



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 10 of 2016

CHARLES CHERUIYOT MOSONIK AND

**BORNICE CHEPKIRUI SEREM (*Suing as the administrators of the estate of
Peter Tengecha Serem-Deceased*).....PLAINTIFFS**

VERSUS

DAVID KIPKEMOI SIELE.....1ST DEFENDANT

MARY CHEPWOGEN SIELE.....2ND DEFENDANT

KERICHO DISTRICT LAND REGISTRAR.....3RD DEFENDANT

NATIONAL LAND COMMISSION.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

JUDGMENT

By a Plaint dated 24th February 2016, the Plaintiffs filed suit against the Defendants claiming that the 1st and 2nd defendants assisted by the 3rd defendant fraudulently sub-divided LR No. 631/21/IV which was registered in the name of Peter Tengecha Serem- Deceased into land parcels number KERICHO MUNICIPALITY BLOCK1/382 and 383 and transferred land parcel number KERICHO MUNICIPALITY BLOCK1/383 to the 1st and 2nd defendants. The plaintiffs seek the following reliefs:

- a) A declaration that the sub-division of LR No. 631/21/IV was and is illegal, unlawful and unprocedural, hence null and void
- b) A declaration that the transfer of land parcel number KERICHO MUNICIPALITY BLOCK1/383 to the 1st and 2nd defendants was and is illegal, unlawful and unprocedural, hence null and void
- c) An order of cancellation of title in the name of the 1st and 2nd defendants in respect of land parcel number KERICHO MUNICIPALITY BLOCK1/383
- d) A temporary and permanent injunction restraining the defendants either by themselves, agents and/or servants from advertising, selling, entering, dealing with or transferring and interfering with land parcel number KERICHO MUNICIPALITY BLOCK1/383
- e) Costs of this suit

The 1st and 2nd defendants filed a joint defence denying that the sub-division and transfer of LR No. 631/21/IV was fraudulent and stating that they took possession of the suit land following valid agreements of sale and exchange of their respective properties with the knowledge and permission of the original proprietor. The 3rd and 5th Defendant also filed a defence denying any fraud on their part and stating that if there was any transfer effected on land parcel number KERICHO MUNICIPALITY BLOCK 1/383 to the 1st and 2nd defendants, the same was done procedurally and within the law.

Simultaneously with the Plaint, the plaintiff filed an application for injunction to restrain the 1st and 2nd defendants from interfering with land parcel number KERICHO MUNICIPALITY BLOCK 1/383 as well as orders of inhibition/restriction against land parcel number KERICHO MUNICIPALITY BLOCK 1/383 pending the hearing and determination of the main suit. The said application was argued and

the court granted temporary orders of injunction in September 2016.

When the case came up for hearing on 20th June 2017, only the plaintiffs and their advocates attended court and since the date had been taken by consent, the case proceeded with only the plaintiffs testifying.

The plaintiff Charles Cheruiyot Mosenik who is the son and one of the administrators of the estate of Peter Tengecha Serem- Deceased testified that after they obtained a confirmation of grant, they wanted to transfer LR Number 631/21/1V from the name of the deceased into the names of some of the beneficiaries only to discover that it had been sub-divided into land parcel number KERICHO MUNICIPALITY BLOCK 1/382 registered in the name of the deceased and KERICHO MUNICIPALITY BLOCK 1/383 in the name of David Kipkemboi Siele and Mary Chepwogen Siele (the 1st and 2nd Defendants respectively). He further testified that the original title had been surrendered by an unknown person. He produced a deed of surrender dated 30th October 2011, six months after his father's death. He stated that the original plot was sub-divided into two without their knowledge. He produced a certificate of official search indicating when the sub-division was done.

He testified that the process of sub-division and transfer was done without the knowledge of the family. He stated that his father had been sick from 1999 and was in and out of hospital upto to the time of his death in 2011. He produced medical treatment records from various hospitals including Moi Teaching and Referral Hospital, Eldoret as well as Avenue Healthcare where his father had been hospitalized upto to the time he died in April 2011. He stated that if his father wanted to transact in any of his properties during the period when he was ill, he would have had to involve his family. For example, he wonders how his late father could have gone to the firm of Motanya and Co Advocates to sign the transfer form on 14th October 2010 without the family's knowledge yet he was very sick. He cast doubts on some of the documents in the 1st and 2nd defendant's list of documents such as the consent to transfer dated 5th May 2014 and signed by one Patroba Omolo on behalf of the Commissioner of Lands. He said this document was strange to him as by this date they already had the certificate of confirmation of grant yet they were not involved in the transfer. He also pointed out that the lease document which was registered on 13th May 2014 was not signed by his father as he had died three years prior to that date.

