



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 181 OF 2013**

**TITUS KUTO KIPUNGAR.....PLAINTIF**

**VERSUS**

**SELINA TAMINING.....1<sup>ST</sup> DEFENDANT**

**PIUS ROTICH.....2<sup>ND</sup> DEFENDANT**

**MUSA KOSKEI.....3<sup>RD</sup> DEFENDANT**

**JAMES KIPYETO.....4<sup>TH</sup> DEFENDANT**

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

**INTRODUCTION**

1. The plaintiff is the administrator of the estate of his late father **Sangara Chepkati *alias* Kipungar Chepukat Kipsoen** (deceased) who was the registered owner of **LR. No. West Pokot/Siyoi/263** measuring **13.8 hectares** (suitland). The deceased was registered as proprietor of the suitland on **17/5/1979**. The property has since been registered in the plaintiff's name together with his brother who has since died through transmission.

2. The deceased was an elder brother of **Samuel Kukwai** who was the husband of the first defendant and father to the second, third and fourth defendants. The plaintiff brought this suit against the defendants seeking an order of eviction and demolition of houses the defendants have put up on the suitland.

3. The defendants filed a defence to the plaintiff's claim and raised a counter-claim in which they seek an order that the plaintiff is holding the suitland in trust for himself and them and for an order that the defendants are lawfully in occupation of the suitland.

**PLAINTIFF'S CASE**

4. The plaintiff testified that he is the registered owner of the suitland through the process of succession. That in the year **2010**, the defendant invades the suitland and put up houses on it without any colour of right. He went on to state that the defendants are occupying **1.87 acres** of the suitland.

5. The plaintiff called in a surveyor who produced a survey report which shows that the defendants have cumulatively occupied **1.87 acres**.

**DEFENDANTS' CASE**

6. The defendants stated their case through the evidence of the first and second defendant. The first defendant who is the mother of the other three defendants stated that she was married to **Samuel Kukwai Lokor** who was a younger brother of the deceased. She was married to her husband in **1962**. Her husband took her to the suitland where they have been staying todate.

7. The first defendant's husband died in **2013**. When she went to suitland it was a forest. She cleared the suitland and put up a house there. The three defendants who are all her sons have also put up houses on the suitland.

8. Prior to the demise of her husband, he had filed ***Kitale HCCC No. 131 of 2005*** against the sons of the deceased. He was seeking cancellation of title which was now in the name of the plaintiff and one of his brothers who has since died. The defendants in this case filed a defence and counter-claim in which they sought eviction orders against the husband of first defendant and his family. The first defendant's husband however died before the case could be heard.

9. The first defendant's husband was not buried on the suitland because the plaintiff prevented his family from burying him on the suitland. In **1968**, her husband had filed a suit against two neighbours who wanted to take over the suitland. The case was ***Kitale RMC Land Case No. 8 of 1968***. The case ended in favour of the first defendant's husband who sought to evict the intruders.

10. It is in **2004** that Samuel Kukwai Lokor discovered that the suitland had been registered in the name of the deceased without his knowledge. The husband to the first defendant then caused a caution to be registered against the title to the suitland to protect his interest.

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

11. The plaintiff had stated in his evidence in chief that the defendants invaded the suitland in the **year 2010**. However when he was cross-examined, it turned out that he was born in **1978** and that when he grew up, he found the defendants on the suitland and that he does not know the history of the suitland.

12. The plaintiff admitted lying to the court that the defendants invaded the land in **2010**. Documents pertaining to the suitland dating back to **1968** were shown to him including the suit filed by Samuel Kukwai Lopor against himself and two others.

13. A look at the evidence of both the plaintiff and the defendants shows that the issues for determination are as follows:-

**(1) Whether the defendants invaded the suitland in the year 2010.**

**(2) Whether the defendants are entitled to remain on the suitland.**

**(3) Whether the plaintiff is holding title to the suitland for himself and the defendants**

#### **Whether the defendants invaded the suitland in the year 2010**

14. It is clear that the plaintiff was not being honest when he claimed that the defendants invaded the suitland in the **year 2010**. The plaintiff did not want to mention the fact that he is related to the defendants. The truth came out during cross-examination when he conceded that the defendants were on the suitland before he was born in **1978**. It even turned out that he and two others had been sued by the husband of the first defendant in the **year 2005**. He was therefore lying on oath when he claimed that the land was invaded in **2010**. I therefore find that the defendants did not invade the suitland in **2010** as the plaintiff had claimed.

