



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 10 OF 2016

**CHARLES CHERUIYOT MOSONIK AND BORNICE CHEPKIRUI SEREM (*Suing as the Administrator of the Estate of the Late Peter Tengecha Serem*).....
.....PLAINTIFF**

VERSUS

DAVID KIPKEMOI SIELE1ST DEFENDANT

MARY CHEPWOGEN SIELE.....2ND DEFENDANT

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

NATIONAL LAND COMMISSION.....4TH DEFENDANT

ATTORNEY GENERAL..... 5TH DEFENDANT

RULING

(Application for injunction; principles to be applied; land registered in name of 1st & 2nd respondents; registration done after demise of the former proprietor; applicants being administrators of former proprietor arguing that the transfer to 1st & 2nd respondents was fraudulent; 1st & 2nd respondents contending that deceased had executed all documents before his demise; transfer document indicating a date after demise of the deceased; applicants establishing prima facie case; no dealings to be entered pending hearing of the suit; but status quo as to possession to remain as it is)

This suit was commenced by way of plaint filed on **24th February 2016**. It relates to the ownership of the **land parcel reference number 631/21/IV** (later converted to be **Kericho/Municipality Block 1/383**) which property was previously owned by the late Peter Tengecha Serem who died on **2nd April 2011**. The plaintiffs are the administrators of his estate. That land is now registered in the name of the **1st and 2nd defendants**. It is the contention of the plaintiffs that the **1st and 2nd defendants** procured registration by way of fraud. The plaintiffs have pleaded that the deceased was taken ill sometimes in the **year 1996** and never recovered until his demise in the **year 2011**. They have questioned how the defendants came to be registered as proprietors of the suit property after the death of the late Tengecha. They have alleged that the defendants must have forged the requisite documents. In this suit, the plaintiffs want the following orders :-

- a) A declaration that the subdivision 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/ Block 1/383** 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/Block 1/383**.

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/Block 1/383**.

e) Costs of the suit.

Together with the suit, the plaintiffs filed an application under **Order 40 Rules 1(a) and (b), 2 (i) and (2) of the Civil Procedure Rules**. It is that application which is the subject of this ruling. They seek the following principal order which is prayer (c) of the application :-

*That this honourable court be pleased to issue an order of temporary injunction restraining the 1st and 2nd respondents either by themselves, agents and/or servants howsoever from selling, transferring, alienating, dealing with or otherwise interfering with **land parcel number Kericho/Municipality/Block 1/383** pending the hearing and determination of this suit.*

The supporting affidavit is sworn by Charles Cheruiyot Mosonik, the 1st applicant. He has inter alia deposed that upon the death of the late Tengecha, they did apply for letters of administration which were confirmed on **19th December 2013**. He has stated that subsequently, after the confirmation of grant, they discovered that they had property in Kericho, which is the suit property. He has averred that the deceased was sickly from the **year 1996** and has annexed several hospital discharge summaries showing that he had been admitted to various hospitals. He has queried how the suit property was transferred to the 1st and 2nd plaintiffs after the demise of his father and without their participation as administrators.

The 1st and 2nd defendants have opposed the application through the replying affidavit of the 1st defendant. He has inter alia deposed that he put up his properties for sale and the deceased got interested. **On 24th September 2009**, they entered into a mutual agreement whereby they exchanged properties being the **land parcels Kericho/Boito/1621, Kericho/Boito/1618, Kericho/Boito/740, Kericho/Boito/1620** and part of the suit property **LR No. 631/21/IV**. The late Tengecha added Kshs. 250,000/=. The property was to be subdivided into two equal parts and he asked David, the 1st Respondent, to follow up on the subdivision. This was done, giving rise to the **land parcels Kericho/Municipality/ Block 1/382 and 383**. The **land parcel No. 382** got registered in the name of the late Tengecha and the **land parcel No. 383** got registered in the name of the 1st defendant and the 2nd defendant who is his wife. The late Tengecha handed over the tenants of the property to the 1st and 2nd defendants who have since been paying him rent. He has deposed that the deceased took over proprietorship of the properties in Boito including a house and tea bushes. He has asserted that all this happened when the deceased was alive and healthy. He has averred that the survey for the subdivision was done by a surveyor hired by the deceased. He has questioned why the plaintiffs have come to court now yet they obtained the grant of letters of administration **on 25 November 2011**. He has stated that there is no way the plaintiffs can claim not to have known of such a prime property and he has questioned their sincerity and integrity. He has deposed that the plaintiffs have been receiving rent from the **land parcel No. 382**.

