



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 131 OF 2013**

**ELISHA KARE BUSIENEI .....1ST PLAINTIFF**

**AGNES ROP .....2ND PLAINTIFF**

**STEPHEN KEMBOI .....3RD PLAINTIFF**

**JACKSON KIBOR .....4TH PLAINTIFF**

**VERSUS**

**JAPHET KIPYEGO CHEPKWONY (*suing as***

***the administrator of the estate of***

**ELIZABETH J. SIRMA .....1ST DEFENDANT**

**REBECCA SOY.....2ND DEFENDANT**

**GIRO COMMERCIAL BANK LTD .....3RD DEFENDANT**

**J U D G M E N T**

**INTRODUCTION**

1. This suit was filed at Eldoret High Court on the **16th December, 1998**. Its history can be traced back to the **1970's** when a group of six men came together under an informal partnership and purchased a property known as **LR. No. 11383** near Eldoret town. The property was **421.5 acres**. Those who were involved in the partnership were **Elisha Busienei, Jackson Kibor, Daudi Chumo, Job Rop, Paul Sirma** and **Edward Soy**.

2. Four of the original partners have since passed on. They are **Job Rop** the husband of the second plaintiff, **Daudi Chumo**, the father of third plaintiff, **Paul Sirma**, the father of the first defendant and **Edward Soy** the husband of the second defendant. The original suit was against **Elizabeth Sirma** wife of **Paul Sirma** who passed on during the pendency of this suit and was substituted by his son **Japhet Chepkwony** as first defendant. The suit against the third defendant was withdrawn on **2/4/2014**. The surviving original partners are **Elisha Busienei** the first plaintiff and **Jackson Kibor**, the fourth plaintiff.

3. In the early 80's the partnership property was subdivided and each partner got a number of plots which were each measuring one acre. There were some blocks which were not subdivided and were to be subdivided later for distribution to the partners. Some blocks were reserved for public utilities. The plaintiffs claim against the first defendant is that Elizabeth Sirma (deceased) illegally and fraudulently

had herself registered as owner of **Plot No. Eldoret Municipality Block 14/604** which was one of the blocks which had not been subdivided as well as **Eldoret Municipality Block 14/586** which had been earmarked as public utility plot. The claim against the second defendant is that she is illegally claiming interest in **Eldoret Municipality Block 14/653** which was also one of the blocks that had not been subdivided.

4. The first defendant filed a defence to the plaintiffs claims against her. The second defendant only entered appearance but did not file a defence to the plaintiffs claim. The second defendant's lawyer actively participated in cross examination of plaintiffs witnesses but the second defendant did not say anything in defence to the plaintiffs claim. Her lawyer however filed written submissions on her behalf.

### PLAINTIFFS CASE

5. The plaintiffs case is that the six partners contributed **Kshs.10,000/= each**. They took a loan of **Kshs.40,000/=** from a bank making a total of **Kshs.100,000/=** which they then paid for the land which was owned by a settler of white origin. Once the land had been purchase it was jointly cultivated for one year. Some partners provided machinery like tractors and others provided seeds and fertilizer. After one year, each partner was allocated a portion where he was to farm pending subdivision.

6. It was later agreed that the land had to be subdivided. The subdivision was carried out in the 80's. As at the time of subdivision, Job Rop the husband of the second plaintiff had already died. It was agreed that each of the six partners was to get **40 plots of one acre each and one commercial plot** of one acre each making a total of **41 plots per partner**.

7. The process of subdivision was co-ordinated by the fourth plaintiff Jackson Kibor. It was agreed that Jackson Kibor was to get an additional commercial plot for his role of co-ordinating the exercise. It was also mutually agreed among the partners that **Retired President Daniel Toroitich Arap Moi** was to be given **twenty (20) plots and one commercial plot**. Moi was not a partner but the partners decided to give the plots as a sign of respect for him.

