



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 6 “A” OF 2013 (O.S)**

**ANNAH CHEPTUM CHERIGE.....PLAINTIFF**

**VERSUS**

**DAVID KIPKURUI KOECH.....1<sup>ST</sup> DEFENDANT**

**JOEL SOY KIMENGECH.....2<sup>ND</sup> DEFENDANT**

**JOSEPH KIBIWOTT *alias* JOSEPH TANUI.....3<sup>RD</sup> DEFENDANT**

**PATRICK KEBENO.....4<sup>TH</sup> DEFENDANT**

**DANIEL BOSIRE.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The originating summons dated 1/2/2013 seeks the following orders:-

(a) That this Honourable Court be pleased to find and declare that the Defendants/Respondents hold in trust land parcel number Kaplamai/Kachibora/Block 7(Motosiet) 333, 374, 375 and 376 hived off from original parcel number 166 registered in their respective names, for the plaintiff and all beneficiaries of the estate of the late Richard Kipsugut Cherige.

(b) That this Honourable Court be pleased to declare that the Defendants/Respondents are required to transfer the land to the Plaintiff/Applicant to hold in trust for the beneficiaries of the estate of the deceased.

(c) That a temporary injunction do issue restraining the Defendants/Respondents either by themselves, their servants, agents or otherwise howsoever from sub-dividing, disposing of, transferring, inviting strangers to settle thereon or in any manner dealing with or interfering with the said title number Kaplamai/Kachibora/Block 7(Motosiet) 333, 374, 375 and 376 pending the hearing and determination of this suit.

(d) Costs be provided for.

2. The grounds upon which the originating summons is based are to be found at the foot of the originating summons itself. It is said that the plaintiff's husband purchased **5 acres** of land from **Motosiet Farm** in the year **1972** and in **1978** he intended to give his land to be a trading centre hence he went to the then County Council of Trans-Nzoia for approval. Upon his demise in 2005, the defendants altered the

numbers of the plots that had been subdivided in favour of the deceased and secretly registered themselves as respective owners thereof.

3. By reason of that conduct the plaintiff claims that the defendants have acted fraudulently and in breach of fiduciary duty owed to the members of Motosiet Farm and their families. The defendants are said to have unlawfully restrained the plaintiff from accessing the suit land. It is further averred that they are erecting structures thereon.

4. The Originating Summons is supported by the affidavit of the plaintiff sworn on **1/2/2013** which has numerous annexures attached thereto.

5. The plaintiff's case is that: she is the administrator of the estate of the late **Richard Kipsugut Cherige** who was a member of the **Motosiet Farm**; that the deceased purchased **5 acres** from the Motosiet Farm in **1972**, that the deceased commenced a licensed liquor and retail trade business on the land; that he also sought approval of the County Council of Trans-Nzoia to convert the land into a commercial plot and that the plot was subdivided into **20 plots** and area residents were given leeway to apply for plots on which they were to erect semi-permanent structures. The plaintiff erected structures on one of those plots namely **Plot No.1**. The deceased also collected money from the people who sought permission from the County Council to erect business premises on the said plots. It was after the demise of the plaintiff's husband that the newly formed committee that ran the affairs of the centre and the farm illegally acquired **4 plots** at the centre and secretly altered the numbers allocated to the deceased by the County Council. The plaintiff and her children, upon learning this, fenced off the said plots but the fence was uprooted on **18/11/2009** and taken to the Chief's office. Thereafter, reports to all relevant authorities seeking a resolution of the matter have been in vain.

6. The County Council denied that it owned the land in question and wrote a letter dated **4/10/2010**. However, the District Land Registrar by way of a letter dated **15/3/2012** had declined to register the land in the names of the plaintiff on the ground that the land is reserved for the Motosiet Market. Certificates of Official Search show that the **Plot Nos. 333, 375, 374 and 376** are all registered under the names of one or the other of the four defendants who purport to own one plot each. The plaintiff has exhibited receipts issued for monies paid by her husband dating back to **1973**. Receipt **No. 450** reads "*land purchase*". Receipt **No. 564** reads "*lease*" and it is not clear what receipt **No. 30** was issued for.

7. The plaintiff also exhibited receipts showing that her deceased husband paid for a building plan in respect of one of the portions on the suit land. Agreements were exhibited by the plaintiff, which showed that the plaintiff's husband disposed of rooms and plots to third parties and that in respect of plots, the deceased is the one who undertook the responsibility of paying for and obtaining development permissions from the then Local Authority.