The 3rd respondent filed a replying affidavit sworn by Grace C. Korir, the District Land Registrar, Kericho. She has deposed that on **6th February 2013**, the lease of Peter Tengecha Serem was forwarded to her office from the Commissioner of Lands through the Chief Land Registrar for registration. The same was registered and on **13th May 2014**, a transfer in favour of the 1st and 2nd respondents was presented and registered on **14th May 2014**. The documents had been signed by the late Tengecha on **14th October 2010**. He also supplied a copy of his Identity Card and PIN. The transferor had requested for the

subdivision of the **land parcel LR No. 631/21/IV** into two equal portions which the lands officer on **22nd January 2010** forwarded a scheme plan and various conditions to be met prior to subdivision. The original title was surrendered on **1st February 2010**. Payment of Kshs. 60,110/= for stamp duty was made by the 2nd respondent on **14th May 2014**. She has deposed that she had no reason to reject the documents since both parties had executed the transfer before an advocate. She was not aware that Mr. Tengecha had died and she has denied all allegations of fraud.

A supplementary affidavit was filed by the applicants through which they deposed that the 1st and 2nd defendants have not provided any documentary proof of the exchange agreement. It has been asserted that the deceased could not have possibly signed the transfer since he was unwell and bedridden at the time. They have refuted the signature contained in the transfer instrument.

In his submissions, Mr. Kipkoech for the applicants pointed out that the **land parcel No. 631/21/IV** was registered in the name of the deceased. He submitted that the surrender of the Lease which was done in **October 2011** was done about 6 months after the death of the deceased. He submitted that the deceased could not possibly have signed the transfers since he was unwell and bedridden at the time the transfer was purportedly signed. He also submitted that the signatures are contested. He submitted that the transfers were done without the participation of the administrators of the estate. He submitted that there will be irreparable loss if the prayer for injunction is not allowed.

Mr. Motanya for the 1st and 2nd respondents inter alia submitted that the applicants when applying for letters of administration, mischievously left out the properties **Kericho/Boito/1618, 1620, and 1621**.

I have considered the matter. The properties **Kericho/ Municipality Block 1/382 and 383**, which are titles issued under the Registered Land Act (now repealed) were initially comprised in the **land parcel L.R No. 631/21/IV** which is a title issued under the **Registration of Titles Act** (now repealed). The deceased was registered as proprietor of this latter leasehold title **on 25th March 1975**. There is an instrument of surrender of this title which is said to have been signed by the deceased on **30th October 2011**, before an advocate by name of Magdaline Ng'etich of Nairobi, although it seems to have been presented for registration on **18th October 2011**. The Land Registrar did annex a proposed subdivision plan of **LR No. 631/21/IV** which is dated **23rd September 2009**, which plan was forwarded to the deceased through a letter dated **22nd January 2010**. From the plan, the **parcel LR No. 631/21/IV** was proposed to be subdivided into two equal portions. In the letter the deceased was asked to signal his acceptance of certain stipulations which were outlined as a condition for approving the proposed subdivision plan.

I have not seen any letter of acceptance signed by Mr. Tengecha. Neither party annexed the conversion register through which the **land LR No. 631/21/IV** was converted from the **Registration of Titles Act** regime to the **Registered Land Act** regime and neither have I been shown proof that the register to **LR No. 631/21/IV** was closed. But there does seem to be consensus that the **land LR No. 631/21/IV** was converted to the **Registered Land Act** regime and was subdivided into two equal halves thus producing the **land parcels Kericho/Municipality Block 1/382 and 383**.