8. During the survey process, not all land was surveyed. This was because certain sections of the land were impassable due to flooding. Two blocks were left unsubdivided. These are the two blocks which were later subdivided and became what is now **Eldoret Municipality Block 14/604** which is about **50 acres** and is currently in the name of **Elizabeth Sirma**. The other block is **Eldoret Municipality Block 14/653** which is about **twenty (20) acres** and is being claimed by **Rebecca Soy** the second defendant.

9. The other plot which is the subject of this suit is **Eldoret Municipality Block 14/586** which is about **three (3) acres** and is registered in the name of **Elizabeth Sirma**. This plot had been earmarked as an open space for public utilities which were to be for the benefit of all partners. It is the plaintiffs case that the first and second defendants claim to the parcels in issue is unjustified and that the registration of Plot No. 586 and 604 in Elizabeth Sirma's name was fraudulent as the Sirma family had already been allocated their plots and there was therefore no basis upon which they could take more land which was meant for public utility and for distribution to all other partners.

10. The second plaintiff, Agnes Rop contends that the Sirma family took away a total of **fifteen (15) plots** which had been allocated to her. These are **Plot Nos. 587, 588, 589, 590, 591, 592, 593, 594, 596, 597, 598, 699, 600, 601 and 602**. When she demanded to know why her plots were taken by the Sirma family, a meeting of partners was held in which the children of Elizabeth Sirma who is said to have been advanced in age was represented by his son **Japhet Sirma** and another son called **Noah Sirma**. In one of such meetings, Japhet Sirma conceded that indeed their family had been erroneously given plots which were meant for Agnes Rop. Japhet undertook in the meeting that their family was going to return the plots which had been erroneously given to them back to Agnes Rop. Japhet Sirma signed a written document which he took to his mother Elizabeth Sirma who also thumb-printed on the same document effectively committing themselves to return the parcels to Agnes Rop.

11. Elizabeth Sirma signed an acknowledgement undertaking to surrender **Eldoret Municipality Block**

**14/604** back to the partners for distribution to all members. Rebecca Soy on her part too signed an undertaking that she was to return **Eldoret Municipality Block 14/653** to the partners for sharing it out. **Eldoret Municipality Block 14/586** which had been registered in the name of Elizabeth Sirma was charged to Giro Commercial Bank Ltd to secure a loan of Kshs.600,000/=. The property has since been discharged and its title is held by the court pursuant to a consent order recorded by the plaintiffs and Giro Commercial Bank Ltd in exchange for withdrawal of the case against it.

12. The second defendant is the one who is utilizing **LR. No. Eldoret Municipality Block 14/653** but as this case was going on the plaintiffs discovered that the property had been registered in the names of three individuals namely **Geoffrey Tenai, George Ngugi Keru** and **Richard Kemei** as tenants in common. The registration was effected on **19/6/2011** and certificate of lease issued on the same day. The third plaintiff went and caused a caution to be registered against the title.

### **DEFENDANTS CASE**

13. As I said hereinabove, it is only the first defendant who filed a defence to the plaintiffs claim. The first defendant generally denied the plaintiffs claims. Japhet Kipyego Chepkwony who is the administrator of the Estate of his late mother Elizabeth Sirma testified that his mother died on **23/4/2002**. That he has since obtained Letters of Administration in respect of her estate. He stated that Eldoret Municipality Block 14/604 is one of the properties of his late mother and that the same has since been distributed to twelve (12) beneficiaries eleven (11) of whom were not joined in this case.

14. He further testified that certificate of lease in respect of Eldoret Municipality Block 14/604 was issued on 18/10/1993. He denied ever attending any meetings as alleged by the plaintiffs. He stated that he was neither a shareholder nor a partner of the six original partners and that he does not know how his mother obtained Plot Nos. Eldoret Municipality Block 14/586 and 604.

### **ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION**

15. I have carefully gone through the pleadings herein, documents filed and the evidence adduced by the witnesses. I must say at the outset that is a sad case where a noble idea conceived by a group of six united men has ended up inflicting pain on others. This is one of the cases which demonstrates how delay in settling out some matters can end up complicating what would have otherwise been a smooth process. The second plaintiff Agnes Rop had been allocated 41 plots. She now has only 22 plots. Fifteen of her plots were taken by the Sirma family who was one of the initial partners.

