



**REPUBLIC OF KENYA**

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

**E & L CAUSE NO. 515 OF 2013**

**TERESA CHEBICHII RUTTO**

**[Administratrix of the Estate of the Late ERNEST KIMAIYO.....PLAINTIFF**

**VERSUS**

**TALALEI KIPTENAI.....DEFENDANT**

**JUDGMENT**

**Teresa Chebichii Rutto**, suing as the Administratrix of the Estate of the Late Ernest Kimaiyo, (*hereinafter referred to as the plaintiff*) has brought this suit against Talalei Kiptenai, (*hereinafter referred to as the defendant*). The plaintiff obtained a limited grant with respect to his late father's estate; one *Ernest Kimaiyo* who died on the 8th day of July, 1975 on 23rd of September, 2013 hence has the capacity to institute this suit. The plaintiff claims that the plaintiff and her siblings namely Tecla Cheron Rutto and Philip Kiptoo Maiyo are the legal beneficiaries of 28 acres comprised in parcel number Eldoret Municipality Block 21 (King'ong'o) 1 measuring approximately 72 acres being the portion legally owned by their late father, Ernest Kimaiyo and that the defendant's share ought to be 24 acres while the remaining 20 acres belonged to their paternal grandmother one Zipporah Tapletgoi who died in 1991. After the demise of the plaintiff's father one Ernest Kimaiyo in 1975, Zipporah Tapletgoi, constructed a house for the plaintiff's mother one Susan Jepchirchir Maiyo on the portion belonging to her late father which house the plaintiff, her mother and her siblings continue to occupy to-date. That after Zipporah Tapletgoi died in 1991, the defendant herein fraudulently caused to be registered in his sole name the whole parcel known as Eldoret Municipality Block 21(King'ong'o) 1 measuring approximately 72 acres without any due regard to the above entitlements which property he has since sub-divided into other portions and sold some to third parties.

The plaintiff and her siblings being the biological children of the late Ernest Kimaiyo, the son of the late Zipporah Tapletgoi are equally entitled to the portion owned by the said Zipporah Tapletgoi in equal proportion with the defendant thereby bringing their total acreage to 38 acres. The plaintiff claims that the defendant has without any colour of right and/or legal justification threatened to evict the plaintiff herein and her siblings from the aforementioned parcel of land which he is desirous to sell and/or transfer to third parties. The plaintiff claims that she has been in use and occupation of the suit parcel of land quietly and uninterruptedly with her siblings for over 38 years and therefore they stand to suffer great loss and damage in the event that the defendant makes good his threat of eviction and/or transferring the suit property to third parties hence the need for an injunction to be issued in order to preserve the subject matter of the suit.

The particulars of fraud on the part of the defendant according to the plaintiff are:

- (a) ***Illegally transferring the suit properties to himself in the full knowledge of the 38 acres thereof belongs to the plaintiff and her siblings.***
- (b) ***Unlawfully and illegally transferring portions of the suit property to third parties in the full knowledge that 38 acres thereof belongs to the plaintiff and her siblings.***
- (c) ***Misrepresenting himself as the sole owner of the whole parcel measuring approximately 72 acres while knowing that position to be untrue.***
- (d) ***Fraudulently acquiring title documents without following the legally laid down procedure.***
- (e) ***Failing to heed to the plaintiff's sentiments that part of the suit parcel belongs to the plaintiff and her siblings.***
- (f) ***Secretly transferring part of the suit parcel of land without the consent of the plaintiff and her siblings knowing very well that they are entitled thereto.***

The plaintiff claims that she and her siblings have suffered great loss and damage as a result of the defendant's encroachment and transfer of the suit property without due regard to the fact that the plaintiffs and her siblings are entitled thereto reasons whereof the plaintiff prays for judgment against the defendant for a permanent injunction restraining the defendant from trespassing onto, encroaching and or in any other way dealing with the portion of land belonging to the plaintiff and her siblings measuring approximately 38 acres and a declaration that 38 acres comprised in the suit property belongs to the plaintiff and her siblings being the portion legally belonging to their late father Ernest Kimaiyo. The plaintiff further prays for an order of cancellation of the title deed issued in favour of the defendant herein.