The leases to these two plots were received for registration **on 13th May 2014** and registered on the same day. They were both registered in the name of the deceased. From the documents annexed by the Land Registrar, the 1st and 2nd respondents became registered through a transfer instrument which was registered on **14th May 2014**. I have looked at the transfer instrument and it shows that Mr. Tengecha executed the transfer before Advocate Julius Motanya on **14th October 2010**. Of course at this point in time, Mr. Tengecha had died and given this fact, there could be substance in the arguments of the applicants that the transfer instrument is not a proper one. I am also at a loss as to how the transfer instrument could have been signed on **14th October 2010**, when the property **Kericho/ Municipality Block 1/383** did not exist since the leasehold title was only registered on **13th May 2014** and it can only be on that date that the leasehold title to the said parcel of land came into existence.

The 1st and 2nd respondents have of course stated that everything was done above board and that they acquired the title to the **land parcel Kericho/Municipality Block 1/383** following an exchange agreement. It was said that in the exchange, they did give up their properties **Kericho/Boito/1618, 1620, 1621 and 740** and that the deceased topped up with a sum of Kshs. 250,000/=. Now no document was annexed by the 1st and 2nd respondents to demonstrate that they had such an agreement. It is trite law that under **Section 3 (3) of the Law of Contract Act**, agreements for sale of land need to be in writing to be enforceable, but so far I have not been shown any agreement, and without the same being displayed, I cannot say that there was ever an agreement between the deceased and the 1st and 2nd respondents. It is the 1st and 2nd respondents who have asserted that there was such an agreement and it is trite law that he who asserts must prove. The burden of proving that there was any agreement of sale or exchange lies with the 1st and 2nd respondents and they have not discharged that burden, at least in so far as this application is concerned.

I am prepared to hold from the material before me, that the plaintiffs have established a prima facie case with a probability of success. Without an agreement in writing, it is questionable whether there was ever any exchange agreement. There is adequate material to raise serious questions as to how the instrument of surrender and transfer in favour of the 1st and 2nd respondents were signed long after the deceased had died. Given the above, I am of the view that the plaintiffs are entitled to an order of injunction stopping the 1st and 2nd respondents from dealing with the **property Kericho/Municipality Block 1/383** pending hearing of the suit. I order that there be no sale, or charge or any other encumbrance entered into by the 1st and 2nd respondents with regard to this property, or any other dealings, pending hearing and determination of this case. To buttress this, I issue an order of inhibition, inhibiting the registration of any disposition in the register of the **land parcel Kericho/Municipality Block 1/383** until conclusion of this case.

That said, I do have a feeling that the plaintiffs have also not disclosed the whole of the story herein. For starters, I doubt whether it would have been possible for them not to know that their family owned a property such as this, which from a letter from counsel for the 1st and 2nd defendants, seems to house an outfitters business, two chemists, a tea shop and a butchery. That to me does not appear to be a small property. I also find it strange that the plaintiffs have allowed the 1st and 2nd respondents to continue being in possession of the **land parcel Kericho/Municipality Block 1/383** which must be next door to the **land parcel Kericho/Municipality Block 1/382** which they own. Nothing has been said by the plaintiffs as to what is in this premises **Kericho/Municipality Block 1/382**, and if it is tenanted, who has been collecting its rent and from which day. I think there is more between the parties than has been fully revealed in this application and the complete picture will probably emerge at the hearing of the suit. For that reason, I will not disturb the prevailing status quo maintaining with regard to possession of the property **Kericho/Municipality Block 1/383**. I order that the status quo be maintained pending hearing and determination of this case.

The plaintiffs have succeeded in their application and I award them costs of this application.

It is so ordered.

Dated, Signed and delivered on this 30th day of September, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Ms Mwita holding brief for Mr. Kipkoech for Plaintiffs/Applicants

Mr. Motanya present for 1st and 2nd Defendants/Respondents

No appearance on the part of the State Law office for 3rd – 5th Defendants/Respondents

Court Assistant; Ms Wambany.