



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 953 OF 2012**

**KIMOI CHERUIYOT.....PLAINTIFF**

**VERSUS**

**JOHANA SAWE ARAP BIWOT.....1<sup>ST</sup> DEFENDANT**

**CHEPKANGOR KIGEN alias CHEPKANGORO KIGEN CHERUTICH.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Kimo Cheruiyot (*hereinafter referred to as the plaintiff*)** has sued **Johana Sawe Arap Biwot, Chepkangor Kigen alias Chepkangoro Kigen Cherutich** claiming that his late father Cheruiyot Tormos had early in 1970's been allocated Plot Number 219 in Elgeyo Border Settlement Scheme but passed away before he could develop the same.

The said Settlement Fund Trustees later repossessed the said parcel of land measuring 6.3 hectares and on 8<sup>th</sup> November, 2002 the said piece or parcel of land was offered to the Plaintiff which offer the Plaintiff accepted on 16<sup>th</sup> January, 2003.

That the plaintiff avers that her late mother paid all dues required by M/s Settlement Fund Trustees and the charge over the said piece or parcel of land was discharged and the land in question was registered into the name of the plaintiff's mother on 10<sup>th</sup> December, 2009.

That the Plaintiff avers that when her late mother went to take possession of the said land, she found the Defendants who are neighbours and own parcel number Uasin Gishu/Elgeyo Border/220 and 218 respectively had unlawfully encroached on her land and had been using the same.

That in the premises, the Plaintiff's claim against the defendants is that the Defendants both jointly and severally have unlawfully encroached upon the Plaintiffs Parcel of Land known as Uasin Gishu/Elgeyo Border/219 and are trespassers thereon. The Plaintiff's claim against the Defendants both jointly and severally is for an order of evicting the Defendant from the said piece or parcel of land. The Plaintiff further claims against the Defendants both jointly and severally for general damages for trespass.

The plaintiff prays for a declaration that parcel Number Uasin Gishu/Elgeyo Border/219 is the property of the Plaintiff and an order that the Defendants have illegally trespassed on the said piece or parcel of land and hence the order of eviction be issued against the Defendants both jointly and severally, their agents or servants evicting them from the said parcel of land. The plaintiff further prays for general damages for trespass and costs of this suit plus interest.

The 1<sup>st</sup> defendant on his part denies that the suit parcel L. R. No. UASIN GISHU/ELGEYO BORDER SCHEME/219 measuring 6.3 hectares was repossessed and re-allocated to the Plaintiff on 16<sup>th</sup> January, 2003 and on any such other date at all. The 1<sup>st</sup> defendant further denies that the plaintiff ever paid for the discharge of charge in respect of the suit parcel of land. The 1<sup>st</sup> defendant denies paragraph 7 of the plaint and particularly that the plaintiff was denied, or that she is ever entitled to, possession in respect of the suit parcel of land. The 1<sup>st</sup> defendant states that no notice of intention to sue was ever issued.

The jurisdiction of this Honourable court is admitted however, the 1<sup>st</sup> defendant sought to raise a preliminary objection at the earliest opportunity on a point of law to the effect that the cause of action and the subject matter ELGEYO BORDER SCHEME/219 falls within the provisions of the Law of Succession Act, Cap. 160, Laws of Kenya.

The defendant prays that the suit be dismissed with costs. The defendant filed a counterclaim stating that at all material times before this suit, the 1<sup>st</sup> defendant was and is the lawful allottee of all the parcel of land known as L. R. No. UASIN GISHU/ELGEYO BORDER SCHEME/219 measuring 8.0 acres thereof.

That on or about 10.12.2009, the plaintiff fraudulently and unlawfully did cause to be registered in her names the aforementioned 1<sup>st</sup>

defendant suit parcel of land;

