



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 66 OF 2004**

**SAMWEL POISHO KAPTIBIN.....PLAINTIFF**

**VERSUS**

1. **ELIZABETH CHESANG** )  
2. **JOSEPH ROTICH** )  
3. **JACKSON KIPLAGAT** ) ..... **DEFENDANTS**  
4. **ERICK SIKUKLUU KIPCHUMBA** )  
5. **ENOCK KIPKOECH** )  
6. **JACOB RUTO** )

**JUDGEMENT**

**INTRODUCTION**

1. The Plaintiff is the husband of the first defendant and father of the second to 6th defendants. The plaintiff is the registered owner of LR NO. West Pokot/Siyoi/327 which is about 30 acres (suit land). The plaintiff filed a suit against the defendant on 31/5/2004 in which he sought the following reliefs;-

*(a) A declaration that he is the sole registered proprietor of the suit land and is entitled to unlimited use and possession of the same and that the defendants actions are unlawful.*

*(b) A permanent injunction restraining the defendants from interfering with the plaintiff's use and possession of the land.*

*(c) Cost of the suit.*

2. Though the defendants had filed defence to the plaintiff's claim, when the hearing commenced on 3/2/2015 it is only the second defendant who was present. The plaintiff testified and closed his case after being cross – examined by the second defendant. The hearing was adjourned to 12/3/2015 to enable the defendant prepare. On 12/3/2015 when the hearing resumed, none of the defendants were present. Their defence case was deemed closed and a date for Judgement given.

3. This is one of the cases which should have been sorted out of court but for reasons not fully disclosed to court, the same was never solved. The court has been trying to have the matter resolved amicably with little success. There have been assaults directed by the defendant against their father. A consent was recorded in court temporarily cooling down the tension between the parties but some parties have breached the terms at times with impunity.

## **PLAINTIFF'S CASE**

4. The Plaintiff testified that he is the registered owner of the suit land and that the first defendant is his second wife and the rest are his children. He has always wanted to subdivide his land among his children but the children have refused to allow him to do so. His efforts to involve elders have not borne any fruits. The children have as a result assaulted him on a number of occasions. Sometime back, he obtained a consent order from the court to sub divide his land but he could not do so as his sons could not allow the sub-division to be carried out. He testified that the case has taken long to conclude because he has been trying to settle it out of court with the defendants.

## **ANALYSIS OF EVIDENCE**

5. The Plaintiff produced a title deed for the suit land [exhibit 1]. He also produced two P3 forms as exhibit 2 (a) and (b) to confirm that he has been assaulted by known people on two occasions. The plaintiff had pleaded in the plaint that he has all along reserved 11 acres out of the 30 acres for himself. This is for purposes of educating his children. He testified that he has left the rest of the land to his three wives who are utilising it. The plaintiff's evidence was not controverted. The plaintiff's evidence could not even be shaken during cross – examination by the second defendant.
6. I have gone through the evidence of the plaintiff as well as the pleadings in this case. The issue in contention appears to be on sub- division of land and which portion each party should occupy. The plaintiff testified that he has always utilised 11 acres of land and the rest is being utilised by the defendants. The plaintiff's evidence is supported by the consent which was entered into by the parties on 12/11/2005. In that consent it was agreed that the plaintiff was to continue using 11 acres out the suit land. The defendants were to reside on the remaining portion of the land.
7. It is apparent that the plaintiff is ready and willing to give land to the defendants. It would appear that the defendants do not want what the plaintiff is proposing. The question which then arises for determination is whether children of a parent who is alive can dictate to the parent on how he should sub-divide his land. I do not think that children of a surviving parent can dictate to him on what they want. The plaintiff has already given 19 acres to them. The plaintiff has reserved 11 acres for his use. He is utilising this land to raise fees to educate his children. There is no claim that the plaintiff is intending to dispose of the 11 acres. The defendants who are wife and children of the plaintiff have a right as licensees to utilise the land of the plaintiff. They have no right to claim a share of it during his lifetime. It is wrong for the defendants to prevent the plaintiff from utilising the 11 acres.

## **DETERMINATION**

8. I find that the plaintiff has proved his case against the defendants on a balance of probabilities. There is no doubt that he is the registered owner of the suit land. The defendants actions of preventing the plaintiff from utilising his 11 acres are unlawful. A permanent injunction is hereby given restraining the defendants from interfering with the plaintiff's user and occupation of the 11 acres. As the parties herein are family members, I make no order as to costs.

Dated, signed and delivered at Kitale on this 22nd day of April, 2015.

**E. OBAGA**

**JUDGE**

**In the Presence of M/S Arunga for Plaintiff. Court Clerk – Kassachoon.**

**E. OBAGA**

**JUDGE**

**22/4/2015**