk as claimed. He claimed that he is entitled to 9 acres to be divided into 3 portions.

On reexamination DW1 stated that the two brothers Chebore and Kipkurui bought the land together and that they were to share the same equally. He also asserted that the plaintiff did not buy the land as he claims.

DW2 the 2nd defendant reiterated the 1st defendant's evidence and stated that the suit land was bought by two brothers, Chebore and their father Kipkurui and the same was registered in the plaintiff's name in trust for the family. That the land measures 18 acres and that the same was to be shared equally. It was also his evidence that they had given the plaintiff the land to cultivate to educate his children but he later denied them their share of the land. He therefore prayed for 3 acres each.

On cross examination DW2 stated that Chebore and Kipkurui gave the plaintiff money to buy the suit land

On reexamination the witness stated that it is the plaintiff's sons who do not want the land to be subdivided.

DW3 Magdalene Chemweno Chebelyeng who is a sister to the plaintiff and the defendants stated that the suit land belonged to the late Kipkurui Kipkulei and the late Chebore Kipkulei and that the same is held in trust by the plaintiff. It was her evidence that her father was sick and could not walk so he entrusted the plaintiff with the task of the transaction as a 1st born son. She further stated that she is the one who introduced the two old men to the vendor and asked them to sell three goats and add to the money that they had to buy the land. She stated that the suit land was 18 acres of which they were to share equally between them.

DW3 also confirmed that the plaintiff did not buy the land and urged the court to divide the same equally.

On cross-examination she reiterated her evidence and stated that the land was registered in the plaintiff's name in trust for the family members. DW4 also stated that the land does not belong to the plaintiff as he was registered as a trustee. DW 4 stated that he is Chebore's son and that they are using their 9 acres although it is registered in the plaintiff's name. That they will subdivide it later and get their titles.

On cross examination he stated that he gave his father Chebore Kshs. 500/ to top up for the purchase and that they have never had a dispute with the plaintiff. The defence therefore closed their case.

Plaintiff's Submissions

Plaintiff's Counsel reiterated the plaintiff's evidence and submitted that a certificate of title under section 26(1) of the Land Registration Act is a prima facie evidence or conclusive evidence that the plaintiff is the absolute and indefeasible owner whose rights are protected and not subject to the overriding interests under section 25 and section 28 (b) of the Land Registration Act respectively.

The plaintiff also submitted that the defendants' claim and/or counterclaim to recover land from the plaintiff is time-barred under section 7 of the Limitation of Actions Act (cap 22) under which an action to recover land may not be brought after the end of twelve

(12) years from the date on which the right of action accrued to the person who may have such right to bring such action.

It was further Counsel's submission that the dispute is over the plaintiff's suit land which is not a dispute over the estates of the late Chepkurui Kipkulei and the late Chebore Kipkulei. Counsel urged the court to find that the plaintiff has proved his case against the defendants on a balance of probabilities.

Counsel for the defendant did not file submissions as was agreed in court.

Analysis and determination

The issues for determination are as to whether the plaintiff bought the suit land, whether the land was bought by the late Kipkurui and Chebore to be shared equally, whether the suit land was registered in the plaintiff's name as a trustee for the family, whether the land should be subdivided into 3 portions to be given to the defendants and the plaintiff.

Who should pay the costs of the suit?

On the first issue as to whether the plaintiff bought the suit land, the plaintiff produced a copy of a title deed registered in his name and a plot allocation card from Kapsiliot Co Ltd. There was no agreement produced to show how the suit plot was acquired. The plaintiff did not produce any payment receipts for the suit plot.

Even though the plaintiff produced a title deed registered in his name in respect of the suit plot, the process of acquisition was not clear. There was neither transfer forms nor consent to transfer. The plaintiff did not produce a copy of the green card to show the history of the suit land and official search. This was necessary as the acquisition had been challenged on the ground that the plaintiff did not buy the land but was holding it in trust for the defendants.

