



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 910 OF 2012

[Formerly Eldoret Hccc No. 165 of 2012]

SOME ARAP KIROREI alias SOME KIROREI RUTO.....PLAINTIFF

VERSUS

BARNABAS KIPLIMO KOGO.....1ST DEFENDANT

PATRICK KOINGA TAWAI.....2ND DEFENDANT

ADISHON WEMALI OMUYONGA.....3RD DEFENDANT

JUDGMENT

Some Arap Kirorei alias Some Kirorei Ruto, (hereinafter referred to as the plaintiff) has come to court claiming that at all material times to this suit, he is the registered owner of Land Parcel Number **NANDI/SOIMINING/279** measuring 3.6 Ha and also Land Parcel **NANDI/CHEPKUNYUK/639**. The plaintiff avers that he stays in Land Parcel Number **NANDI/CHEPKUNYUK/639** and did farming activities in land Parcel Number **NANDI/SOIMINING/279**. The plaintiff further avers that land parcel Number **NANDI/SOIMINING/277** borders Land Parcel Number **NANDI/SOIMINING/279**.

The plaintiff contends that the 1st defendant was allowed by the plaintiff and his brothers John Kiprop Sitienei and David Rono Ruto to take care of their late Aunt known by the names Regina Jerono alias Fatuma Jerono who stayed in **NANDI/SOIMINING/277** and that his Aunt Regina Jerono alias Fatuma Jerono passed on and the 1st defendant started utilizing the plaintiff's Land Parcel Number **NANDI/SOIMINING/279** by ploughing, planting crops and constructing the home in it.

The 2nd and 3rd defendant have subsequently invaded the plaintiff Land Parcel Number **NANDI/SOIMINING/279** on allegations that they purchased it from the 1st defendant and they have subsequently planted sugarcane, maize and build their homes on it.

The plaintiff contents that the actions of all the defendants are illegal and/or unlawful and/or malicious and/or unconstitutional and intends to deprive the plaintiff to occupy and/or utilize his land hence he has suffered loss and damages mesne profit and that despite numerous demand and intention to sue the defendants have ignored and/or refused and/or neglected to adhere to his demands hence this suit.

The plaintiff prays for eviction orders as against the defendants and their agents and/or servants and/or workers and/or relative from Land Parcel Number **NANDI/SOIMINING/279**.

Moreover, the plaintiff prays for an order of permanent injunction as against all the defendants and their agents and/or servants and/or workers and/or any other person and/or relative jointly and/or severally in working or claiming and/or undertaking any dealing in **NANDI/SOIMINING/279**.

Lastly, the plaintiff prays for mesne profit from all the defendants from the year 2007 to the date of determination of this suit plus costs of the suit.

The defendants filed a joint statement of defence stating that the land parcel No. **Nandi/Soimining/279** measuring 3.6 Ha is registered under the plaintiff's name though the same was bought in the year 1970s by the late Jerono Ngetich, the 1st Defendant's mother from the plaintiff and that transfer has never been effected to date.

The defendants further aver that the plaintiff does not carry out any farming activities in land parcel No. **Nandi/Soimining/279** as alleged.

The Defendants further aver that though land parcel No. Nandi/Soimining/279 is registered in the plaintiff's name, it formed part of the initial ancestral land which was later subdivided amongst the plaintiff, the 1st Defendant's late mother and one Tabsambu Arusei (the Plaintiff's aunt).

The 1st Defendant avers that after purchase of land parcel known as Nandi/Soimining/277 by the 1st Defendant's late mother, she was buried in the same parcel of land. The 1st Defendant avers that the plaintiff attended his late mother's funeral and even conceded before the congregation that the land parcel in question belong to the 1st Defendant's mother. The Defendants aver that in any event, the plaintiff has never resided in the land parcel ever since he sold it to the late Jerono Ngetich.

The 1st Defendant further avers that there were negotiations among family members where a compromise was reached between the plaintiff's family and the 1st Defendant's family.

The 1st Defendant aver that during the compromise, the plaintiff's brother, one David Rono Sitienei sold 0.3 acres of the said land parcel to one Martin. The Defendant's further aver that if it is indeed true that the Defendants have no right to land parcel known as Nandi/Soimining/279, the 1st Defendant would not have been allowed by the plaintiff to sell property which is not registered in his name. The 1st Defendant avers further that the plaintiff is his uncle.