8. According to the plaintiff the deceased advised those who took up shops to put up temporary structures and when the building plans were approved the deceased paid for them. However, when her husband went to obtain title, he was informed that a title had already been issued. The deceased then brought the dispute for resolution before a panel of elders who resolved that the land belonged to the deceased. An exhibit of the elders' decision was produced in court. The plan produced as "**P. Exhibit 12**" shows that the subdivisions concerned were included in the map in the year 2006.

9. Upon cross-examination, the plaintiff maintained that her late husband allowed people to put up structures on the suit land and that those people used to pay him rent.

10. **PW 2** testified that he knew that the plaintiff's husband was a member of Motosiet Farm, and that the deceased's share was 5 acres, on which he established a liquor selling club. However when the Government banned sale of traditional liquor the deceased approached the County Council to buy the land. He added some 1.6 acres to his 5 acres. Then the council allowed him to sell the land in plots. He subdivided the land into 20 plots which he sold to individuals. Before its subdivision the plaintiff's husband's plot was **plot No. 166**. **PW2** denied that the plot was set aside by Motosiet Farm for a market. Upon cross examination **PW2** maintained that **plot No. 166** was not Government land. However on re-

examination, he stated that the deceased sold all his land except the place reserved for a Market.

### **The Defendants' Defence**

11. The defendants filed an affidavit sworn by the 1<sup>st</sup> defendant in opposition to the Originating Summons. In that affidavit the defendants aver that the Originating Summons is malicious, frivolous, false and that it is meant to embarrass them; that two other suits, that is **Civil Suit No. 32 of 2012** and **No. 91 of 2010** are pending before Kitale Court; that some order was issued on 9/5/2012 injuncting the County Council of Trans-Nzoia and one A.O. Indakwa from interfering with the suit land pending the hearing of **Civil Suit No 32 of 2012**; that the applicant ought to have applied to be enjoined in any of the two suits; that parties in **Civil Suit No. 91 of 2010** were frustrated by the Ruling and have resorted to using the applicant herein to bring a new suit, being this one; that by **1994** when the entire Motosiet Farm was subdivided, the plaintiff's husband was not a member as he had sold all his share to other persons and hence his name was not included in the area list; that if the deceased had a claim, he could have raised it before he died and he died **11 years** after issuance of titles; that the respondents' titles were issued upon a first registration in **1994**; that the plaintiff's delay in coming to court is unexplained; that **Plot Nos. 333, 374, 375 and 376** were not hived off from **plot No. 166**; that the County Council had no role in the matter as the entire Motosiet Farm was managed by Directors of Motosiet Farm Co. Ltd who included the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants; that the applicant has failed to establish a link between the disputed plots and the deceased; and that the documents produced in court are not authentic so as to support the plaintiff's claim.

12. The defendants aver that the 5<sup>th</sup> defendant is non-existent. Annexures to the said affidavit show that **HCCC No. 32 of 2012** involved the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants herein who sued the County Council of Trans-Nzoia in that suit seeking injunctive orders to restrain the latter from interfering with peaceful occupation of the suit premises, a declaration that the suit premises belong to the defendants herein absolutely and general and special damages.

It is the defendants' case in **HCCC 32 of 2012** that the County Council and A.O Indakwa caused demolition of the premises of the 2<sup>nd</sup> defendant in this suit purporting to distraint for land rent owed in respect of plot No. 166. The plaint therein claimed that the Trans-Nzoia County Council contended that the defendants herein occupy plot No. 166 which the defendants deny. In the plaint filed in **HCCC 32 of 2012** a disclosure is made that an earlier case, **Kitale HCCC 91 of 2010** between **Simon K. Lagat and 16 Others** and the defendants in the instant suit exists.

13. The defendants herein also exhibited the plaint in Kitale **HCCC No. 91 of 2010**. In that suit, **17 persons** claim to be "shareholders" of Motosiet Trading Centre which they allege was carved out of Motosiet Farm; The claim that the Centre comprised of 20 business plots, measuring 50 feet by 100 feet which includes plots set aside for public utilities. They aver that in **1977**, the deceased and one Roselyn Langat surrendered **6 ½ acres** to be used as a public utility which donation gave rise to Motosiet Trading Centre which was placed under the management of the County Council of Trans-Nzoia. Subsequently the Council drew a standard plan of an open air market and an access road and advertised the plots for sale whereby each individual applicant paid **Kshs. 2500/=** as membership fees to facilitate transfer of the plots; upon payment of **Kshs.2500/=**, the Council would approve construction of business premises.