Further from the evidence on record the plaintiff called his two sons as witnesses to give evidence to support his case. They were not very helpful as they did not shed light on whether their father bought the land or not. They stated that they were not aware of how the land was acquired and that they only knew that the land belonged to their father. They also admitted that the total acreage is 18 acres and that 9 acres belongs to the Chebore family of which they do not have a problem with.

The question is why would he be the one to share the land with the Chebore family and not the defendants who are his brothers. How did he come to be registered as the sole owner but in trust for the Chebore family? The plaintiff does not dispute that the whole 18 acres was registered in his name and was to give Chebore family 9 acres.

DW3 who is a sister to the plaintiff and the defendants is the only witness who gave evidence on how the suit land was acquired and that she is the one who introduced her late father Kipkurui and uncle Chebore to the vendor who sold the land to them. She even paid KShs. 5/ for membership to enable the two purchase the land. She advised them to sell 3 goats to top up the purchase price. DW3 appeared as a truthful witness who had nothing to hide from the court or gain from the suit. Her evidence shed light to the case and this leads me to the conclusion that the plaintiff did not have any proof that he bought the suit land.

On the 2nd issue as to whether the suit land was bought by the late Chebore and Kipkurui, having found that the plaintiff did not buy the suit land, it is evident from the testimonies of the defence witnesses that the land was bought by their late parents. One of the sons of the late Chebore who was a witness for the defendant stated that they are entitled to 9 acres of which the plaintiff does not deny. That they are in occupation of their portion and just waiting for transfer to them by the plaintiff as the 18 acres is registered in the plaintiff's name. I do not understand how the plaintiff would be registered as an owner of land that belongs to another family if not in trust. The 9 acres belonging to the Chebore family is not denied, what the plaintiff is claiming is that he is the one who bought the remaining 9 acres.

I find this not convincing as he did not lay a basis on the acquisition of the 9 acres. He did not state his source of income that enabled him buy the suit land having failed to produce any agreement for the purchase. There is a process for acquisition of a title which is very elaborate and clear. The fact that the plaintiff produced a title document is prima facie evidence that he is the absolute owner of the land but if the same is not acquired procedurally then it can be impeached as per section 26 of the Land Registration Act. Title is the end product of a transaction but the process of acquisition is also very important.

Section 25 of Land Registration Act provides for the rights of a proprietor as follows

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided 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 the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(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 in the register.

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

This section provides that the proprietor cannot be relieved from any duty or obligation as a trustee. In the current case the plaintiff was registered as a trustee for the two families and therefore he cannot hide behind the provision that registration as a proprietor makes him an absolute owner of the suit land. He has to fulfil his obligation as a trustee and transfer the land to the defendants and the Chebore family of which he has no issue with.

Further section 26 provides as follows:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and

indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This section emboldens the court to impeach titles which have been fraudulently, illegally or unprocedurally acquired or through misrepresentation. This is a welcome section in the amendments of the land laws which previously did not give such latitude on titles that were acquired through fraud. The rider introduced that absolute proprietorship can be challenged on the grounds of fraud or misrepresentation has saved parties whose properties had been taken away by the schemes of fraudsters who prey on unsuspecting individuals.

The above section does not apply to this case as the defendants in their counterclaim did not claim that the plaintiff was involved in any fraud to be registered as a proprietor. The defendants therefore did not plead the particulars of fraud or misrepresentation in their counterclaim. Their main claim is that the plaintiff was registered in trust for them

On the 3rd issue as to whether the title was registered in the plaintiff's name in trust for the family, the plaintiff admitted that he does not have a problem with transferring 9 acres to the Chebore family as he was registered in trust for them. What he has a problem with is sharing the remaining 9 acres with the defendants who are his brothers. From the evidence above the plaintiff has neither proved that he bought the land nor rebutted the evidence that the suit land was registered in his name in trust for the two families. His witnesses who were his sons did not adduce evidence to rebut the allegation that the suit land was registered in the plaintiff's name in trust for the family.