The defendant denied the allegations of the plaintiff in his defence dated 17.12.2013 and filed on the same date. The defendant categorically denies that the plaintiff and her siblings are beneficiaries of Land Parcel No. ***Eldoret Municipality Block 21 (KING'ONG'O) 1***. He further denies that the plaintiff and her siblings have been in occupation for 38 years or at all as the defendant has been solely in possession and categorically states that he is the sole registered owner of the suit parcel ELDORET MUNICIPALITY BLOCK 21 (KING'ONG'O)1. He single handedly purchased the parcel out of his own hard work and neither his late brother Ernest Kimaiyo nor the plaintiff contributed any monies towards purchase of the parcel. The family land is situated elsewhere where the plaintiff's claim should be directed and not land parcel ***Eldoret Municipality Block 21 (KING'ONG'O) 1***. With the demise of his brother, the defendant acted in good faith by bringing up the plaintiff and his siblings in his own land. That the plaintiff by filing this suit is abusing the good faith and help shown to them by the defendant. The defendant states further that the plaintiff suit is not merited, does not disclose a cause of action against the defendant, strange in the face of the law and ought to be dismissed with costs. The plaintiff also gives notice of a preliminary point as the plaintiff suit is wanting both in form and substance.

In reply to defence filed on 9.1.2014, the plaintiff reiterates that she indeed has the legal capacity to institute this suit on her own behalf and on behalf of all her siblings, the beneficiaries of the estate of the late ERNEST KIMAIYO and more particularly the fact that all that parcel of land known as ELDORET MUNICIPALITY BLOCK 21(KING'ONG'O) 1 measuring approximately 72 acres was jointly purchased by the defendant herein, his mother and the plaintiff's late father one Ernest Kimaiyo which fact is well within the knowledge of the defendant.

That further to the above, the plaintiff further states that the defendant herein never produced any evidence to corroborate his allegations of having singly purchased the suit property and any such allegations are unfounded, uncorroborated and/or unsupported hence strict proof of the same shall be invited. The plaintiff reiterates having been in occupation of her late father's share of the suit property as authorized by her late grandmother, Zipporah Tapletgoi.

On 25.11.2014, when the matter came up for hearing, the plaintiff ***Teresa Chebichii Rutto*** gave evidence that she is the first born child of the late Ernest Kimaiyo having been born in the year 1970. That after the death of her father who was a policeman, her paternal uncle who is the defendant herein promised to provide the basic needs of his late brother's family in the full knowledge that their father owned part of the suit property. That the defendant then started abrogating his parental responsibility over them forcing her to seek the intervention of the then District Commissioner, Yusuf Haji in order to have their late father's share surrendered back to them by the defendant. A meeting was later convened on the strength of the letter she received from the said District Commissioner summoning the directors of the Kapking'ong'o Farmers Society though she was never allowed by the then Chief, Mr. Koech to attend the said meeting due to her tender age. That she was however, later called by the said chief after the meeting was held, after which he informed her that a resolution had been passed and the defendant had agreed to continue paying their school fees together with her siblings namely Tecla Cheron and Philip Maiyo. That in addition to the above, the chief further informed her that the defendant had also agreed to surrender their late father's share which comprised of 28 acres to them once they had finished their education or became of age to handle the same. That in 1988 when she was due to join Form 1, she requested for school fees from the defendant who declined to give but instead assaulted her mother over the issue which case was later reported to the then chief of Kiplombe, Mr. Kirwa to deliberate on the issue. That the above issue led to a meeting being convened on the suit parcel of land, which meeting she too attended. That all their extended family members were in attendance and it was resolved that they had a portion of land comprised in the suit property and further her paternal grandmother that their share would be given to them hence the reason she even built the house they still occupy to-date for them.

That it is at this meeting that their grandmother then directed that her mother, Susan Maiyo do plough one acre of land near their house which was to be used as a vegetable garden as they awaited third legal share during the final distribution. That her grandmother later died in 1991 before their share had been given to them by the defendant. That her late grandmother owned 20 acres comprised in the suit property for which she proposes that half of it being 10 acres should go to both the defendant herein and their house making their total acreage 38 acres.

That in 1992, the defendant came to their house and showed their mother a title deed of the whole parcel of land registered in his sole name to which their mother asked why he had chosen to register the whole parcel in his names despite knowing that their late father's share was comprised therein. That the defendant then assured their mother that there was no problem and that should she need her late husband's share, he would go to the relevant land authority and effect transfer of the same to their mother which he has never done to-date. That in the year 2010, the defendant then stopped them from tilling the parcel they had been tilling. He also started disposing part of the suit property to third parties to their detriment. That prior to demise of her late father in the year 1975, they were living on the suit parcel of land. Her paternal grandmother one, Zipporah Tapletkoi built for them a semi-permanent house on the suit property sometimes in 1988 before her death in 1991 and that they have been living in the said house to-date. That several meetings have been held to try and solve the issue of her late father's portion being surrendered to them by the defendant in vain hence rendering the instant suit necessary as the defendant has been very adamant.