#### **Whether the defendants are entitled to remain on the suitland**

15. There is credible evidence that the husband of the first defendant has been on the suitland since the

1960's. He had even a case with some intruders one of whom was **Kapsoyo Ruto** whom he sued in 1968. The case was filed *before Kitale RMC Land Case No. 8 of 1968*. A letter dated 7/9/1970 was produced as Exhibit 3(a). Samuel Kukwai was seeking assistance for an eviction order. The Resident Magistrate responded to Kukwai's letter on 22/9/1970 in which he advised him to seek assistance from the nearest police officers. For his costs, he was advised to come to court to pursue the decree. This letter was produced as Defence Exhibit 3(b).

16. During the lifetime of the plaintiff's father, there was no dispute or case filed seeking to evict the family of Samuel Kukwai. The problem started after Samuel Kukwai discovered that the deceased had had himself registered as sole owner of the suitland and that the plaintiff and his brothers had carried out the process of succession and had transferred the title to themselves by way of transmission. I do find that the defendants are entitled to remain on the suitland as will more particularly be seen when I deal with the next issue for determination.

### **Whether the plaintiff is holding the suitland in trust for himself and the defendants**

17. The question of trust is a matter of evidence and that evidence has to be credible. In *Mwangi Mbothu & 9 Others -vs- Gachira Watimu & 9 Others, the Court of Appeal Judges* had this to say regarding trust:-

*“The law never implies, the court never presumes, a trust but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”.*

18. In the instant case, it is clear from the evidence adduced that the intention of the deceased and his brother was to live together. The deceased only came to register the land in his sole name in 1979 without the knowledge of his brother. The deceased's brother had been in occupation of the suitland from the early 60's and when intruders came to the suitland, he went and filed a suit against them in his own name. This is not someone who had no interest in the suitland. He peacefully lived on the suitland until the demise of the deceased after which he learnt that his deceased brother had been registered as the sole owner of the suitland which he had known as his only home.

19. In 2005, **Samwel Kukwai** filed a suit against the plaintiff and two others. A plaint was produced as Defence Exhibit 1(a) and a defence and counter-claim as Defence Exhibit 1(b). The defendants also produced a letter dated 7/5/1992 addressed to the chief of Kapenguria location [Defence Exhibit 4]. The letter was written pursuant to the complaint made by Samwel Kukwai over the suitland. He was complaining that **Kapsoyo Ruto** and **Tuwai Tutonyo** had refused to give him access to the suitland.

20. The defendants produced an application for registration of a caution against title to the suitland as Defence Exhibit 4(a) and a green card as Defence Exhibit 4(b). The green card clearly shows that a caution was registered by Samuel Kukwai on 4/3/2004. The plaintiff was registered as proprietor of the suitland the following year. There is no evidence on how the caution was removed to pave way for the registration of the plaintiff and his brother. Everything seems to have been going clandestinely.

### **DECISION**

21. For the reasons given hereinabove, I find that the plaintiff's suit is misconceived. He cannot seek to evict people who have been on the suitland for **56 years**. I proceed to dismiss the plaintiff's suit with costs to the defendants. On the other hand, I find that the defendants have adduced credible evidence upon which a trust can be implied. The trust by the plaintiff is hereby terminated and an order is given that the title held by the plaintiff should be cancelled and new separate ones issued in favour of the plaintiff and the defendants in equal shares.

Dated, signed and delivered at Kitale on this 7<sup>th</sup> day of **November, 2016**.

**E. OBAGA**

**JUDGE**

In the presence of Ms. Arunga for defendant and Mrs. Analo for Mr. Nyamu for plaintiff.

Court Assistant - Isabellah.

**E. OBAGA**

**JUDGE**

**7/11/2016**