The evidence of DW3, who is the plaintiff and the defendants' sister was credible. She asked why the plaintiff is claiming the land and yet in the same breath stating that it is co-owned with the Chebore family. How did he come to co-own the land with the Chebore family while during the time of the purchase he owned nothing. I find that the evidence before me points towards the conclusion that the plaintiff was registered in trust for the family.

Section 28 of the Land Registration Act provides for overriding interests including customary trusts without being noted on the register.

In the case of **Joseph Githinji Gathiba v Charles Kingori Gathiba [2001] eKLR Khamoni J.** stated:

“The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee”.

The issue of trusts has been a thorny issue in most of the cases which prompted litigants to file an appeal in the Supreme Court to decide on it. The Supreme Court in case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** held as follows:

we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

*Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **Kiarie v. Kinuthia**, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:*

1. *The land in question was before registration, family, clan or group land*
2. *The claimant belongs to such family, clan, or group*
3. *The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*
4. *The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some*

intervening circumstances.

5. *The claim is directed against the registered proprietor who is a member of the family, clan or group.*

*We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in **Obiero v. Opiyo and Esiroyo v. Esiroyo**. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.*

In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act.

What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests.....

These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered Land Act (now repealed), in Section 25 of the Land Registration Act, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered Land Act, have now been subsumed in the "customary trusts" under Section 25 (b) of the Land Registration Act. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.

It should be noted that whether a trust exists or not is an issue of fact which has to be proved by evidence. As earlier stated above, it is evident from the record that the defendants proved through their evidence that the plaintiff actually held the suit land in trust for the.

Counsel for the plaintiff raised an issue of succession of the estate of the deceased Chebore and Kipkurui, the issue of succession does not arise as the suit land was registered in the name of the plaintiff who is still alive. You cannot file a succession cause to administer property of a person who is still alive. The issue of lack of jurisdiction of the court to handle the matter is not tenable as this is not property in a deceased person's name.

The issue of limitation also does not arise in this case. Having looked at **Section 20 (1) and (2) of the Limitation of Actions Act** as well as the pleadings herein, this suit falls under **Section 20 (1) of the Limitation of Actions Act** for which there is no period of limitation. See also the case of **STEPHENS AND SIX OTHERS VS STEPHENS AND ANOTHER 1987 K.L.R. 125** where the Court of Appeal held that the period of limitation prescribed in the **Limitation of Actions Act Section 20 (1) (b)** does not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use. The case was filed by the plaintiff, if he is claiming limitation, then he would be the one to be caught up with the limitation of actions.

Having said that I find that the plaintiff is a person who wants to reap where he has not sown. The plaintiff might have been guided by greed to disentitle his siblings from what is rightfully theirs. I find that the plaintiff has failed to prove his case on a balance of probabilities and his case is dismissed.

The defendants filed a counterclaim for 3 acres each of which they gave evidence to prove that the land belonged to their late father and not the plaintiff's. As earlier stated DW3 who knew how the suit land was bought helped the court in getting to the root of this case. The suit land is 18 acres of which 9 acres belongs to the Chebore family and the same is not in dispute. It therefore follows that the 9 acres belongs to Kipkurui family which comprises the plaintiff and the two defendants who are seeking 3 acres each. I find that the defendants have proved the counterclaim and order that the plaintiff surrenders 3 acres each to the defendants with the plaintiff remaining with 3 acres.

This being a family dispute involving brothers, I order that each party bear their own costs.

Dated and delivered at Eldoret this 13th day of October, 2018.

M.A ODENY

JUDGE

Judgment read in open court in the presence of Miss Sitienei holding brief for Mr. Cheptarus for the Plaintiff and Miss Lelei for Mutei for defendant.

Mr. Koech: Court Assistant.