***On cross examination by Mr. Keter,*** she states that the land was bought in 1965 while she was born in 1970. Her father died in 1975 when she was five years old and that she is the eldest in the family. She acknowledged the fact that she did not know much as everything was explained to her. However, she confirmed that the defendant, who is her father's brother took her to school and assisted her brothers in terms of school fees. The defendant married their mother after their father's death and had three children. The land in dispute is in the name of the defendant and has been subdivided and part of it sold. The defendant promised to give their mother land but did not do so.

The plaintiff called ***Susan Jepchirchir Maiyo*** as her witness who testified that she is the mother of the plaintiff and widow of the late Ernest Kimaiyo having solemnized their marriage on 21.6.1969. That in her marriage to the late Ernest Kimaiyo, they were blessed with three issues of the marriage namely Teresa Chebichii, Tekla Cheron and Phillip Maiyo.

That prior to his death in a road accident in 1975, her late husband, his brother the defendant herein and their mother Zipporah Tapletkoi had each contributed to the purchase of the suit property. That she was expecting Phillip Maiyo when his father died on the 8.7.1975. That they were on the suit property at the time her late husband died and have been using and residing on the said parcel to-date. Moreover, that her late mother-in-law, **Zipporah Tapletkoi**, then informed her before her demise in 1991 that her late husband had contributed 2,800 shares towards the purchase of the suit property which represents about 28 acres out of the 72 acres while she had contributed 2,000 shares representing 20 acres. She claims that her late mother-in-law then built her a semi-permanent house after the death of her husband to which house she moved to in 1990 before her mother-in-law passed away in 1991. Her daughter raised a complaint with the then District Commissioner, Yusuf Haji in 1983 when the defendant herein failed to pay school fees for her children or surrender her late husband's share of land to enable her adequately take care of her children. The chief convened a meeting with the directors of Kapking'ong'o Farmers Society in which meeting it was confirmed that her late husband had indeed contributed 2,800 shares towards a portion of the suit property which comprised of 28 acres at 100 shares per acre. That it was in that very meeting that the defendant herein undertook that he would surrender her late husband's share to her and her children as soon as they became of age and/or completed their education. That the defendant has not complied with the above to-date and instead started threatening the plaintiff and her children not to dare till their portion of the land including the one acre given to her by her late mother-in-law before her demise hence rendering the suit before court necessary. That she believes her late husband did have a share of the suit parcel of land measuring 28 acres as well as being entitled to a share of his deceased mother's portion which was 20 acres being 10 acres thereby bringing the total of her late husband's share to 38 acres. That she confirmed that in the meeting held pursuant to the D. C.'s letter of 1983, the defendant herein did confirm that his late brother had a share in the suit property. That she believes that her children and her have a legal right to inherit her late husband's share out of the suit property.

**On cross examination by Mr. Keter**, she states that they lived at Cherunya Farm as Squatters with her husband and mother in law while the defendant was living at King'ong'o farm with his wife. They left Cherunya farm in December 1975 for King'ong'o farm where her mother in law and husband had constructed. Her mother in law took them to the King'ong'o farm and showed them their land as they had cleared paying. The family was utilising 8 acres, the rest was a grazing filed. When the elders distributed the King'ong'o land, the family of Ernest Kimaiyo was not given land. The defendant later went to them and showed them a title deed in 1991. She complained that the title deed was only in his name. The defendant told her that he would sue for the title. The defendant did not do so and attempts to resolve the dispute by the Provincial administration as it then was and Elders of Huruma did not succeed.

**On re-examination by Isiaho**, she states that her father-in-law had two wives. The 1st wife was her mother-in-law and the second wife was called **Anna Cheptanui**. Her father in law had 2 homes and lived at both homes.

The plaintiff called **Sammy Kimutai Tenai**, a step brother to the defendant who states that the late Ernest Kimaiyo was the father to the plaintiff herein. His late father one Kiptenai Tanui was married to two wives namely Anna Cheptanui (his mother) and Zipporah Tapletkoi who was the mother to the defendant herein and the late Ernest Kimaiyo.

Before their father bought land, they were living as squatters at Kapcherunya. His father, their aforementioned brothers (Ernest Kimaiyo and Talalei Kiptenai) later contributed money to purchase their family land. Their late father then sold some heads of cattle and purchased their family land at Sarura where his late mother (Ann Cheptanui) was settled till her death. They have resided on said parcel at Sarura land to-date. His mother was the 2nd wife.

