



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 111 OF 2012

BENJAMIN SENGENGE..... PLAINTIFF

VERSUS

MARY SIMOTWO DEFENDANT

J U D G M E N T

INTRODUCTION

1. The plaintiff is a nephew of the defendant and is the registered owner of **LR. No. West Pokot/Keringet A/182** (suitland). The plaintiff filed this suit against the defendant seeking a declaration that the defendant is a trespasser on the suitland and that she together with her agents or representatives should be evicted from the suitland.
2. The defendant filed her defence and raised a counter-claim in which she contends that the plaintiff is holding the suitland in trust for her and other dependants of her mother **Chepokwanyan Lokales**. She prays for an order of cancellation of title held by the plaintiff so that the land can be shared equally amongst the dependants of her mother.
3. The dispute herein has been pending in court since **28/5/1996** when the case was first filed in Eldoret High Court. The plaintiff proceeded ex-parte and obtained judgment in his favour. The ex-parte judgment was however set aside by consent and the case transferred to Kitale High Court where it was assigned a new number. The case had been registered as **Eldoret HCCC. No. 98 of 1996**.
4. The suitland was originally registered in the name of Chepokwanyang Lokales. Chepokwanyan Lokales had three daughters. The first born was called Musto, the second born was the plaintiff's mother and the last born was the defendant.

PLAINTIFF'S EVIDENCE

5. The plaintiff testified that he is a teacher by profession and that his full names are Benjamin Sengenge Simon. He is a grandson of Chepokwanyan Lokales who had three daughters. His mother was the second born and the defendant was the last born. He further stated that he was born out of wedlock and that he was staying with his grandmother after his mother got married. That prior to the death of his grandmother, the grandmother transferred the suitland to him as a gift.
6. In or around **1996**, the defendant who is married and has her own land at Tartar came to the suitland and chased away her mother and has since been staying on the suitland. The plaintiff's

grandmother went to stay with the plaintiff's mother. He stated that he filed this suit against the defendant in Eldoret High Court and that he wants the defendant to be evicted from the suitland as he is not holding the suitland in trust for anyone.

DEFENDANT'S CASE

7. The defendant testified that she is the daughter of **Chepokwanyan Lokales** who was the wife of **Lokales Kaprioni**. That her mother left their home at Keringet and went to live with the plaintiff's mother. She remained behind to take care of her father and though she is married, she still resides on the suitland with her children. She testified that she knows that the title to the suitland is held by the plaintiff but that she does not know how the plaintiff obtained the same.
8. The defendant called **DW2 James Sikuku Lemureng** who testified that his own father was the age-mate of the defendant's father. The defendant's father inherited the defendant's mother who had two daughters. The defendant's father sired the defendant. He later died around 1975. This witness testified that the defendant has been staying on the suitland and that he has known her for over 64 years. This witness testified that the plaintiff has never occupied the suitland.
9. **DW3 Christopher Kenya Chemonges** testified that he is a neighbour of the defendant. He stated that he knew that the plaintiff was born out of wedlock to one of the daughters of Lokales. The plaintiff used to stay with his grandmother when he was young. The husband to the plaintiff's mother later came and gave one cow to Mzee Lokales and took away the plaintiff. This he said is as per Pokot customs and that the plaintiff stays at Makutano where his step father lives.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

10. The plaintiff contends that the suitland was transferred to him by his grandmother as a gift and that he was not to hold the land in trust for anyone. In support of his contention, the plaintiff produced an application for consent of the Land Control Board [Exhibit 1] which shows that Chepokwanyan Lokales sought to transfer the suitland to the plaintiff as a gift. The plaintiff also produced a letter dated 27/4/1995 [Exhibit 2] from the assistant chief of Keringet sub-location who stated in the letter that the suitland belonged to Chepokwanyan Lokales and that the said Chepokwanyan Lokales wanted to transfer the whole land to her grandson who is the plaintiff herein.
11. The plaintiff further produced a letter written on 15/3/1995 by the grandmother who stated in the letter that she was giving the suitland to her grandson (plaintiff) and no one else. This letter was written in Swahili and was produced as Plaintiff Exhibit 3.
12. The defendant on the other hand contends in her pleadings that the plaintiff is holding the land in trust for the dependants of her late mother Chepokwanyan Lokales. Her contention is that the plaintiff failed to indicate that he was holding the title in trust for the beneficiaries and or dependants of her mother.
13. I have carefully considered the evidence adduced by the plaintiff as well as the evidence by the defendant. There is no contention that Chepokwanyan Lokales had three daughters. There was the first one called Musto. This is according to the evidence of the plaintiff. There was the plaintiff's mother and lastly the defendant.
14. The father of the defendant who is the grandfather of the plaintiff is said to have died in 1975. This was before the suitland was demarcated. A green card in respect of the suitland was produced as Defence Exhibit 4. The green card shows that the suitland was first registered in the name of **Chepokales Chepokwanyan Kaprion** on 9/4/1984. On 30/8/1993 the register was changed to read **Chepokwanyan Lokales** by way of correction of names. **DW4 Aggrey Kavei**, a Land Registrar from West Pokot testified that correction of names is only possible if the names belong to one person.