16. What remained of the original land after initial distribution is again being wasted by some partners who seem not to care about the others. What began as an investment for six members is now turning out to be a battle for a few who want to use the law to retain what clearly appears to be for the benefit of all the partners.

17. From the evidence adduced, there is no contention that the six partners bought 421.5 acres. There is evidence from PW2 Jackson Kibor one of the partners that on distribution of the land in the 80's, each of the partners was to get 40 plots of one acre each. There were also 8 commercial plots. He took two commercial plots, one commercial plot was given to Moi and the remaining five were given to each of the five partners. This is how Jackson Kibor ended up getting 42 plots and Moi 21 plots. The other partners of Kibor got 41 plots each.

18. One of the issues for determination in this case is whether the 421.5 acres were to be shared equally. The evidence of the plaintiffs is that the land was to be shared equally. The defendants seem to think otherwise. The burden of proof was on the plaintiffs to prove that the land was to be shared equally. In proving that the land was supposed to be shared equally the plaintiffs produced a letter dated 21/4/1983 [Exhibit 3]. This letter was from the Survey of Kenya and was addressed to Jackson Kibor (PW2) who is the fourth plaintiff. This letter listed down each of the six partners and the plot which had been allocated to them. Each of the six partners were to share survey fees equally and each was to collect their certificate of lease from the Eldoret Lands offices.

19. To demonstrate further that the land was to be shared equally, PW1 Agnes Rop produced a transfer [Exhibit 23]. This transfer was in respect of her one sixth ( $\frac{1}{6}$ ) share which her husband had in the land then known as 11383. Agnes husband had died in 1975 and she had carried out the process of succession and her husband's share being one sixth was being transferred to her. This was long before distribution was done. There were six partners and this shows that each partner was entitled to an equal share in the property. There is therefore no basis upon which one can argue that one partner could have more land than the other except where it was by agreement of the partners as in Jackson Kibor's case where he was given an additional plot because of the role he was undertaking in co-ordinating the subdivision.

20. There is evidence that Paul Sirma was allocated 41 plots. The plot numbers are indicated on the letter produced as Exhibit 3. Jackson Kibor was allocated 42 plots and the reason for this has been explained. It is not that he paid more than the others. There was evidence adduced that Jackson Kibor was to collect 63 leases. Out of the 63 leases, 42 were for himself and 21 for Moi. I therefore find that the six partners held equal share of **LR. No. 11383**.

21. The next issue for determination is whether the defendants are entitled to retain the three disputed plots namely **Eldoret Municipality Block 14/586, 653 and 604**. There is evidence which has been adduced by the plaintiffs that there are two blocks which were not subdivided during initial subdivision. The reason why the two blocks were not subdivided is that the area was impassable due to floods. This evidence has not been controverted. These three disputed plots were not allocated to any of the six partners. This is clear from the list produced as Exhibit 3. **Plot No. 586** had been earmarked as an open space for public use. Elizabeth Sirma later processed title for this parcel which was issued on **17/11/1995**. Elizabeth processed this certificate of lease more than 10 years after the initial partial subdivision. This parcel is about 3 acres. There is nothing to show that she was entitled to this plot.

22. Elizabeth Sirma also processed title for **Eldoret Municipality Block 14/604**. The certificate of lease for this plot which is about **50 acres** was issued to her on **18/10/1993**. When the other partners noticed that she had had herself registered as owner of the two parcels, meetings were held. In these meetings, Elizabeth who was said to be advanced in age did not attend. However she was represented by her sons **Japhet Sirma, Noah Sirma and Moses Sirma**. During a meeting held on **6/10/1998**, the issue of **Plot No. 604** was discussed. Minutes of this meeting were produced as Exhibit 13. Three of Elizabeth Sirma's sons were present. These were Japhet Sirma, Noah Sirma and Moses Sirma. It was agreed in principle that Plot No. 604 had been erroneously registered in the name of Elizabeth Sirma. Japhet Sirma the first defendant herein even undertook to bring the title from their lawyers. It was also agreed that those who had taken public plots were to surrender them.