Their late father, his step-mother (Zipporah Tapletkoi), his late brother Ernest Kimaiyo and the defendant herein also contributed money which they used to purchase the family land at King'ong'o on which his step-mother being the 1st wife was settled. This what forms the suit parcel in the current suit. It is on this particular plot that his late father died though he was later buried at their Sarura parcel since at that time the Municipality could not allow people to be buried on municipal land.

The 1st family has lived on the suit property from the 1970s to-date. His late step-mother was later buried at the Eldoret GK Prison's Cemetery because the Kapking'ong'o land belonged to her and her sons.

His late brother, Earnest Kimaiyo was a policeman and contributed to the purchase of the sit property. He resided on the said property till he died in 1975 leaving on the land the widow Susan Maiyo and their three (3) children the plaintiff herein inclusive.

Disagreements emerged later and in a family meeting held in 1988, the defendant herein undertook to surrender the late Ernest Kimaiyo's portion to his family. In attendance in the meeting, was the assistant chief one Kirwa their late father, his step-mother, the defendant, the late Ernest Kimaiyo's family and himself.

It was also resolved in the above meeting that a semi-permanent house and a granary be built for the family of the late Ernest Kimaiyo. The late Kimaiyo's portion of land was also to be surrendered to them as resolved in the meeting. The suit property was thus to be shared equally between the family of the late Ernest Kimaiyo and that of the defendant herein. During the commemoration ceremony of their late father in the presence of the extended family, it was resolved that each widow should continue to occupy their parcels at a Sarura and King'ong'o which portions each would share out to their children. While his mother and his siblings were to remain in the Sarura parcel, his step mother would occupy the suit property together with her children.

It was to his utter shock and consternation that he learnt that the defendant herein had refused to surrender the late Ernest Kimaiyo's share to his family hence necessitating the institution of this suit. The family of the late Ernest Kimaiyo has never lived on the Sarura parcel of land as that was given to his late mother and his siblings while the King'ong'o parcel remained for his step mother and her children, the defendant herein and the family of the late Ernest Kimaiyo.

He gave evidence that the defendant herein on more than one occasion during family meetings had promised that he would surrender the late Ernest Kimaiyo's portion to his family, which he has regrettably not done to-date and that the suit parcel of land is indeed family land given to his step mother and her children by their late father.

On 22nd April, 2014, the defendant called for a family meeting at the suit property in which meeting the defendant was ready to give the family of the late Ernest Kimaiyo five (5) acres out of the suit property which proposal was declined by the said family since their late father's share was 38 acres which was more than what was being offered by the defendant.

They left the parties herein to deliberate on the way forward and by 1st May, 2014, the defendant had increased his proposal to ten (10) acres which was once again declined to be the Kimaiyo family. It is his belief that Kapking'ong'o being a family land, ought to be shared equally between the family of the late Ernest Kimaiyo and that of the defendant herein.

It is within his knowledge that the defendant herein has been adamant to transfer the late Ernest Kimaiyo's share to his family despite their intervention as the immediate family for reasons best known to him. It is also within his knowledge that the defendant herein has been selling the suit property and using the proceeds therefrom to buy other parcels of land elsewhere. According to this witness the Kimaiyo family has been residing on the suit property for almost forty (40) years. The semi-permanent house built for them by their grandmother is the one they continue to reside in to-date. The late Ernest Kimaiyo's widow has called him and the other extended family members to try and resolve this dispute in vain as the defendant has been adamant in his refusal to surrender his late brother's portion to his family.

**Ng'ang'a Njuguna**, a neighbour of the family of the defendant testified that he moved to his current residence in the 1970s. That he also knew the defendant herein as a village elder of Kahoya B as he was also a village elder for Sangura village within Eldoret County having been a village elder there for 24 years. That to the best of his knowledge, the suit property belonged to three (3) people namely the late Zipporah Tapletkoi, the late Ernest Kimaiyo and the defendant herein Talalei Kiptenai although he cannot

authoritatively tell how much share each owned. That the property in issue was allocated by the directors of Kapking'ong'o Farmers' Society. That the plaintiff and her family have been staying on the suit property from 1971 to-date on which property their late father Ernest Kimaiyo was buried after his death in a road traffic accident in 1975. That the Huruma farm also formed part of the Kapking'ong'o Farmers' Society then under a settlement scheme. That individuals were allocated land depending on the shares one owned in the above settlement scheme whereby each share represented one acre of land. That settlers then decided to sell the Huruma portion of land in order to use the proceeds thereto to repay the loan owed to the settlement scheme before being relocated to the King'ong'o area after the loan was paid for in full. That the plaintiff and the defendant's family moved to the suit property sometimes in 1974 depending on the shares each held in the society. That the plaintiff and her siblings were born on the suit property where that have been living to-date. That in 1983, he was made aware of the contents of the letter from the then District Commissioner, Yusuf Haji which raised the issue of the plaintiff and her siblings school fees as well as their share of land which belonged to their late father.

