



**REPUBLIC OF KENYA**

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

**PETITION NO. 9 OF 2014**

**SUSAN CHEBURET CHELUGUI AND**

**DAVID K. CHELUGUI**

**(Suing As The Administrators To The Estate Of The Late N**

**NOAH KIPNGENY CHELUGUI.....PETITIONERS/APPLICANTS**

**VERSUS**

**EZEKIEL KIPTOO.....PROPOSED 1ST INTERESTED PARTY**

**ERNEST KIBET.....PROPOSED 2ND INTERESTED PARTY**

**RULING**

Susan Cheburet Chelugui and David K. Chelugui suing as administrators of the estate of the late Noah Kipngeny Chelugui (*hereinafter referred to as Petitioners*) have come to court by way of petition against His Excellency the retired President Daniel Toritich Arap Moi, Rai Plywood (K) Ltd, District Land Registrar, Uasin Gishu District. The Registrar of title and the National Land Commission (*hereinafter referred to as Respondents*) claiming that the late Noah Kipngeny Chelugui was the owner and the registered proprietor to all that parcel of land (formerly L.R. No. 10492 Uasin Gishu) and the registration of that land in his names vested in him the absolute ownership of that land with all rights and privileges belonging or appurtenant thereto. Arising therefrom, the estate of the late Noah Kipngeny Chelugui had the right to own the said property and of the right have the said property protected from arbitrary deprivation of property without payment in full of just compensation under Article 40(1) and 40(3) of the Constitution of Kenya. The title to the suit property had been issued under the registered Land Act Cap. 300 Laws of Kenya and therefore conclusive proof of ownership and the owner is entitled to exercise and enjoy all the incident that ownership confers including the protection of property conferred by Article 40 of the Constitution of Kenya. Under Article 40(6) of the Constitution of Kenya, the rights to protection of right to private property does not extend to any property that has been found to have been unlawfully acquired and that is precisely the gist of the petitioners' petition against the respondents.

According to the petitioners, as matters stand, the petitioner's estate property L.R. No. 10492 Uasin Gishu has since been subdivided and the following titles issued:

- i. Eldoret Municipality Block 15/238(12 acres) – I.N.O. Stanley Kiptoo Arap Metto.
- ii. Eldoret Municipality/Block 15/239(53 acres) – His Excellency the Retired President Daniel Toroitich Arap Moi.
- iii. Eldoret Municipality/Block 15/237 I.N.O. Noah Kipngeny Arap Chelugui.

The property Eldoret Municipality/Block 15/239(53 acres) which had gone to the Retired President Daniel Toroitich Arap Moi was subsequently sold by him (the Retired President) to the Rai Plywood (K) who have since taken possession, occupation, enjoyment and use of the said property.

The petitioners allege that the process that led to the late Noah K. Chelugui losing his parcels of land aforesaid was without sale, without any consideration passing to him, without his consent, without his authority, without compensation, without any colour of right, was not a product of a willing buyer, willing seller basis and on the contrary was an illegality, null and void *ab initio* and that the process that led to the loss of the said land was arbitrary, illegal, unconstitutional and gross violation of Article 40 and 47 of the Constitution of Kenya (or was in violation of Section 75 of the former Constitution of Kenya).

They contend that in any event, the acquisition of the said land by the 1st and 2nd respondents was not only illegal, unconstitutional but that in the same there was no prompt payment in full of just compensation to the person of the late Noah Kipngeny Chelugui or to his estate. On the contrary, the petitioners estate had been acquired illegally, irregularly, unprocedurally or through a corrupt scheme all falling within the provisions of Article 40(6) of the Constitution of Kenya.

It follows from the aforesaid that the titles that the 1st and 2nd respondents hold are illegal, without any sanctity, acquired irregularly, unprocedurally, is tainted and not entitled to any constitutional protection, a nullity *ab initio*. In any event, since the act of the acquisition of the said parcels of lands by the 1st and 2nd respondents was void from the birth, then anything done under it, whether closed, completed, or developing will be wholly illegal and the estate of the late Noah K. Chelugui is entitled to the reliefs sought being the persons affected by such an unconstitutional act.