The Defendants admit that the 1st Defendant's late mother Jerono Ngetich also known as Regina Jerono or Fatuma Jerono is the registered owner of the land parcel known as Nandi/Soimining/277.

The 1st Defendant denies that the plaintiff together with his brothers allowed the 1st Defendant to take care of their late aunt Regina Jerono alias Fatuma Jerono. The 1st Defendant contends that prior to the demise of his mother Jerono Ngetich, they ploughed, planted crops and even constructed their home on parcel No. Nandi/Soimining/279 having bought it from the plaintiff way back in 1970s.

The Defendants deny that the 2nd and 3rd Defendants have invaded the plaintiff's land parcel known as Nandi/Soimining/279 on allegations that they purchased it from the 1st Defendant and that they have planted sugarcane, maize and build their home on it.

The 2nd and 3rd defendants aver that they bought a portion of the land parcel known as Nandi/Soimining/279 from the 1st Defendant and are not invaders as alleged. The Defendants deny that the actions of all the defendants are illegal and/or unlawful and or malicious and/or unconstitutional and that the Defendants intend to deprive the plaintiff to occupy and or utilize his land as a result of which the plaintiff has suffered loss and damages, mesne profit as is alleged and invites the plaintiff to strict proof thereof. The Defendants aver that they have neither received a demand nor intention to sue as is alleged in paragraph 9 and invite the plaintiff to strict proof.

The defendants aver that the plaintiff is not entitled to eviction orders against the defendants and their agents and/or servants and/or workers and/or any other person and/or family and/or relative from land parcel No. Nandi/Soimining/279.

The Defendants further aver that the plaintiff is not entitled to the prayer of permanent injunction against all the defendants and their agents and/or servants and or workers and/or any other person and or relative jointly and/or severally from working and or claiming and/or undertaking any dealing in the land parcel No. Nandi/Soimining/279 as is alleged in paragraph 11 of the plaint and the plaintiff is called to strict proof thereof.

The plaintiff's demands and/or claims for mesne profits from all defendants jointly and/or severally from the year 2007 to the date of determination of the suit as alleged under paragraph 12 of the plaint are denied in toto and the plaintiff is invited to strict proof thereof.

In the reply to defence, the plaintiff states that he is the registered owner of the said parcel No. Nandi/Soimining/279 to the exclusion of others and puts the defendants to strict proof thereof of the rest of the contents of paragraph 4 of the defence.

The plaintiff states that the 1st defendant's mother is still alive contrary allegations to paragraphs 6, 7 and 8 of the defence and the defendant is put to strict proof of his allegations. The plaintiff denies the contents of paragraph 9 of the defence as far as sale of the land Parcel No. Nandi/Soimining/279 to anyone and the defendant is subsequently put to strict proof thereof. The Plaintiff asserts that the agreement was verbal between family members and limited for the 1st defendant to take care of the late Regina Jerono alias Fatuma Jerono.

The Plaintiff further denies contents of paragraph 16, 17 and 18 of the defence and categorically states that it is the 1st defendant who unlawfully sold, allowed and or facilitated the presence on Nandi/Soimining/279 to the 2nd and 3rd defendants and adds that as the registered owner of the parcel Nandi/Soimining/279 he has all the rights and privileges appertaining thereto to the exclusion of others and that he has never at any time surrendered or transferred such to the 1st, 2nd and 3rd defendants.

When the matter came for hearing, ***PW1, Some Arap Kirorei, the plaintiff*** testified that he lives in Chepkunguk in Nandi County. He is not employed but has been a small-scale farmer all along. He knows Barnaba Kogo, the 1st defendant who is son to his brother called John Sitienei. He does not have any relationship with the 2nd and 3rd defendants.

He had an aunt called Regina Cheprono alias Regina Jerono alias Fatuma Jerono who did not bear any children. His brother John Sitienei gave out his son Barnabas Kiplimo Kogo, the 1st defendant, to live with Regina Cheprono, when he was very young, about 3 months old in the year 1973. He was raised up by Regina Jerono alias Fatuma Jerono who was living in the parcel Nandi/Soimining 277 and died in the year 2006. After Regina died, Barnaba started encroaching into his land Parcel No. 279 measuring 3.6 hectares. He developed a structure and planted sugarcane and yet his land is parcel No. 277. He has the title deed and produced the same as an exhibit.