That he also attended the meeting summoned by the then assistant chief Mr. Koech wherein the defendant herein promised to pay school fees for his late brother's children as well as surrender their share of land to them as soon as they had completed their education and had become of age.

That to-date, he is aware the defendant has never complied to the above.

**Ezekiel Kiplagat Lel** testified that he is an immediate neighbour of the family of the defendant herein Talalei Kiptenai and Susan Maiyo who is the mother to the plaintiff having moved to his current residence in 1977. That he also knew the late Ernest Kimaiyo who was the husband to Susan Maiyo as well as his late mother one Zipporah Tapletkoi who collectively owned the suit property. That the late Ernest Kimaiyo was survived by 3 children namely Teresa Chebichii, Tekla Cheronon and Phillip Maiyo and a widow, Susan Maiyo when he met his death in 1975 in a road traffic accident. That the late Ernest Kimaiyo was a policeman before his demise. That the defendant herein was the elder brother to the late Ernest Kimaiyo.

The above family members lived harmoniously till 1983 when the plaintiff herein brought a letter from the District Commissioner, Yusuf Haji, authorizing the chief of the area where the suit property is situated to summon all the directors and members of Kapking'ong'o Farmers Society to meet and solve the complaint by the plaintiff herein to the effect that although their late father had left them land, the defendant herein was not meeting their educational needs that he, the defendant was mistreating her, her siblings and her mother. The above letter also authorized the chief that the family of Ernest Kimaiyo be given their share as left by their late father so that the widow, Susan Maiyo could provide for her children. The then assistant chief one Mr. Koech, summoned the above directors and members to ask about the issue raised by the aforementioned letter in the presence of the defendant herein. The directors in the meeting confirmed the indeed the late Ernest Kimaiyo had a share of land in the suit property. The defendant then promised in the presence of the directors, members and the assistant chief that he would meet the educational needs of his late brother's children and when they would have finished their education and become of age, he would then give them their late father's share of the suit parcel of land. That the said defendant has never fulfilled the above to-date as the children to the deceased have raised their complaints severally thereafter.

That on or about the 17.06.2013, the assistant chief for Kapsaos sub-location called him to his office and raised the land issue between the plaintiff's family and the defendant herein to the effect that the defendant was denying them use of the parcel of land they had been ploughing and further that the defendant herein had also denied them to carry out development on their portion of land.

That the chief and Mr Lel later asked the defendant about the land issue and to their astonishment despite having earlier agreed to surrender his late brother's share to his children upon finishing school and becoming of age, he stated that his late brother did not have a share of the suit property and that the only thing he can remember was that his brother only sold one head of cattle to contribute to the purchase of a portion of the suit property.

That the defendant was then ordered to go back home and solve the issue of the share of land with his family members and surrender the late Ernest Kimaiyo's share to his family after which he was to take the report to that effect to the assistant chief. That the defendant has never taken back the feedback to-date.

The plaintiff called the assistant chief, **Mr. Philemon Birech Kibitok** who gave evidence that on 14.06.2013, the defendant herein, Talalei Kiptenai came to his office to report that the plaintiff herein had fought with her sister Monicah Jepkemboi after which he summoned the plaintiff to his office on 17.06.2013 for arbitration.

That on 17.06.2013, Teresa Chebichii, Tekla Cheronon, Phillip Maiyo who are siblings and one of their relatives by the names Emmanuel Kipchumba attended the meeting and it later emerged that the issue was a long family land dispute.

That when the issue of land was raised, he called a neighbour by the names Hezekiah Kiplagat Lel who was personally known to the family in question. That the complaint by the above siblings was that they had been side-lined by the defendant herein Talalei Kiptenai who had refused to surrender to them their late father's share of the suit property. The issue of their educational not having been provided by the said Talalei Kiptrenai was also raised. That after some deliberations, the defendant herein Talalei Kiptenai denied any share of land belonged to his deceased brother.