15. DW4 testified that the suitland was later transferred from **Chepokwanyan Lokales** to **Benjamin Sengenge Simon**. The transfer was registered on **23/8/1995**.
16. The issues which emerge for determination are firstly whether the transfer of the land into the name of the plaintiff was by way of gift to be solely held by the plaintiff. Secondly whether the plaintiff is holding the land in trust for the defendant and other dependants of Chepokwanyan Lokales.
17. The suitland was transferred to the plaintiff during the lifetime of Chepokwanyan Lokales. Though the plaintiff claims that his grandmother transferred the suitland to him as a gift, the evidence from the grandmother which was given at Eldoret Court when this case proceeded ex-parte is contrary to the plaintiff's claims. The plaintiff's grandmother testified that she had heard that the plaintiff had obtained title to the suitland but that she had no objection to him holding the title. She told the court that she wanted the plaintiff to hold the title until she died and that the land was to be shared after her death.
18. The plaintiff's grandmother did not know how to read or write. It is clear that the plaintiff had hatched a plot to have the land for himself. This is why he wrote a letter dated **15/3/1995** which is attributed to the grandmother. The letter is addressed to the District Commissioner and it reads in the relevant parts as follows:-

“RE: WILL OF THE LAND PARCEL NO. KERINGET A/182

Mimi Chepokwanyan Lokales nimesema nikiwa hai kwamba shamba hilo hapo juu ni langu. Katika uzee wangu hivi sasa, nimeamua nimpatie mjukuu wangu Benjamin Sengenge hilo shamba maana kati ya wote, nimemchagua kama mtoto/mjukuu wangu wa kiumeatakerithi shamba langu, atakayenjegea nyumba, kunilisha na mwishowe kunizika. Na nitakufa nikijua kuwa shamba ni la mjukuu wangu Sengenge. Kwa hivyo, hakuna mwingine tena kwa watoto na wajukuu wangu wote nitakayempatia shamba hilo. Watoto wangu wote wasichana wameolewa kwa mabwana zao. Hawana haki ya kuriithi shamba langu. Mimi (thumbprint)

Chepokwanyan Lokales”.

19. It is clear that the plot to have the land solely registered in the plaintiff's name started with the letter which I have quoted above herein. This was followed by a letter dated **27/4/1995** which the assistant chief of Keringet wrote that the plaintiff's grandmother was the owner of the suitland and that she wanted to transfer the land to her grandson (plaintiff). About five months later, the suitland was transferred to the plaintiff.
20. During the ex-parte hearing at Eldoret, it became clear that the plaintiff's grandmother had been made to sign certain documents. These are the documents which finally enabled the land to be transferred to the plaintiff. Six days after the plaintiff had had the land transferred into his name, he went and caused the District Officer Kapenguria Division to write a letter addressed to the chief of Mwagei location asking him to ensure that the defendant and her son were removed from the suitland. This letter was produced by the plaintiff as Exhibit 5 and is dated **29/8/1995**.
21. The plaintiff's grandmother testified before Nambuye J. as she then was on **17/3/1997**. Her evidence is clear that her intention was to have the suitland shared after she died. She had no intention at all of giving the suitland absolutely to the plaintiff. The judgment of Justice Nambuye as she then was was very clear that the intention of the plaintiff's grandmother was that he was to hold the title for protection purposes. This is why the judge ordered that the title should be endorsed that the plaintiff's grandmother was to have a life interest in the suitland.
22. I therefore find that there was no intention on the part of Chepokwanyan Lokales to transfer the land absolutely to the plaintiff.

23. On the second issue as to whether the plaintiff is holding the suitland in trust for the defendant and other dependants, I have no doubt that he is holding the land in trust for the defendant and her other dependants. The defendant's mother had made it clear that upon her death, she wished the land to be shared amongst her daughters. She allowed the plaintiff to hold the title in trust for the other beneficiaries. During the ex-parte hearing at Eldoret, it was clear that the defendant had separated from her husband and that she was staying on the suitland. It was even said that she was a bit mentally disturbed and that is why she was causing trouble to her mother who was forced to move out of the home. The defendant's mother was however clear that she wanted the defendant to have a share of the suitland upon her demise.

24. There is evidence from the defendant as well as her witnesses that she has been residing on the suitland for a long time. The plaintiff cannot therefore claim that the defendant invaded the land and chased away his grandmother after he had been given the suitland. The plaintiff cannot seek to evict the defendant from the suitland when it is clear that he did not obtain registration in his name in a genuine manner. The process leading to the registration of the plaintiff as owner of the suitland was tainted but that notwithstanding his grandmother allowed him to hold the same in trust for her three daughters.

DECISION

25. I have demonstrated hereinabove that the suitland though registered in the sole name of the plaintiff, it was not meant to be solely his. He was only allowed to hold it in trust for the three daughters of Chepokwanyan Lokales who was his grandmother. I therefore find that his suit against the defendant is misconceived. The same is hereby dismissed with costs to the defendant. On the other hand I find that the defendant has proved her counter-claim to the required standards. I find that the plaintiff is holding the suit land for the benefit of the defendant and her two sisters. I therefore proceed to order cancellation of the title held by the plaintiff and direct that the suitland should be shared equally by the defendant and her two sisters or their nominees and fresh titles issued to reflect the new ownership. The defendant shall have costs of the counter-claim as well.

Dated, signed and delivered at Kitale on this 28th day of June, 2016.

E. OBAGA

JUDGE

In the presence of Mr. Wanyam for Defendant and the Plaintiff in persons.

Court Assistant – Isabellah.

E. OBAGA

JUDGE

28/6/2016