There is a whole procedure and a whole legal regime of the sale and transfer of land but in the instant case, one Stanley Kiptoo Arap Metto (now deceased) through deception or trickery obtained the petitioners' original file allegedly to facilitate a sale but no sale took place. The end result has been that the petitioners' land changed hands in circumstances which has never been explained or fathomed. The petitioners received only a meagre Kshs.70,000 which was neither purchase price nor any other consideration for the purchase of land. In any event, no sale of land ever took place and petitioners invites the respondents to have their say in the matter.

The late Noah K. Chelugui efforts to recover to recover his land from the **new owners** proved more or less like a wild goose chase. Indeed, the late Noah Kipngeny Chelugui made all efforts, knocked several offices including the police to report his "Lost Title" but all in vain.

The property that had allegedly been acquired above by the Retired President has since changed hands and now in the names of Rai Plywood (K) Lted who have also acquired the said land as a result of an illegality, irregularity, unconstitutionality and therefore to suffer the same consequences, the consequences of the illegal acts and no good title passed to them.

As a consequence of the above acts, the petitioners claim that they are entitled to the plea of the declaration of the unconstitutionality of the above acts and the reverting of the land to the petitioners' estate which can be described as restitution. That would entail not only declarations that the acts that led to the loss of the said parcel of land in the first place was unconstitutional, null and void *ab initio* and any ensuing titles declared a nullity and/or for cancellation with all the attendant consequences.

The respondents violated the petitioners' rights under Article 19, 20, 21, 22, 23, 24, 25, 27, 40, 47, 48 and 50 of the Constitution of Kenya and thereby deserves not only a declaration of the unconstitutionality of acts above but the compensation and/or damages be worked out and paid by the persons found to have violated the petitioners fundamental rights and freedom and in this case right to the protection of the right to property under Article 40 and 47 of the Constitution of Kenya.

In any event, the acts complained of above violated the petitioners' rights under Article 47 of the Constitution of Kenya in that the taking away of the petitioner land was not an act of titillating drama but rather a serious violation of the petitioners rights, an act of illegality and arbitrary deprivation of private

property contrary to Article 47 of the Constitution of Kenya which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

At the very core of the petitioners' plea is that the 1st and 2nd respondents' title was unconstitutional, illegal, null and void and does not enjoy any sanctity or protection under the Constitution of Kenya. That on the contrary, the same was acquired through fraud, mistake, misrepresentation in which the 1st and 2nd respondents were party to or were acquired illegally, unprocedurally, unconstitutionally or through a corrupt scheme.

The issues that inform this petition have been raised with the respondents but all in vain. Indeed, the petitioners made visits to the respondents seek resolution and/or redress but all in vain as the **“door was permanently locked,”** no access leaving them with no alternative but to turn to the courts of justice for the much needed remedies and/or redress to assuage their long suffering.

Together in these, the various Land Registrars Eldoret, Uasin Gishu District and indeed, the Ministry of Lands through its officers over the years played along in the acts that saw the petitioners' estate lose huge chunk of land, thus 53 acres to the Retired President and subsequently to Rai Plywood (K) Ltd and 12 acres to the Estate of the late Stanley Kiptoo Arap Metto and therefore they are culpable or guilty of the said acts or abetted the same and used Government offices to process suspect titles that saw the petitioners lose. They must face the same fate and be held to compensate the petitioners for their losses and/or suffering for all these years.

The petitioners therefore prays for a declaration that the petitioners constitutional right to property and/or interest in or over the property Eldoret Municipality/Block 15/239 (53 acres) – His Excellency the Retired President Daniel Toroitich Arap Moi and subsequently Rai Plywood (K) Ltd all in Uasin Gishu District deserves the protection by the Honourable court and that the protection do issue accordingly in terms of the declarations that the acquisition of the said properties by the 1st and 2nd respondents were arbitrary unconstitutional, irregular, unprocedural, tainted, a nullity *ab initio* and therefore not worthy of any constitutional protection.