That he later referred the family back home to resolve the issue internally and that they should then bring him a feedback after a resolution was reached. That nothing has taken place to-date and he only came to learn that the plaintiff and her family chose to institute the instant suit when the defendant became unco-operative and adamant in surrendering his late brother's share of his family. The plaintiff closed her case after calling a total of 5 witnesses.

The defendant, **Talalei Kiptenai** took the witness box on the 25.2.2015 and stated that he was a businessman living at King'ong'o farm in Eldoret. He states that he knows the plaintiff being the daughter of one Ernest Kimaiyo, now deceased who was his brother. That he recalls vividly that he bought the land parcel Eldoret Municipality Block 21 (King'ong'o) 1 which he is now the sole registered owner. That he purchased the parcel in two equal shares of 50 acres each at Kshs.300,000/= single handedly. That upon subdivision and hiving out of road reserves, he remained with 72 acres which is now registered in his name.

That prior to the purchase of the above parcel they were staying with his late brother at their father's land which is a family land situated at Sarura. That upon the demise of his brother, he took the responsibility of bringing up his children as he was his only brother. That it is his mother who requested him to stay with the deceased's children instead of having them sent to Sarura. That he subsequently settled in this suit land and took care of his brother's children including the plaintiff herein, he has educated them until they were married. Three are abroad. That at no point in time did his brother or any other person contribute to the purchase of the suit parcel. That the suit parcel is not and has not been a family land or subject to any form of trust. That the plaintiff is desirous of reaping where he has not sown and in overall intends to blackmail him.

***On cross-examination by Mrs. Isiaho,*** he confirmed that the Langas farm is the same as Cherunya farm which belonged to a white settler where they lived as squatters. They lived on the farm before Susan Jepchirchir Maiyo was married. He was employed by the white man who used to pay him Kshs.15. However, he used to sell and buy cattle to buy the suit land. His father occupied and lived on the Sarura land with his younger wife and that his mother refused to go to the family land because of the differences between his mother and father. They were squatters with his mother on the Charunya farm, however, their father had confirmed that the Sarura land was available. When her mother was chased from the Charunya farm, she went to the King'ong'o farm that is in dispute.

He claims to have bought the King'ong'o farm through shares of Kshs.7,500/=. However, the card was burnt. He claims to have been given a receipt but does not have the same. He reported loss of the receipt but he did not have police abstract.

He claims that his mother requested him to stay with his brother, sister in law and children who are now 8 in number.

He denied ever inheriting the brother's wife. He was willing to give them five acres but they refused because they wanted 10 acres. However, when they took him to court, he declined to give them land.

***The defendant called Kibor Arap Sang*** who stays at King'ong'o and a member of the King'ong'o farm. He entered the land in 1965. He bought 47 acres for Kshs.3,000/= per share and one share was equivalent to 50 acres. He bought one share for 47 acres. He knew that the defendant bought 50 acres initially and later bought 22 acres from another shareholder known as Arap Rotich. He states that he does not know the family of defendant very well.

***On cross-examination by Isiaho***, he states that he moved to the land before the defendant and states that the defendant's land was 72 acres and not 100 acres. He bought 50 acres but 3 acres were used in paying the company's debt. He appeared not to remember his plot. He did not remember when their names were registered.

***Barnaba Chirchir Mutai*** states that he lives in King'ong'o and that he is a village elder. His other name is Kipketer Mutai. He testified that everybody bought one share of 50 acres and that nobody bought more than one share. At the subdivision, the share was reduced to 47 acres. He began living in the land in 1966, the same year the defendant moved into the land with his immediate family. He later brought his mother and brother into the land. He was a member of the committee that distributed the land and produced Minutes of the meetings of the Committee. He also produced the register of members that was prepared in 1992 – 1993. He claimed that Ernest Kimaiyo was not a member of the group and same applies to his mother.

On cross examination, he did not have any document to show that his father bought the land or that he bought the land on behalf of his father. He claimed that there was a meeting of the company in 1982 but he did not have the documents.

The 1992 meeting was held but the summons were issued to the defendant and not the plaintiff as they were not members.

The defendant called ***James Kirwa Arap Sambu*** who testified that he is a former retired chief of Kiplombe Location in Uasin Gishu County. That he knows the defendant one Talalei Kiptenai as among the 62 members of King'ong'o Farm from the year 1974 to 1988. That King'ong'o Farm belonged to a white settler who left around 1965. That when he became chief of Kiplombe Location in the year 1988, he invited all the 62 members to a baraza and encouraged them to register their names so that they can be issued with title deeds. That the total hectares of land was 3,200 and that survey was done and each member was allocated land according to the share contribution.