PW2, David Rono Ruto, a farmer who lives in Turbo, Surgoi states that the plaintiff is his brother. The land parcel No. 279 belongs to the plaintiff. He has owned it since the 1960s. Barnabas Kiplimo Kogo is son to his brother, John Sitienei. When Barnaba was born, the family decided to give him to Fatuma Jerono their aunt. She is now deceased. Fatuma was also called Regina. When she started getting old and weak, Barnaba started selling portions of the land parcel No. 279. He did not have any right or permission to sell.

On cross examination, he states that Barnabas Kiplimo Kogo was given out according to Nandi custom. He was young when given out. He was only given out to help Fatuma but he would not be regarded as son to Fatuma. The land was originally one and was sub-divided into two parcels No. 277 and 279. This witness lives in Surgoi about 30 km away from the disputed land. He would not know the daily happenings on the land. He is not aware whether Fatuma and the plaintiff agreed on the sale of this land. He does not recall any family meeting held on 21st January, 2011. He knows Augustine Rop as the follower to Barnaba whilst John Sitienei is his immediate younger brother.

PW3, John Kiprof Sitienei states that he currently lives in Trans Mara, Narok County. He is a preacher. He moved to Trans Mara about 2-3 years ago. Before moving to Trans Mara, he was living with David Rono, PW2 who is his brother. He knows Some Kirorei Ruto, the plaintiff, who is also his brother being their first born. He also knows Barnaba Kogo, the defendant, his son. He is the first born in his family.

He has no relationship with Patrick Tawai, 2nd defendant, and Adson Wemali Omuyonga, the 3rd defendant. He knows land parcel Nandi/Soimining/279 in Mosop. It is land that belongs to the plaintiff who has two parcels of land the other being in Siwor in Nandi where the plaintiff lives thus Nandi/Chepkunyuk/639. The land in Soimining was originally owned by their father. When land was being adjudicated, the plaintiff was already an adult and he became registered as owner of the Parcel No. 279. This was in the 1960s, a few years after independence. He was still young at that time. His father got registered as owner of parcel No. 277. When his father died, he had no brother but had a sister who was unmarried. She was Fatuma Jerono or Regina Jerono Ngetich. Their mother had left and gone back home. They were raised by Fatuma Jerono. They lived in the parcel No. 277. In the 1970s, their mother got land in a settlement scheme in Likuyani, Western Province. It is Plot No. 336 Sango Scheme.

In 1975/1976, their mother called her sons, being himself, David Rono and Some Kirorei, to go to Sango. They went to Sango and lived there upto 1992. At that time, tribal clashes emerged and they sold that land. They shared the money amongst themselves. Each person had 4 acres. They had a younger brother Nicholas Ruto. After selling the land and each getting his money, every person moved to get land on his own. Himself and David Rono bought a land parcel together in Kaptebei in Uasin Gishu. Some Kirorei (plaintiff) bought the land in Chepkunyuk.

He gave Barnabas Kiplimo to Fatuma so that he could live with her on parcel No. 277. The parcel No. 277 is in the name of Regina/Fatuma Jerono. It is not true that Regina bought the land parcel No. 279 from the plaintiff. But she used to take care of it on behalf of Kororei (plaintiff).

He is not aware of any meeting held on 21.1.2011. He admits signing the document but there was no meeting. Barnaba brought to him the document to sign. He signed on the understanding that Barnabas Kiplimo Kogo would get 6 acres of a land that was bought by Regina from a person called Busienei. The 6 acres bought from Busienei were included in the land parcel No. 277. The land No. 277 is inclusive of 6 acres bought directly by Regina. He was agreeable to Barnaba getting 6 acres out of the parcel No. 277 not parcel No. 279. If Barnaba moved out of the land parcel No. 279, he can go and get 6 acres out of the land parcel No. 277. He will ensure that he gets the 6 acres as he is his son.

On cross examination, he states that Barnaba is his son. He gave him out to Regina to take care of her. He gave him out when he was 3 years old. When young, Regina was to take care of him but when he grew old, he would take care of Regina. Regina was living alone and asked him to give him to her. After circumcision, he called him Arap Kogo meaning somebody raised by a woman and he could then inherit the 6 acres from Regina.

He knows Tabsamu Arusei as a sister to Fatuma. During adjudication, some land was registered directly into her name. At that time, Regina was living in Mombasa. The land parcel No. 277 was adjudicated in the name of their father Kirorei Ruto. He died before the title deed was taken out. Regina took over the land and the title was then issued in her name.