23. The issue of Agnes Rop's plots was also discussed. It turned out that most of Agnes Rop's plots were taken by sons of Elizabeth Sirma. Some had even sold those plots to third parties. **Plot No. 601 and 602** was said to be in Elizabeth Sirma's name. Noah Sirma had sold **Plot No. 587** to one **Mr. Wamba**. Japhet Sirma confirmed that **Plot No. 588** was in their family name. **Plot No. 591** had been transferred to **Peter Kibarak Kibet** by Moses Sirma. **Plot No. 592** had been transferred by Aaron Metto Sirma to one **Collins Nzili**. **Plot No. 593** had been transferred to **Collins Nzili** by Joshua Metto. **Plot No. 594** had been transferred by Joshua Metto to **S.C. Lilan and Wanjiku**. Noah Sirma confirmed in the meeting that **Plot No. 595** was in their family name.

24. An acknowledgement was drawn in which Elizabeth Sirma acknowledged that **Plot No. Eldoret Municipality Block 14/604** was in her name and that she was ready to return it to the partners. This acknowledgement was taken to her home and the contents thereof explained to her by her son Japhet Sirma. She then thumb-printed and her son signed the same acknowledgement. This acknowledgement was subjected to a fingerprint examiner **PW5 Evans Mangaa Oyori**. The thumb-print impression was found to match with that held by the National Registration Bureau. The examiners report was produced as Exhibit 20 (a).

25. The second defendant Rebecca Soy also signed an acknowledgement that **Plot No. Eldoret Municipality Block 14/653** which she was claiming belonged to the partners and that she was willing to return it. Rebecca Soy had never denied signing the acknowledgment which was produced as Exhibit 15.

Rebecca Soy was in the meeting of **6/10/1998** and she revealed to the members that there was someone who had tried to take the same land from her and that she had taken steps to have the person stopped from going ahead. To demonstrate that indeed the meeting of 6/10/1998 was held and that what Rebecca Soy said in that meeting was true, **Plot No. Eldoret Municipality Block 14/653** was subsequently illegally registered in the names of three persons namely **Geoffrey Tenai, George Ngugi Keru and Richard Kemei**. Rebecca Soy has filed a suit against the three persons in which she seeks to have the land back to her. She had already carried out succession cause in respect of the estate of her late husband Edward Soy whereby this particular plot is shown as one of the properties of her husband. The case is **Kitale ELC. No. 132 of 2013** which is still ongoing. It was even raised by her lawyer during cross-examination in the present case.

26. There is another meeting which was held on **6/11/1998**. The minutes of this meeting were produced as Exhibit 16. In this meeting, Japhet Sirma was present. He explained that he could not surrender the certificate of lease for **Plot No. 604** as their lawyer was out of the country. He even revealed that title for **Plot No. 586** had been charged in Kisumu to Commercial Bank Ltd to secure a loan of Kshs.600,000/=. He further admitted that Agnes Rop's plots which had been taken by his family had already been sold to third parties. He suggested that Agnes Rop should be compensated once **Plot No. 604** was shared out. He pointed out that **Plot No. 601** had already been transferred to **Ezra Ondari Ogemo** and that **Plot No. 602** had been transferred to **Reverend Misoii**.

27. What was recorded in the minutes of **6/11/1998** is confirmed by the fact that it was indeed found that **Plot No. Eldoret Municipality Block 14/586** had been charged to **Credit Commercial Finance Ltd**. A charge document dated **11/4/1997** was produced as Exhibit 18. A Certificate of Official Search for the same plot was produced as Exhibit 17. Japhet Sirma gave details of the charged property. He said that the money had been borrowed by **Matayo K. Bii** but he was the beneficiary of the money. The documents produced confirm what Japhet Sirma said during that meeting. After the meeting of 6/11/1998, Japhet signed an agreement that he was going to rectify the mistake which had been committed regarding Agnes Rop's plots. He signed the agreement which he later took to his mother who thumb-printed on it. This agreement was produced as Exhibit 22.