The petitioners further pray for a declaration that the petitioners rights and fundamental freedom and in particular the protection of right to property and/or interest in or right over suit properties had been violated and/or infringed and their property parcel No. Eldoret Municipality/Block 15/239(53 acres) – His Excellency the Retired President Daniel Toroitich Arap Moi and subsequently to Rai Plywoods (K) Ltd all in Uasin Gishu District is in real danger of being permanently arbitrarily acquired by the 1st and 2nd respondents and their beneficiaries to the detriment of the petitioners and that violates the petitioners' right to the protection of private property afforded by Article 40(1) and 40(3) of the Constitution of Kenya (the equivalent of section 75 of the former Constitution of Kenya) and appropriate declaratory order do issue as such.

Together with the grant of the orders above, the petitioners pray that the Honourable court do forthwith cancels all the titles or any title issued to and/or emanating therefrom the Eldoret Municipality/Block 15/239 (53 acres) – His Excellency the Retired President Daniel Toroitich Arap Moi and subsequently to Rai Plywood (K) Limited all in Uasin Gishu to the 1st and 2nd respondents and all other beneficiaries and the Registers be rectified accordingly and the titles reverts to the estate of Noah K. Chelugui or its his administrators and/or in the alternative the 1st and 2nd respondents do pay and be ordered so pay the estate of the Late Noah K. Chelugui the prompt payment in full of just and current market value of the said properties in such amounts to be assessed and/or worked out and a declaration to issue that the acts of the 1st and 2nd respondents of unlawfully attempting to deprive the petitioner of their allotted parcels of land in the light of the above was without any legal basis, an act of illegality and unconstitutional and are liable to the petitioners in compensation and/or damages for losses, for loss of use land and for breach of their constitutional rights on such compensation as shall be assessed by the court.

They further pray for damages as against the 3rd, 4th and 5th respondents for their acts of aiding and abetting the illegal, unconstitutionality of the acts above, of issuing suspect titles and for breach and/or violation of the petitioners constitutional right to properties and protection of the same.

On the **17.12.2014**, **Ezekiel Kiptoo** and **Ernest Kibet** the proposed Interested parties filed an application dated 15.12.2014 praying that they be enjoined in the matter on grounds that they are administrators of the Estate of William Kipngeny Arap Letting who jointly with the Estate of the Petitioners, Nathaniel Kiptalam Arap Lagat, Thomas Kipkosgei Arap Yator, Cherwon Arap Maritim are common proprietors in equal shares for the subject matters in dispute in this petition which was taken from the aforesaid parties, fraudulently and/or unlawfully. The proposed interested parties claim that they stand to suffer great loss unless the orders sought are granted. According to the applicants, the participation of the proposed interested parties in this suit is necessary so that the court can effectively determine all issues in controversy.

In the supporting affidavit, the proposed interested parties claim that they are Administrators of the Estate of the late William Kimngeny Arap Letting and owners, in equal shares of the subject matters in dispute herein being Eldoret Municipality Block 15/2371, Eldoret Municipality Block 15/2370, Eldoret Municipality Block 15/2369, Eldoret Municipality Block 15/237, Eldoret Municipality Block 15/339 and Eldoret Municipality Block 15/10.

That William Kimngeny Arap Letting, Noah Kimngeny Arap Chelugui (now represented by the Petitioners), Nathaniel Kiptalam Arap Lagat, Thomas Kipsisgei Arap Yator and Cherwon Arap Maritim bought land reference number 10492, comprising 3,236 acres on the 28th June, 1965 to be owned in equal shares. On the 16th October 1976, the parties obtained a consent to subdivide the land reference No. 10492 into 6 portions. That the subject matter in dispute in this petition falls south of the railway line, specifically Eldoret Municipality Block 15/10 and was obtained by 1st and 2nd respondent not only unlawfully but also fraudulently and that the controller of state House who ordered for subdivision has neither powers to order subdivision nor transfer of private property as was the case in this particular context. That from the foregoing, it will be meet and just that they be allowed to be enjoined in these proceedings.