Regina died in 2009 and was buried in land panel No. 279. He was not able to attend the burial. He believes that the plaintiff was present at the funeral. There was no problem in her being buried in parcel No. 279 as she was like their father. She was buried there because Barnaba has made a house on that land. But burying her on that land does not mean that she owned it.

DW1, Barnaba Kiplimo Kogo sworn and states that he lives in Kamasai Location Kamasai village. He has lived there from birth. He was born in 1972. He identifies his parent as Regina Jerono. He knows John Sitienei (**PW3**) as the son of his uncle. His mother Regina and Sitienei's father were brothers. He is a defendant in this case. He is aware that his mother bought the land parcel No. 279 from Some Kirorei. When his mother died, he opened her box and found an agreement. He produced the agreement.

The document shows a balance of Kshs. 2,540. He cannot tell whether this balance was paid. He was young and the only document that he found was this document He was raised up in the land parcel No. 277. In 1987, he moved to the parcel No. 279. He was instructed to do so by his mother. She told him that she had bought the land. He built a "singira" in 1987. His mother had built was on the boundary of the two parcels but on the land parcel No. 277. He built near her house but now on parcel No. 279. He married in 1992 and continued living in the land parcel No. 279. His mother started getting sick in 2008 and he moved her to the parcel No. 279 and built a house for her unfortunately, she died in 2010. They buried her just besides her house in the parcel No. 279. At the burial, the plaintiff was present. He had no objection to Regina being buried there. At the burial, he stated that he had sold the land to Regina. He called himself, his wife and their children and said that the land now belongs to his children. After the burial, He filed a succession cause for the Estate of Jerono his mother. He inherited the land parcel No. 277. He produced the Death Certificate, the Grant and confirmed Grant as exhibits.

He is aware that the plaintiff wants him out of the land. His mother bought the whole land. He is aware that on 21.1.2011, they held a

family meeting. It was held at Jua-Kali in Eldoret at the home of Wilson Kirorei who is son to the uncle of the plaintiff. In the meeting, it was agreed that he gets 6 acres out of the land parcel No. 279.

On cross examination, he states that his mother is Fatuma because that is the person he saw as his mother from when he can remember. She is the one who raised him. When he married, she is the one who gave out dowry. He never asked her who his father was and she on her own volition never offered the information to the defendant. He considered her his mother in all respects. He knows Jane Sitienei as wife to John Sitienei (PW3). He heard the evidence of PW3 as he said that he was the defendant's father and that Jane Sitienei was his mother. He is not aware that those two are his biological parents. As far as he is concerned, Regina gave birth to the 1st defendant as the only child. Augustine Rop is not his brother. As far he knows, he was born alone as the only child of Regina. He was born in 1972 and circumcised in 1986. He does not know when Regina was born acknowledges the fact that her ID showed that she was born in 1924. Put to witness that if he was born 1972, Regina was past child-bearing age, he states that some people can still give birth at the age of 48. He states that John Sitienei is not his father.

When his mother started getting sick, he moved her to where he was living and built for her a small semi-permanent house. That is where she lived until she died. He did not demolish her old house when she moved. He later demolished it in September, 2010. He buried her in land that she had purchased.

DW2, Alex Koech stated vide affidavit sworn in at Ongata Rongai Township that his father, Mr. Some Arap Kirorei alias Some Kirorei Ruto is the Plaintiff in Eldoret High Court Civil Case No. 910 of 2012 (E & L Division) in which he has sued Barnabas Kiplimo Kogo and 2 Others.

That at the last hearing of the said matter, allegations were made to the effect that a meeting involving himself, Barnabas Kiplimo Kogo and others was held on 21st January 2011 where the issue relating to the land in dispute was discussed and further that he took the minutes of the said meeting.

That as a consequence of the said allegations, he has been summoned to appear in court on 9th October, 2014 to produce the alleged minutes he is supposed to have taken.

He states that he is not aware of any meeting having taken place on 21st January, 2011 as alleged, or at all, or at any other time and neither has he ever been involved in any discussion relating to the land in dispute. That his father is in full control of his faculties and his properties and has not now or in the past involved him in matters pertaining to the said properties.

That about two years ago, he was involved in a motor cycle accident and suffered injuries to his back, which injuries require regular attention.

That he has been attending medical clinics regularly as well as undergoing physiotherapy from time to time to ease the pain and get the said back strong and stable again.