28. The first defendant cannot therefore turn round and deny that he never attended the meetings or that he never signed the acknowledgement and agreement. It is clear that the first defendant fraudulently had herself registered as owner of **Plot No. Eldoret Municipality Block 14/586 and 604**. The first defendant was not entitled to more plots than the other partners. I have demonstrated hereinabove that the original land was held in equal shares. There is nothing to show that the defendants were entitled to more land than the other partners. If this was to be the case nothing would have been easier than for them to at least give something in their defence to contradict what the plaintiffs are alleging. The defendants admitted their wrong doing but they did not want to rectify their wrong doings. The second defendant never bothered to file a defence.

29. It was argued in the submissions of both the first and second defendants that the plaintiffs did not prove fraud as pleaded in the plaint. In this regard the second defendant's counsel cited **Nairobi HCCC No. 2 of 2004 Dr. C.O. Okere -vs- Esther Kiiyukia & 2 Others** where the court cited the case of **Mutsonga -vs- Nyati [1984] KLR 425** where it was observed as follows:-

**“Charges of fraud should not be lightly considered – they must be strictly proved and although may be so heavy to require reasonable doubt, sometimes more than a mere balance of probabilities is required in fact high degree of probability is required – it is very much a question for trial judge to answer”.**

30. The first defendant's counsel relied on **Nairobi ELC No. Case No. 339 of 2009 Susan Nyokabi Ngochi & Another -vs- Kimson Holdings Limited & Another** where Justice Onguto held as follows:-

**“Thirdly, the burden was always on the plaintiffs to prove fraud on the part of the defendants. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the**

**ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt”.**

31. I agree with the position in the two cases regarding the burden of proof in cases where fraud is involved. I must however point out that the standard to be applied depends on the circumstances of each case. For instance in the present case, the plaintiffs burden was lessened by the admission of the defendants that they had indeed unfairly taken what was meant for the benefit of the other partners. Evidence of those admissions have been tendered in evidence. In the case of the second defendant, she has not denied the truth or otherwise of the admission which she signed. On the part of the first defendant, it has been found that she thumb-printed on the acknowledgement and the agreement to return plots taken by her from Agnes Rop and the plot which had not been subdivided namely **Eldoret Municipality Block 14/604**. The plaintiffs were only expected to prove that the plots were unprocedurally taken. This they have proved by providing evidence of admission of the irregular registration and claim to the disputed properties. I do not know how a person can have himself registered as owner of land not belonging to him if not by way of fraud.

32. A list of plots meant for each partner had been released and individual letters addressed to each partner asking him or her to collect titles. The first defendant's family then decided to take their share and proceeded to take plots belonging to Agnes Rop. When this was discovered, they admitted and promised to return which they didn't do. A suit was filed and evidence was adduced of those facts. What other burden is there to prove other than to show that this was what the position was and this is what happened. The burden would have been heavier had the defendants not admitted to having unfairly taken the disputed properties. I therefore find that the plaintiffs have proved fraud as per their pleadings.

33. The first defendant in her submissions submitted that the title to **Plot No. Eldoret Municipality Block 14/604** has already been shared out among 12 beneficiaries and that only one beneficiary has been sued that is Japhet Kipyego Chepkwony and that the eleven (11) others have not been sued. It is important to note that Japhet Kipyego Chepkwony was brought in after the demise of his mother Elizabeth Sirma who had been sued. Even if the disputed property has been shared out amongst twelve beneficiaries, there is evidence that the property has not been subdivided. This evidence came from **PW6 Wilson Francis Ojunju** from the Survey office. There were orders issued by the court barring any transaction being done on this property. The beneficiaries of the estate of Elizabeth Sirma have not lodged the certificate of confirmation of grant for registration of the portions given to them as required under *Section 61(2) of the Land Registration Act of 2012*. The first defendant confirmed during cross-examination that the beneficiaries of Elizabeth Sirma had not obtained titles in respect of the confirmed grant which shared out the disputed parcel that is **Eldoret Municipality Block 14/604**. It is therefore clear that the decision of *Nyeri Civil Appeal No. 149 of 1996 Fredrick Wachira Ndegwa -vs- Richard Wanjiku Ndanjeru* cannot apply in the circumstances. In the aforesaid case as at the time the appeal was being heard, the portion which had been given to the respondent had been transferred to a third party. Since the said third party was not a party to the appeal, the court held that it would not be just to make an order whose effect would affect the interest of the third party who was not a party to the appeal.