That the land was surveyed and all 62 members were listed and their names taken to Registrar of Lands. That in the year 1992, every member was issued with a title deed. That one Talalei Kiptenai was issued with a title deed of Eldoret Municipality Block 21 (King'ong'o) 1 measuring 72 hectares.

The defendant closed the defence case on 25th May 2015 when directions were made for submissions. The plaintiff filed her submissions on 17th June 2015 while the defendant filed his on the 08 of July 2015. The learned counsel for the plaintiff submits that there is no contention that the parties herein are blood related and that the plaintiff and her siblings have been in occupation of the suit land from the 1970s and the suit land is now registered in the defendant's name, and therefore from the foregoing, the suit property is indeed family land hence subject to trust. She submits that the plaintiff has proved her case on a balance of probability as registered in civil law in Civil matters hence judgment should be entered for the plaintiff against the defendant.

The learned counsel for the defendant Mr. Keter on his part argues that the plaintiff has failed to establish that the registration of the defendant as the owner of land parcel number Eldoret Municipality Block 21

(King'ong'o) 1 was fraudulent.

I have considered the pleadings, testimony of the plaintiff, defendant and their witnesses and do find that the plaintiff is a daughter of Ernest Kimaiyo, a brother to the defendant who died on the 8.7.1975 intestate leaving behind Susan Jepchirchir Maiyo (widow), Teresia Chebichii Rutto (daughter), Tecla Cheron Rutto (daughter), Philip Kiptoo Maiyo (son). The family of the late Ernest Kimaiyo as aforesaid have been residing on a portion of land known as Eldoret Municipality Block 21 (King'ong'o) 1 measuring approximately 72 acres since 1975 when their father died. The land has been subdivided to create new numbers being Nos. 2382-2466.

Apart from the fact that they have resided in the parcel of land since 1975, the plaintiff's statements are based on hearsay as she admitted that she was five years old when his father died in 1975. Everything she said was explained to her and that she did not attend the meetings. However, **Susan Jepchirchir Maiyo**, the wife of Ernest Kimaiyo testified that her late husband his brother and defendant and their mother, Zipporah Tapletkoi had each contributed to the purchase of the suit property. The family of Ernest Kimaiyo has been in the suit property at the time he died to date. Though the land in dispute was bought in 1964 before she got married in 1969 they were taken to King'ong'o land the suit parcel of land herein by her mother in law where they all lived as one family including the defendant.

I do believe this witness because she was steadfast in her testimony and further due to the fact that it was not disputed that the family of Ernest Kimaiyo lived with the defendant at the King'ong'o farm in the suit land happily for more than 38 years without the defendant raising any issue. This witness was very categorical that they were shown the King'ong'o farm by their mother Zipporah Tabletgoi and the whole family of Zipporah occupied 8 acres, the rest was a grazing field.

I also believe the testimony of Sammy Kimtai Tenai, a brother to the defendant as his evidence corroborated the evidence of Susan Maiyo that the King'ong'o land was bought by the family and that Mr SAMMY Kimutai did not waver in his testimony which did not change in cross-examination.

In *Mumo –vs- Makau (2002) EA 170*, the Court of appeal held that trust is a question of fact and has to be proved by evidence. Therefore, what falls for my consideration is whether the evidence tendered before this court has established a trust in favour of the plaintiff. From the record, I do find that it is not in dispute that the plaintiff's father, mother, grandmother all moved from the Cherunya farm to the King'ong'o farm sometimes before 1975 where they have lived to-date. The plaintiff's grandfather also lived on the parcel of land before he died and he could not be buried on the parcel of land due to the fact that the parcel of land was within a municipality according to the evidence of **Sammy Kimutai Tenai**, the defendant's step brother. I do find that the parties herein are members of one family who claim to have purchased the disputed plot through shares however none of the parties has produced a share certificate. This court finds that the register of the farm owners prepared in 1992 and 1993 was prepared without considering the family of Ernest Kimaiyo despite the fact that the wife was residing on the parcel of land with her children. This court further finds that in absence of share certificates and receipts by both parties herein and the fact that the two families resided on the parcel of land harmoniously until the defendant obtained title in his name the logical conclusion is that the parcel of land in dispute was acquired by the families of Ernest Kimaiyo and the defendant, the latter being its head after the demise of their father always acted in trust for the family in meetings and therefore ought to have protected their interest.

In *Njuguna –vs- Njuguna (2008) 1 KLR 889*, the Court of Appeal observed that under Kikuyu customary law the eldest son inherits land to hold in trust for himself and the other heirs.