That as a result of the said injuries, he has been advised by an eminent orthopedic consultant to refrain from any travelling as this would result in further injuries and a reversal of the progress made in the healing of his back.

That in the circumstances, he will not be able to travel to Eldoret in answer to the Court's summon and he swears this affidavit in support of and as a plea for excusal from attending the court on the summons date.

The plaintiff submits that the defendant's exhibit (DW1) the contract for sale does not indicate as to whether the witnesses ever signed the purported agreement hence the same does not conform with the requirements of any sale agreement.

The plaintiff further submits that there was no consent of the Land Control Board. Moreover, that no application was made to the Board for a consent within six months of the agreement as required by law. That the 1st defendant may be entitled to a refund of the consideration paid as a debt.

The plaintiff further submits that he is the registered proprietor of the suit land hence section 24(a), 25(1) and 26 of the Land Registration Act, 2012 applies. The defendant submits that he has been in actual occupation, possession of the suit property since 1987. The parcel of land was bought by his mother who constructed on the said land. The 1st defendant has been in occupation until 2010 when his alleged mother died.

The 1st defendant submits that he has been in actual possession of the suit land from 1987 and therefore he is entitled to the same and that the plaintiff would have not allowed the defendant to build on the said parcel of land. He never asked for possession of the suit land until when the deceased died. He submits that the plaintiff's case must fail.

I have considered the pleadings, evidence on record and submissions and do find that the defendants have not filed a counterclaim for adverse possession. Parties are bound by their pleadings. The defendants are not relying on the defence of Limitation of Actions Act in their pleadings. According to the defendant, the property was purchased by his late mother and therefore, he is entitled to the same. There is no allegation that the plaintiff is holding the land in trust for the defendant.

The plaintiff is an uncle to the 1st defendant and a nephew to the plaintiff's "mother" who was called Regina Cheprono. To set the record straight, the 1st defendant is not a real son to Regina Cheprono but a son to John Kiprop Sitienei who is also a nephew to Regina Cheprono. Regina Cheprono adopted the 1st defendant at a very tender age of 3 years.

According to the 1st defendant's father, he gave the 1st defendant to Regina Cheprono who was raised on their ancestral land being parcel of land No. 277 which was registered in their father's name. When their father died, he had no brother but had a sister who was unmarried, thus, Regina Jerono Ngetich the 1st defendant's "**mother**". Their mother left them to be raised by Regina Cheprono on parcel No. 277.

PW3 was later given land elsewhere and left parcel No. 277 to Regina Cheprono and the 1st defendant. Regina Cheprono used to take care of parcel No. 279 on behalf of the plaintiff.

I am satisfied that PW1, PW2 and PW3 are saying the truth as the uncles and father respectively to the 1st defendant. The 1st defendant was a minor when Regina Cheronon took up her nephews when her brother died. Parcel No. 277 was registered in the names of the plaintiff after adjudication as first registration and therefore, could only be defeated by evidence of fraud or trust which is not existent. The agreement of sale produced as DEX1 though executed was between Maurice Some Kirorei and deceased. It is not clear whether the plaintiff was party to the agreement. Moreover, there is no application for consent of the Land Control Board as required by law and that there was no consent of the land control board given to the plaintiff to transfer the land to the late Fatuma. There was no transfer of the suit land to Regina Jerono the 1st defendant's foster mother.

This court finds that the plaintiff is the registered proprietor of the suit land.

Section 24 of the Land Registration Act provides that subject thereto: —

a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

Section 25 of the Land Registration Act states 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”.

Section 26 states 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

Since the plaintiff is the registered proprietor of the suit land and has produced certificate of title and there is no evidence of fraud or corrupt practice or illegality, I do find that the suit land belongs to the plaintiff. The plaintiff has proved on a balance of probabilities that he is the registered owner of the suit land. I do grant an order of eviction as against the defendants and their agents and/or servants and/or workers and/or relative from Land Parcel Number NANDI/SOIMINING/279. The plaintiff to give a notice of 30 days before carrying out any eviction.

I do further grant permanent orders of injunction as against all the defendants and their agents and/or servants and/or workers and/or any other person and/or relative jointly and/or severally in working or claiming and/or undertaking any dealing in NANDI/SOIMINING/279.

The plaintiff has not proved mesne profits hence I do not grant the same. No order as to costs as this is a family dispute. Orders accordingly.

Dated and delivered at Eldoret this 21st day of December, 2018.

A. OMBWAYO

JUDGE