34. **LR. No. Eldoret Municipality Block 14/586** is still in the name of the late Elizabeth Sirma. This property was never a subject of distribution of her estate. There has been no subdivision. The property had been charged but it has since been discharged. As regards **LR. No. Eldoret Municipality Block 14/653** there is evidence that the second defendant is the one who has been in possession and has been laying claim to it. That is why she signed an acknowledgement that the property was in her possession and that she was willing to return it. She could not have promised to return that which she did not have or control. The second defendant in her submission seems to be priding in the fact that she did not file a defence to the plaintiffs claim because she looked at the plaint and formed an opinion that she needed to file no defence and that in any case the land is not in her name and the court cannot give orders in vain.

35. It may be true that **LR. No. Eldoret Municipality Block 14/653** is not in her name but the fact remains that as at the time this suit was filed, she was the one in possession of it and actually had promised to return it. The registration of the said property in the names of three individuals came much later in the **year 2011**. These three individuals are not partners of the six original partners or purchasers

of the said property from any of the partners. What the second defendant is saying is that she is fighting to have the registration of the property in the names of the three cancelled so that it can revert to her. On **20/6/2011** the second defendant obtained an amended confirmation of grant which shows that **LR. No. Eldoret Municipality Block 14/653** is one of the properties she inherited from her late husband Edward Soy. These documents are contained in **Kitale ELC. No. 132 of 2013** which is still ongoing.

36. A search in respect of **LR. No. Eldoret Municipality Block 14/653** was produced as Exhibit 19. This search was done on **30/7/ 2013**. It shows that the property is in the name of **Geoffrey Tenai, George Ngugi Keru** and **Richard Kemei** who hold it as tenants in common in equal shares. It is strange that whereas the search shows that the property was intact as at **30/7/2013**, evidence from **PW6 Francis Wilson Ojunju** shows that the same property was subdivided on **13/7/2011** and it yielded 8 plots ranging from **Nos.2332 to 2339**. These subdivisions were done notwithstanding that there were orders in place restraining any dealings on this and other disputed properties. It appears there is something wrong which is going on.

### **CONCLUSION**

37. All in all, I find that the plaintiffs have proved their case against the defendants. Consequently, I grant the following reliefs:-

**(a) A declaration that Parcel Numbers Eldoret Municipality Block 14/586, 604 and 653 are jointly owned by the plaintiffs and the first and second defendants**

**(b) An order is hereby issued directing the cancellation of the name of Elizabeth Jepchoge Sirma in LR. No. Eldoret Municipality Block 14/586 and 604 and replacing it with the names of the plaintiffs and the defendants jointly.**

**(c) As evidence adduced herein has showed that the title to LR. No. Eldoret Municipality Block 14/653 is not in the second defendant's name, there can be no order for cancellation given as to do so will be giving orders in vain. The fact however remains that the said property remains property of the plaintiffs as well as the defendants and any orders for cancellation of the titles which may have been obtained can be pursued in a separate claim.**

**(d) A permanent order of injunction is hereby issued restraining the defendants from interfering with the disputed properties.**

**(e) The defendants shall bear the costs of this suit.**

Dated, signed and delivered at Kitale on this **18th** day of **July, 2016**.

**E. OBAGA**

**JUDGE**

In the presence of Mr. Kiarie for 1st defendant, Mr. Bitok for 2nd defendant and Mr. Akenga for the plaintiffs.

Court Assistant – Isabellah.

**E. OBAGA**

**JUDGE**

**18/7/2016**