14. The council it was said also reserved land for an open air market to be utilized by the plaintiffs and an access road. The plaint claimed that the defendants herein had allocated the suit premises herein to themselves and commenced the construction of permanent structures in the suit premises. Subsequently the plaintiffs in **HCCC 91 of 2010** reported to the County Council of Trans-Nzoia who ordered the defendants herein to cease any further activities thereon but the defendants defied the directive hence the suit. It is averred that the defendants went on with the construction which the plaintiffs terms as illegal, thus taking away the plaintiff's right of enjoyment and user of the premises. The plaintiffs also expressed their apprehension that the defendants could be in the process of procuring titles to the suit premises. On those grounds the plaintiffs prayed for a declaration that the purported acquisition, subsequent transfer and registration of **plot Nos. 333, 374, 375 and 376** by the defendants unto themselves is null and void and that titles, if any, be recalled for cancellation. A permanent injunction is also sought to issue to

restrain the defendants from further interfering with the said plots.

15. In their joint defence dated 12/11/2010 filed same day, the defendants in **HCCC No. 91 of 2010**, some of whom who are also the defendants in the instant Originating Summons state that the plots are part of **LR. 5340 - Trans-Nzoia District** which was acquired by Motosiet Farm Ltd; that in or about 1994 the parcel was subdivided into 378 portions whereby the 4 plots in dispute were included and that on 26/9/1994, the defendants were each issued with a title deed to their respective plots; that on the same date i.e. 26/9/1994, 1.480 Ha of land was reserved for Motosiet Market and a **Title No. Kaplamai/Kachibora Block 7 (Motosiet)/166** was issued. The defendants allege that the suit is malicious, baseless, political and meant to settle personal scores and embarrass the defendants. It is also pleaded that the suit is time barred and that the plaintiffs lack *locus standi* to file it since the plaintiff claims that the disputed plots are public land and therefore the suit should have been brought by way of a representative suit.

16. In a ruling dated 11/2/2011, on an application for an injunction order the court stated as follows:-

**“The allegations that the defendants allocated themselves land belonging and to the late Richard Cherige and Rosaline Changwony and the fact that they have tampered with the area maps of the farm and allocated themselves with (sic) the disputed plots way back in 1994 can only be established through a trial.”**

The application was dismissed with costs.

It has been necessary to restate the contents of the suits referred to in the defence of the defendants in the instant suit because, first, the averments as to the existence of the previous suits appear crucial to their defence and secondly, copies of the pleadings in those suits have been made a part of the record in the instant suit.

17. Hearing of the instant suit commenced on 15/7/2015 when **PW1** testified and was cross examined. Hearing continued on 25/5/2016 when **PW2** gave evidence and the plaintiff closed her case. Defence hearing took place on 20/7/2017 when all defence witnesses gave evidence. The plaintiff filed her submissions on 29/9/2017 and the defendants filed theirs on 9/10/2017. I have considered those submissions.

18. The issues for determination in this suit are as follows:-

**(1) Do the defendants hold the Parcel Nos. Kaplamai/Kachibora Block 7 (Motosiet) 333, 374, 375 and 376 in trust for the plaintiff and all beneficiaries of the estate of the late Richard Kipsugut Cherige?**

**(2) Is the plaintiff's claim time barred?**

**(3) What orders should issue?**

These issues are discussed as herein under.

**(1) Do the defendants hold the Parcels Nos. 333,374, 375 and 376 in trust for the plaintiff and all beneficiaries of the estate of the late Richard Kipsugut Cherige?**

19. The plaintiff's case is that these parcels were hived off from the original **Parcel No. 166** and registered in the names of the defendants. From the evidence of both parties it is apparent that **Plot No. 166** is still in existence; it is said to be in the name of the Government of Kenya and further, which issue is not for determination herein, that it is reserved for Motosiet Market. It is true that **Plot No. 166** and **Plots Nos. 333,374, 375 and 376** appear simultaneously in the same area list exhibited in the affidavit of David Koech filed in **Civil Suit No. 91 of 2010**, as **Exhibit “DK3.”** That affidavit was attached as **exhibit “DKK4”** in the replying affidavit to the present suit.

