



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 149 OF 2015

KIMOI RUTO AND ANOTHER.....PLAINTIFF

VERSUS

SAMUEL KIPKOSGEI KEITANY AND 5 OTHERS.....DEFENDANT

RULING

Kimoi Ruto, (*hereinafter referred to as the 1st Plaintiff*) is the 2nd wife of the late Ruto Chesire while the 2nd plaintiff is the daughter. On the other hand Samuel Kipkosgei Keitany (hereinafter referred to as the 1st defendant) is the registered proprietor of the suitland whilst Vincent Kirwa Ruto and Pius Kiberen Ruto (*hereinafter referred to as the 2nd and 3rd defendants respectively*) are the sons of late Ruto Chesire but of a different mother known as Samiano Ruto who was the 1st wife. It is claimed by the plaintiffs that before land adjudication commenced in the former Elgeyo Marakwet district, the 1st Plaintiff caused some structures to be constructed on a portion of land at Korongoi sub-location in Sengwer location. Upon adjudication, the same was assigned to her but owing to the cultural practices of the Kalenjin people applicable at the time when women could not own property in their own names it was registered as ***Cherang'any/Korongoi/1*** in the name of her husband the late Ruto Chesire who had acquired his own parcel of land which upon adjudication was registered as ***Cherang'any/Korongoi/5*** where he settled with his family. In his entire lifetime the late Ruto recognized the said parcel, namely ***Cherang'any/Korongoi/1*** as belonging to the 1st Plaintiff exclusively hence his decision to give her half portion of ***Cherang'any/Korongoi/5*** as her entitlement as his wife. Sometimes in the 1970s the 1st Plaintiff's son Julius Kipyego Ruto (now deceased) obtained a loan of Kshs 20,000/= from the 4th Defendant using the title to the property known as ***Cherang'any/Korongoi/1*** as security.

It has since emerged that the said Julius Kipyego Ruto defaulted in repaying the loan and the property was transferred into the name of the 4th Defendant in the year 1990. Upon the demise of Ruto Chesire and Julius Kipyego Ruto in the year 2003, the Plaintiffs sought audience with the 4th Defendant for purposes of redeeming their property. They were assured that the title was with the 4th Defendant and that they would be given first priority in redeeming the same.

However, while they were still making arrangements on how to redeem the said property, the Plaintiffs were informed that the Kapcherop Division Land Control Board had given consent for the transfer of the land to the 1st Defendant in the absence of any family member and despite an objection by a member of the said board who knew that the Plaintiffs were not aware of the intended transfer of the land they were occupying.

On or about 6th July, 2007 the 2nd Plaintiff went to the 5th Defendant and conducted a search over the said property and found the same to be in the name of the 4th Defendant. She then proceeded to the offices of the 4th Defendant where she was informed that she could redeem the property upon payment of the loan and interest amounting to Kshs 41,000/= but she had to travel to their head office for

the same to be effected.

Upon undertaking a fresh search on 26th July, 2007 before she could travel to Nairobi, it emerged that the said property had been transferred into the name of the 1st Defendant on 6th July, 2007, the date on which she undertook the first search. The Plaintiffs immediately sought legal advice after which they were advised to institute a suit to claim ownership of the land by virtue of adverse possession against the 1st and 4th Defendants herein vide Eldoret High Court Civil Suit NO. 147 of 2007 (O.S) Later renamed ELC Suit No. 378 of 2012)

According to the plaintiffs, during the proceedings of the aforesaid case, it emerged that the 2nd and 3rd Defendants had colluded with the 1st Defendant and purported to speak on behalf of the deceased person's family and thereupon authorized the 4th Defendant to let the 1st Defendant redeem the property purportedly on behalf of the family. The 1st Defendant had then paid Kshs 287,000/- leading to the subsequent transfer of title to him. The said matter was concluded through a judgment delivered in April 2014 without notice to the Plaintiffs. It was not until 24th April, 2015 that they were evicted from the land with their children on the basis of an order of the Honourable court but without any formal application for the said eviction having been made contrary to express terms of the decree.

The Plaintiffs believe that the transfer of the property known as ***Cherang'any/Korongoi/1*** and issuance of title thereto in the name of the 1st Defendant and their subsequent eviction was utterly irregular, unlawful and smacks of fraud, malice and ill-will on the part of the 1st, 2nd, 3rd and 4th Defendants and the 5th Defendant's officers with the sole aim of dispossessing the Plaintiffs and their children of their only inheritance wherein they have lived for a large part of their life by right.