The application is opposed by the Petitioners in the affidavit filed on 26.2.2015 who state that the said application and its request remains unfocused and is only intended to cause confusion in the instant petition and that the instant petition is about the estate of Noah Kimngeny Chelugui alone. It had nothing to do with the Estate of William Kipngeny Arap Leting or any other person for that matter. That as is clear from the main petition, the property L.R. No. 10492, a total of 3,330 acres had pursuant to a consent granted by the Uasin Gishu Land Control Board on the 7th day of August 1976, sub-divided into the six portions as follows:

- |                             |                                |
|-----------------------------|--------------------------------|
| - Nathaniel Kiptalam Langat | - Ngechek Estate – 620 acres   |
| - Thomas Kipkosgei Yator    | - Lolosio Estate – 620 acres   |
| - Noah Kimngeny Chelugui    | - Kapkoro Estate – 620 acres   |
| - Cherwon Arap Maritim      | - Embiu Estate – 620 acres     |
| - William Kimngeny Leting   | - Kapchumba Estate – 620 acres |
| - Huruma Co. Ltd.           | - 140 acres                    |

That therefore and quite clearly, the property L.R. No. 10492 had been sub-divided long time ago and each of the shareholder shown and/or had acquired their respective portions. Therefore, from the year 1976, there was no question about shareholding as each shareholder had his share and that there was nothing left or being held in common in equal shares. That it is their plea that even before this application is considered, the Honourable court do visit the ground to see whether what they are discussing here is the **same parcel of land** or they are discussing different parcels of land and the outcome of that visit, will obviate the need for arguments in an application which clearly has been shown to have **no head or tail**.

The petitioners claim that their petition herein is against the respondents cited in the petition. If the

instant applicants in the motion have another claim against His Excellency the Retired President Daniel Toroitich Arap Moi and Others over their respective parcel of land, let them file separate proceedings instead of meddling and causing confusion to the Petitioners' petition herein. That further they are aware that the said William Kimngeny Arap Leting sold his entire shares to one Mr. Nderu. They should therefore be honest and direct their claim (if any) to where it belongs and not to complicate the instant petition. That in any event, the late Noah Kimngeny Chelugui share or portion of the land did not even share a boundary with that of William Kimngeny Arap Leting. From the foregoing, they are persuaded that the proposed 1st and 2nd Interested Party application dated the 15th day of December, 2014 has no legal basis, is without any merit and is for dismissal with costs since no purpose would be served by allowing the proposed 1st and 2nd Interested Parties to participate in the instant petition and the refusal of that application will serve the interests of justice.

Mr. Ezekiel Kiptoo and Mr. Earnest Kibet filed a supplementary affidavit stating that the subdivision done on the 7th August, 1976 is not in dispute but every single parcel of the subdivision remained owned in common including Block 15 and that Block 21 was a creation of fraudsters and their late father did not individually own it. That the claim that William Kipngeny Arap Leting sold his entire land to Nderu is not true but he sold only 10 acres to him as agreed by all shareholders which was to be reduced from his shares. That no lease was ever released by the Commissioner of Lands to enable separate titles to be issued. The application is not opposed by the respondents.

**Mr. Rotich** for the applicants submits that the proposed Interested Parties claim is identical to the Petitioners interest. According to learned counsel, each party was given 620 acres and shown a distinct portion as claimed by the petitioners. The parcel of land was subdivided into 7 portions and the land is still being held in common. A search done in 1981 shows that the land was held in common. There was a consent to subdivide the land in 1976 but the applicant and petitioners were dispossessed before it could materialize. He argues that the application should be allowed in the interest of justice.