20. I have examined the supporting affidavit attached to the Originating Summons herein. **Paragraph 3** thereof only states, without giving a plot number, that the deceased was a member of Motosiet Farm in which he purchased 5 acres in 1972. **Paragraph 6** shows how the deceased's land was subdivided into sub-plots once it was finally converted into a trading centre by the then Local Authority.

21. It is outrightly conceded by the plaintiff in her submissions that the deceased sold out some of the resultant plots. However the supporting affidavit is a bit unclear on this issue and in saying this, I am referring to **paragraphs 7, 8 and 9** of that supporting affidavit. Apparently some traders bought sub-plots from the deceased and erected business premises thereon. In this case, the court was not told how many plots were alienated in this manner, but there is evidence that besides the defendants, there are other persons who have plots at the market. The defendants are said to have, according to **paragraph 10** of the supporting affidavit attached to the Originating Summons, added other plots to the trading centre.

22. **Paragraph 14** of the supporting affidavit states that the defendants illegally acquired 4 plots at the centre and "*secretly altered the original numbers*" allocated to the deceased by the Council. At **paragraph 18**, the plaintiff states that the Council has clearly indicated that the "*plot is still in the name of Motosiet Co-operative*" and exhibits the Council's letter to that effect. **Paragraph 19** states that the Lands Office informed the plaintiff that "*the plot*" is reserved for Motosiet Market.

23. At this point I must pause and observe that the plaintiff has, in the most important document of all in her case, mixed up the issue of plots now registered in the names of the defendants and the plot allegedly reserved for a Market. On her mission to prove that **Plots Nos. 333, 374, 375 and 376** were carved out of land that was owned by her husband, the plaintiff has failed to state the number of the plot owned by her husband and how and when the plots in question were carved out it. I find that the Originating Summons and the supporting affidavit, and the evidence of the plaintiff are insufficient to establish any nexus between the plots in question and any land that may have been the deceased's entitlement on the Farm.

24. Consequently this court is unable to hold that the defendants hold the said plots in trust for the plaintiff or all the beneficiaries of the Estate Richard Kipsugut Cherige.

### **(2) Is the Plaintiff's Claim time barred?**

25. The defendant have pleaded that the plaintiff's claim is time barred. Their argument is that the deceased died eleven years after issuance of titles and that their titles were issued in the year **1994**, being the first registration. They plead that the plaintiff has come to court **19 years** later and this delay has not been explained. **Section 7 of the Limitation of Actions Act Cap 22 states as follows:-**

**"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."**

26. It is clear that the cause of action against the defendants herein in respect of the **4 plots** arose when the final area list was issued in the year **1994** as there is no evidence shown of their interference with the plots before that year. I agree with the defendants that the right of action accrued in the year 1994. Consequently it is true that a period of more than 12 years has elapsed since that event. I therefore find that the plaintiff's claim against the defendants is statutorily time barred by the provisions of **Section 7 of the Limitation of Actions Act Cap 22**.

### **(3) What orders should issue?**

27. The plaintiff's claim in respect of the four plots owned by the defendants has failed. However though the plaintiff's claim has failed, I do observe that the defendants were placed into a position of high trust by the members of Motosiet Farm. They have also failed to give a very clear account of how they obtained the four plots despite evidence of discontent among a section of the members of Motosiet Farm in respect of that acquisition. Both the plaintiff and the defendants have failed to illuminate that process in order for the court to make definite and conclusive findings. What the court has found, which is relevant

to this suit, is that no connection has been established between those plots and any land said to be owned by the deceased's estate.

Before I conclude this judgment, I must also indicate here that it comes out as a surprising fact that the process of change of user of land which is so commonplace today was not clear to citizenry in the 1970s and 1980s. That a citizen like the deceased, apparently in the process of attempting to make his land yield more through a dubious process of what may now only be considered a change of user, could end up being presumed to be surrendering his hard earned property free of charge to the then local authority, whereby other probably undeserving persons would subsequently obtain titles to portions of his land, is quite tragic.

All this court can state for now is that the plaintiff has failed to prove her case on a balance of probabilities against the defendants and her suit should be dismissed.

**28.** I therefore dismiss the plaintiff's case. However, I order that each party shall bear its own costs of the suit.

Dated, signed and delivered at Kitale on this **20<sup>th</sup>** day of **December, 2017**.

**MWANGI NJOROGI**

**JUDGE**

**20/12/2017**

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

Ms. Mwemeke holding brief for Barongo for defendants

N/A for the plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJOROGI**

**JUDGE**

**20/12/2017**