The plaintiffs claim that the issuance of title to the 1st defendant was through fraudulent activities and that as a result of the Defendant's fraudulent, negligent and/or malicious acts, the Plaintiffs and their families are now living in temporary structures outside the suit property having been unlawfully evicted on the basis of a decree which clearly provided that the court had to be moved before it could be executed.

The plaintiffs claim that the 1st Defendant has now sent armed and dangerous individuals as his servants and/or employees to the farm who have started causing destruction. They have felled down over 100 eucalyptus trees as well as cypress trees and are harassing the Plaintiffs by denying them access to food crops grown on the farm comprising potatoes and beans and they cannot access their maize farm for purposes of weeding. They have also expressed their intention of constructing structures on the property. There is also information that the 1st Defendant is advertising the whole parcel for sale to interested purchasers at Kshs 100,000/= per acre.

The Plaintiffs' claim is thus for orders of injunction to restrain the Defendants from continuing their acts of fraud and illegality over the suit land and to order them to surrender the title thereto as well as orders for formal transfer thereof to the name of the late Ruto Chesire to await the process of succession of his estate within the law. They are also seeking both general and exemplary damages resulting from the illegal eviction and the destruction occasioned on the trees on the farm.

The Plaintiffs claim to be ready, able and willing to redeem the said property from the 4th defendant on mutually agreeable terms upon nullification of the transfer to the 1st Defendant. Ultimately the plaintiffs pray for a declaration that the transfer of Title to the property known as ***Cherang'any/Korongoi/1*** in the name of the 1st Defendant was issued irregularly and unlawfully and is thus null and void.

They also pray for ***Mandatory orders of injunction*** do issue directing the 5th Defendant to amend the records at their office deleting the name of the 1st Defendant as proprietor of the land parcel known as ***Cherang'any/Korongoi/1*** and to register the same in the name of Kimoi Rutto upon terms to be agreed between the Plaintiffs and the 4th Defendant and orders of ***permanent injunction*** restraining the Defendants either by themselves or through their agents, employees and/or servants from selling, alienating, transferring, charging, disposing of, leasing out, trespassing onto, wasting or otherwise

interfering with the Plaintiffs quiet possession of that parcel of land known as **Cherang'any/Korongoi/1**. Last but not least, the plaintiffs pray for **general and exemplary damages** for mental anguish and loss arising out to the illegal eviction and destruction of property including crops and trees and costs of the suit and interest thereon at court rates.

The suit is accompanied with an application under certificate of urgency where the plaintiff pray for orders that there be interim orders of injunction restraining the Defendant either by themselves or through their agents, employees and/or servants from selling, alienating, charging, disposing of, leasing out, dealing in, wasting, fencing or otherwise destroying crops and trees growing on that parcel of land known as **Cherang'any/Korongoi/1** pending the hearing and determination of this application inter-parties and that the Plaintiffs/Applicants be authorized to resume possession and occupation of that parcel of land known as **Cherang'any/Korongoi/1** pending the hearing and determination of this application inter-partes.

The plaintiffs further pray for temporary orders of injunction restraining the Defendants either by themselves or through their agents, employees and/or servants from selling, alienating, charging, disposing of, leasing out, dealing in, wasting, fencing or otherwise destroying crops and trees growing on that parcel of land known as **Cherang'any/Korongoi/1** pending the hearing and determination of this suit.

The application is based on grounds that the Plaintiffs as widow and daughter of the Late Ruto Chesire respectively owned the suit property and have resided on the property for more than 35 years and that the 1st Defendant acquired the property through fraud. The application is **supported by the affidavit of Esther Ruto** who is the daughter to the 1st Plaintiff and the deceased Ruto Chesire. She states that her mother (**the 1st Plaintiff**) in the 1960s caused some structures to be constructed on a portion of land within Korongoi area and that when land adjudication was undertaken, the portion was assigned to her and given the registration number **Cherang'any/Korongoi/1**. However, due to deeply rooted cultural practices of the Kalenjin wherein women had no capacity to own property in their own name, it was registered in the name of their late father who had his own portion namely **Cherang'any/Korongoi/5** where he settled his entire family including her mother who got half share thereof. That the late Ruto Chesire in his entire life time recognized the said parcel namely, **Cherang'any/Korongoi/1** as belonging to the 1st Plaintiff exclusively hence his decision to give her half portion of **Cherang'any/Korongoi/5** as her entitlement as his wife.

That sometime in the late 1970s her brother Julius Kipyego Ruto (now deceased) obtained a loan of Kshs 20,000/- from the 4th Defendant using title to the property known as **Cherang'any/Korongoi/1** as security and defaulted in repaying the loan and the property was transferred into the name of the 4th Defendant in the year 1990 without any notice to the registered owner or plaintiffs as his lawful Dependents. The property was later transferred to the 1st defendant in what the plaintiff's claim was a fraudulent scheme. That the said matter was concluded through a judgment delivered in April 2014 without notice to the plaintiffs.