**The fraud is particularized as follows:-**

- i. Fraudulently claiming to be the lawful allottee of land parcel UASIN GISHU/ELGEYO BORDER SCHEME/219 when the plaintiff is not.
- ii. Fraudulently purporting that the suit parcel of land was allocated to the plaintiff on 16<sup>th</sup> January, 2003 when there was no further allocation of land from the Government other than the initial allocation of suit parcel of land to Cheruiyot Tormos deceased on 15<sup>th</sup> June, 1967.
- iii. Fraudulently failing to take out Grant of Letters of Administration in respect of the Estate of the deceased CHERUIYOT TORMOS with an intention to defeat transfer by transmission of the suit parcel of land in favour of the 1<sup>st</sup> defendant.
- iv. Fraudulently purporting to have possession of suit parcel when the 1<sup>st</sup> defendant has been in possession of the suit parcel for more than 20 years to date.
- v. Fraudulently and wrongfully presenting false conveyance instruments to have herself registered as the legal owners of the 1<sup>st</sup> defendant's suit parcel of land L. R. No. UASIN GISHU/ELGEYO BORDER SCHEME/219 measuring 6.3 hectares.
- vi. Fraudulently divesting from the 1<sup>st</sup> defendant 8.0 acres of the suit parcel of land L. R. NO. UASIN GISHU/ELGEYO BORDER SCHEME/219.
- vii. On 10.12.2009 unlawfully and fraudulently having herself registered as the owner and obtained a Title Deed in her names over suit parcel of land L. R. NO. UASIN LGISHU ELGEYO BORDER SCHEME/219 measuring 6.3 hectares knowing fully well that the said suit parcel of land belongs to the 1<sup>st</sup> defendant. And the 1<sup>st</sup> defendant shall seek damages.

The 1<sup>st</sup> defendant's claims against the plaintiff is for an order of this Honourable Court for cancellation of the Title Deed for suit parcel of UASIN GISHU/ELGEYO BORDER SCHEME/219 measuring 6.3 Hectares and in her place, the 1<sup>st</sup> defendant to be registered as the lawful owner of parcel of land L. R. NO. UASIN GISHU/ELGEYO SCHEME/219 measuring 8.0 acres thereof.

The plaintiff avers that there is no suit pending and there have been no proceedings in any court between the plaintiff and the 1<sup>st</sup> defendant over the same subject matter. That demand and notice of intention to sue has been issued to the defendants in vain. That the jurisdiction of this Honourable Court is admitted.

The defendant precisely prays that:

- a. An order of this Honourable Court cancelling the Title Deed issued on 10.12.2009 in favour of the plaintiff in respect of the 1<sup>st</sup> defendant's suit parcel of land UASIN GISHU/ELGEYO BORDER SCHEME/219 measuring 6.3 hectares forthwith.***
- b. An order of declaration to the effect that the suit parcel of land L. R. NO. UASIN GISHU/ELGEYO BORDER SCHEME/219 measuring 8.0 acres belong to the plaintiff.***
- c. A vesting order empowering the Registrar of Land, Eldoret Land Registry to register the 1<sup>st</sup> defendant as the rightful owner of land parcel UASIN GISHU/ELGEYO BORDER SCHEME/219 measuring 8.0 acres and that the 1<sup>st</sup> defendant be issued with a Title Deed in respect of the same.***
- d. Costs of this suit and interest.***
- e. Any other relief that this Honourable Court may deem fit to grant.***

The 2<sup>nd</sup> defendant filed defence and claimed adverse possession.

When the matter came up for hearing on 30<sup>th</sup> October 2018, the Mr Geoffrey Kiprotich Ruto testified that he is the son of the late Kimoi Cheruyot the registered proprietor of the suit land. He produced the title deed as evidence that the suitland is registered in her name. Her mother bought the land in a settlement scheme. There was a dispute but the same was resolved. He produced the minutes of the meetings that resolved the dispute.

This court finds that though the deceased was the registered owner and the plaintiff has not demonstrated that he is the legal representative of the Estate of the deceased, the plaintiff has no capacity to file the suit and seek to preserve the estate of the deceased.

It is settled law that the estate of deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person. The powers of the personal representative are set out under Section 82 of the Law of Succession Act, Cap 160 of the Laws of Kenya which provides as follows:

82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers: -

(a) to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best:

(i) Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) No immovable property shall be sold before confirmation of the grant;

(c) To assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof;

(d) .....

A party can thereof not commence, or continue with a suit on behalf of the estate of a deceased person without letters of administration. **Letters of administration** are granted by the court to permit and authorize the **administrator** to deal with the management and distribution of a deceased person's property. In this case no letters of administration have been produced by the plaintiff to show that he has capacity to continue with the suit. The plaintiff has no locus standi hence the suit is struck out with costs plus interest.

Dated and delivered at Eldoret this 7<sup>th</sup> day of December, 2018.

A. OMBWAYO

JUDGE