In answer to questions asked by the court for clarification, the plaintiff stated that the 1st and 2nd defendants were friends of his late father but he does not know how they came to know about his late father's property. He stated that the family members were united and they had not had any disputes among themselves. He also stated that he had not come across any agreement between his late father and the 1st and 2nd defendants regarding the suit land as alleged in their defence. I have no reason to doubt that he was telling the truth.

The main issue for determination is whether the transactions leading up to the sub-division and transfer of the suit property in the names of 1st and 2nd defendants was procedural and lawful and if not, whether the title should be cancelled so that the title reverts to the name of the deceased.

From the evidence on record, it is clear that the process of conversion of the title from the Registration of Titles Act to the Registered Land Act as well as the sub-division and transfer of one of the resultant titles to the names of the 1st and 2nd defendants is shrouded in mystery as it was done without the plaintiffs' knowledge. For example, it has been submitted by learned counsel for the plaintiffs that the lease in respect of land parcel number Kericho Municipality Block 1/383 did not exist until 13th May 2014 yet the deceased is alleged to have signed the transfer form on 14th October 2010 so what was being transferred?

What is even more strange is that some processes were carried out long after the death of Peter Tengecha arap Serem who was the original proprietor without the involvement of the plaintiffs who are the administrators of his estate. This smacks of illegality and fraud on the part of the 1st and 2nd defendants. If they were friends of the deceased as alleged by the plaintiff, and if the transactions were above board as they have stated in their defence, why did they go ahead with the transfer after the deceased's death without involving his family? The case of **In Re estate of Shem Okari Orina –(Deceased) 2014 eKLR** sets out the legal position as follows:

“The property of a dead person can only be handled by a person who is authorized in law to handle it. By virtue of section 45 of the Law of Succession Act, that authority stems from the grant of representation or from some provision of the Law of Succession Act or other law. This means that a person who does not hold a grant of representation may handle the property of a deceased as long as there is provision in the Law of Succession Act or some other law allowing him to. Apart from the holders of a grant of representation, persons who may handle the deceased's estate are those set out in section 46 of the Law of Succession Act- the police and administrative officers. It is an offence under section 45 (2) of the Act for a non-holder of a grant or a non-police officer or administrative officer to handle the property of a deceased person. The holding of a grant of representation whether of probate or letters has the effect of vesting the estate property in the grant holder. Legally the grant holder has title to the property in question. It is the grant holder who should have custody of the estate property including all documents of title. He can enter into contracts on behalf of the estate and can enforce such contracts. Non- grant holders do not have such powers and duties”.

The 1st and 2nd defendants had no legal right to deal with the deceased's property without involving the plaintiffs who had obtained a grant of letters of administration. Granted that they did not testify to give their side of the story, the material and evidence placed before me leads me to the inescapable conclusion that that the sub-division of LR Number 631/21/IV into land parcel number Kericho Municipality Block 1/382 and 383 and the subsequent transfer of land parcel number Kericho Municipality Block 1/383 into the name of the 1st and 2nd defendants was un-procedural, fraudulent and unlawful. Even though the 3rd defendant alleges in her defence that the transfer was procedural, it is strange that she did not inquire as to why some of the documents were signed almost 4 years before they were presented for transfer. This leads me to the conclusion that she was part of the unlawful scheme.

I have carefully evaluated the pleadings, evidence and all the material placed before the court as well as the submissions of learned counsel for the plaintiffs and I am satisfied that the plaintiffs have proved their case on a balance of probabilities. I therefore enter judgment for the plaintiff as prayed in the plaint and make the following final orders:

1. That the sub-division of LR No. 631/21/IV was and is illegal, unlawful and unprocedural, hence null and void.
2. That the transfer of land parcel number KERICHO MUNICIPALITY BLOCK 1/383 to the 1st and 2nd defendants was and is illegal, unlawful and unprocedural, hence null and void.
3. That the title in the name of the 1st and 2nd defendants in respect of land parcel number KERICHO MUNICIPALITY BLOCK 1/383 be and is hereby cancelled. The said title shall revert to the name of the plaintiffs who are the lawful administrators of the estate of Peter Tengecha Serem -Deceased for distribution to his beneficiaries.
4. That a permanent injunction be and is hereby issued restraining the defendants either by themselves, agents and/or servants from advertising, selling, entering, dealing with or transferring and interfering with land parcel number KERICHO MUNICIPALITY BLOCK 1/383
5. The costs of this suit shall be borne by the 1st, 2nd and 3rd defendants.

Dated, signed and delivered at Kericho this 2nd day of November, 2017

J.M ONYANGO

JUDGE

In the Presence of:

Mr. Koech for Kipkoech for Plaintiffs

Mr. Miruka for Omae for the 1st and 2nd Defendants

Mr. Que for 3rd and 5th defendants