**Mr. Arusei** on his part argues that the petitioners are not claiming the entire L.R. 10492 as L.R. 10492 was subdivided into 6 portions due to a Land Control Board consent of 12.10.1976 and the 6 portions allocated to various individuals including the applicants and the petitioners. Each individual was given 620 acres. The parties herein settled on distinct parcel of land but the applicant sold his parcel of land.

Mr. Arusei argues further that his clients claim lies in respect of parcels No. 2370 and 2371. The petitioners in conclusion finally argues that the property claimed is already registered in their names.

Under Rule 7 of the *Constitution of Kenya (Protection of Fundamental Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (“*The Rules*”), the court has discretion to join an interested party. The Rule provides:

1. ***A person, with leave of the Court, may make an oral or written application to be joined as an interested party.***
2. ***A court may on its own motion join any interested party to the proceedings before it.***

***Rule 2 of the Rules defines the term ‘interested party’ as a “person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”***

The party who seeks to be joined must demonstrate the identifiable stake or legal interest in reference to the proceedings. It is therefore vital to understand the nature of the case in order to identify the stake or legal interest. The petition dated 9th June 2014 is in respect of parcels of land referred to as Eldoret /Municipality/Block15/239 and not L.R NO 10492 Uasin Gishu formerly known as King'ong'o farm. The petitioners claim is against retired president Daniel Toroitich Arap Moi and Raiply LTD who allegedly acquired the disputed property arbitrarily. I have considered the application, replying affidavit and supplementary affidavit and do find that the petitioners' claim is based on the historical background that once upon a time, there was a property known as L.R. No. 10492, Uasin Gishu which was subdivided into six portions on the 7.8.1976 and each shareholder was shown his portion as follows:

- Nathaniel Kiptalam Langat                      -Ngechek Estate – 620 acres
- Thomas Kipkosgei Yator                      - Lolosio Estate – 620 acres
- Noah Kimngeny Chelugui                      - Kapkoro Estate – 620 acres
- Cherwon Arap Maritim                      - Embiu Estate – 620 acres
- William Kimngeny Leting                      - Kapchumba Estate – 620 acres
- Huruma Co. Ltd.                      - 140 acres

Ezekiel Kiptoo and Ernest Kibet are legal representative of William Kimngeny Arap Leting whose estate in respect of L.R. 10492 was 620 acres. Susan Cheburet Chelugui and David K. Chelugui are the administrators of the Estate of Noah Kipngeny Chelugui who also got a portion of 620 acres. The whole parcel of land was 3,330 acres.

In the petition herein, the petitioners are claiming parcel NO. Eldoret/Municipality/Block 15/239 measuring 53 acres that was allegedly acquired by His Excellency Retired President Daniel Arap Moi from their share of 620 acres and later transferred to Rai Plywood (K) Ltd. The petitioners appear to be claiming that the portion of land registered in the name of the retired President and later transferred to Rai Plywood (K) Ltd was part of the portion that was meant for Mr. Noah Kipngeny Chelugui.

This court finds that if the claim of the two families is strictly considered, it would appear that their interest is not the same as each party was shown his share of land that was subdivided from Eldoret L. R. Number 10492 and apparently took possession. The 53 acres claimed by the petitioners appear to be part of the Estate of Noah Kimngeny Chelugui.

Entertaining the proposed Interested Party in this matter would not assist the court in determination of the petition as the said Interested Parties have not come out clearly to demonstrate their interest in the petition. If the dispute was surrounding the whole of L.R. 10492 measuring 3,330 acres, the court could have inclined to entertain the application but since the dispute is in respect of the 53 acres alleged to have belonged to the petitioners, then the court holds that the proposed Interested Party should file separate claim against those who allegedly converted their share of land that belonged to William Arap Leting. The application is therefore dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF OCTOBER, 2015.**

**ANTONY OMBWAYO**

**JUDGE**