Further, in *Kanyi –vs- Muthiora (1984) KLR 712*, the Court of Appeal held that registration of land in the name of a proprietor under the *Registered Land Act* (repealed) as in this case did not extinguish rights under Kikuyu customary law and neither did it relieve the proprietor of his duties or obligations as a trustee.

From the foregoing, the court finds that the registration of the defendant as the absolute proprietor of the suit land with the full knowledge that the plaintiff's family had an interest on the said parcel of land

fraudulent and designed to disinherit the family of Ernest Kimaiyo of its entitlement.

To reach a valid determination the court has considered the provision of Sections 28, 126 and 141 of the Registered Land Act Cap 300 laws of Kenya (repealed) which was the existing law when the defendant was registered as the absolute proprietor of the parcel of land.

*Section 28 provides that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in the Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require notice on the register:*

*Section 126 (1) provides that a person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words “as trustee”, but the Registrar shall not enter particulars of any trust in the register.*

*Section 143 provides that subject to subsection (2), the court may order rectification of the register by directing that any registration be canceled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.*

The above sections especially section 126 contemplated the holding of land in trust and the registration of the person as a trustee. There is a school of thought that believes that the word “may” in Section 126 (1) was mandatory and that it meant, and should read, “shall”. This I understand to mean that unless a registered owner is described as a trustee in the instrument of acquisition of land there can be no trust and the land cannot be said to be held in trust and therefore in this case since the defendants' husband was not registered as a trustee in the instrument of title, he cannot be said to have held half of the land in trust for the plaintiffs father.

In *Mwangi Muguthu -VS- Maina Muguthu (unreported) Madan J* held that as regards Section 126, and I agree with him, there is no need to register the defendant as a trustee due to the fact that he was registered as an owner as the eldest son of the family in accordance with Kikuyu custom which has the notion of trust inherent in it. Ordinarily in pursuance of Kikuyu Custom he would have transferred a half share in land to the plaintiffs father but he did not. In any event, the section does not make registration as trustee obligatory as it states a person may be described in that capacity. Under Section 143 of the repealed Act, a first registration could not be attacked even if it was obtained, made or omitted by fraud or mistake however this section does not exclude recognition of customary trust provided that it can be established by evidence. Parliament did not intend to abolish the customary law by enacting Cap 300 Laws of Kenya (repealed) and I believe that is why the word “**may**” is used as opposed to shall. However, I do find that even if the word shall was used, for the court to reach an informed decision other factors such as the object or scope of the enactment and the consequences flowing from such construction may be considered as they may rebut the presumption that the use of the word shall makes a particular provision imperative. When a statute uses the word “shall” *prima facie* it is mandatory but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. Customary trust is made orally and is implied and therefore can only be proved by statements of those claiming that it exists hence is not registrable.

This court finds that Section 143 of the Registered Land Act (repealed) is applicable in this case. Section 143 provides:-

**“ 143(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than the first registration) has been obtained, made or omitted by fraud or mistake.**

2. *The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”*

This court has a duty to protect the rights and privileges of the people and not to discard them. In my view the plaintiff is entitled to succeed in any event as he has proved that there existed an implied trust in the suit land though not registered as such. The defendant was registered as an owner as the eldest son of the great family of Kiptenai Tanui. It seems to me that the plaintiff is entitled to succeed on his claim under the principle of trust and the court is inclined to order that the family of the late Ernest Kimaiyo was entitled to one half of the suit land however the plaintiff has claimed 38 acres of land.

The upshot of the above is that the plaintiff has proved her case on a balance of probabilities that the defendant held the disputed parcel of land for himself and in trust for the family of Ernest Kimaiyo hence the said parcel of land should be shared equally between the two families. Ultimately the court grants judgment against the defendant for a permanent injunction restraining the defendant from trespassing onto, encroaching and or in any other way dealing with the portion of land belonging to the plaintiff and her siblings measuring approximately 36 acres and a declaration that 36 acres comprised in the suit property belongs to the plaintiff and her siblings being the portion legally belonging to their late father Ernest Kimaiyo. The court further grants an order of cancellation of the register in respect of the suit parcel and resultant parcels Eldoret Municipality Block 21 (King'ong'o) 2382-2466 further orders that the suit parcel be shared equally between the family of Ernest Kimaiyo and the defendant. This being a family dispute, there will be no orders as to costs.

**DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF OCTOBER, 2015.**

**ANTONY OMBWAYO**

**JUDGE**