That it was not until 24th April, 2015 that they were evicted from the land with their children and grandchildren on the basis of an order of the honourable court but without any formal application for the said eviction having been made contrary to express terms of the decree. The said eviction was executed without any notice to the plaintiffs and they only came to know of it upon perusing the court file after the execution thereof.

The 1st Defendant filed **a Preliminary Objection** to the effect that the two plaintiffs are not the administratrixes of the Estate of the late Ruto Chesire, the former registered owner of the land comprised in Title No. **CHERANG'ANY/KORONGOI/1** and therefore they do not have the legal capacity to institute the suit, and which is therefore incompetent and for striking out. That in view of this court's judgment of 23.4.2014 in Eldoret HC ELC No. 378 of 2012 (Kimoi Ruto and Esther Ruto -vs- Samuel Kipkosgei Keitany and Agricultural Finance Corporation the present suit is res-judicata and for which reason it should be struck out with costs.

That in view of the Plaintiffs clear and unequivocal admission of the good title of the 1st

Defendant in **Eldoret Environment And Land Court Case No. 378 of 2012**, the plaintiffs are legally estopped from challenging the said title as having been obtained fraudulently. That the filing of the present suit amounts to flagrant abuse of the due process.

When the matter came up for hearing on the 11.6.2015, **Mr Ndarua learned counsel holding brief for Kiarie** for 1st, 2nd and 3rd Defendants argued that the Plaintiffs have no locus by virtue of Section 82 of the Law of Succession Act read with Section 3 of the said Act to commence the suit on behalf of the deceased. He argues that the Plaintiffs are wife and daughter respectively of the late Ruto Chesire who was registered proprietor of the parcel of land who gave a Power of Attorney to his son who borrowed money from **Agricultural Finance Corporation** but defaulted in payment as a result the property was transferred to **Agricultural Finance Corporation** who sold the property to the 1st Defendant the current registered owner. Mr Ndaru further submits that the Plaintiffs are not the present representatives of the Estate of deceased and therefore have no capacity to sue.

Miss Mwaguri learned counsel for the 4th defendant on her part submits that the matter is resjudicata based on Section 7 of the C.P.A Cap 21 Laws of Kenya. The Plaintiffs filed Eldoret Environment And Land Court Case No. **378 of 2012**, formerly 147 of 2007 against the 1st - 5th defendants in which they sought adverse possession of the suit land. Judgment was delivered on 23.4.2014.

Mr. Magut learned counsel for plaintiffs opposed the Preliminary Objection on grounds that it has no merit and that it requires evidence for determination. According to Mr Magut, the 1st Plaintiff claims the property in her own right as she was in occupation. She claims that the redemption was riddled with fraud and that it was not disclosed how **Agricultural Finance Corporation** transferred the property without letters of Administration. He further submits that the suit is not res-judicata as the issues before court in the previous suit were not based on fraud but on adverse possession as opposed to the issues in this suit which are based on fraud.

I have considered the submission of counsel and I do find that following issues for determination.

1. **Whether the suit is a nullity for want of capacity.**
2. **Whether the suit is res judicata.**
3. **Whether the Plaintiffs are estopped from claiming fraud after having admitted in Eld Hc Elc 378/2012 the title herein was good.**
4. **Whether the suit is an abuse of process of court.**

The legal point that will determine this suit, in my view, is whether the plaintiffs have the capacity or locus standi to bring this suit. From the pleadings filed in Court, it is evident that the plaintiffs are seeking to redeem the property of the deceased which has already been sold to the 1st defendant. Secondly, they are seeking Mandatory orders of injunction do issue directing the 5th Defendant to amend the records at their office deleting the name of the 1st Defendant as proprietor of the land parcel known as CHERANG'ANY/KORONGOI/1 and to register the same in the name of Kimoi Rutto upon terms to be agreed between the Plaintiffs and the 4th Defendant and orders of permanent injunction restraining the Defendants either by themselves or through their agents, employees and/or servants from selling, alienating, transferring, charging, disposing of, leasing out, trespassing onto, wasting or otherwise interfering with the Plaintiffs quiet possession of that parcel of land known as Cherang'any/Korongoi/1. Last but not least the plaintiffs pray for general and exemplary damages for mental anguish and loss arising out of the illegal eviction and destruction of property including crops and trees and costs of the suit and interest thereon at court rates. In Trouisik Union International & Anor vs. Mrs. Jane Mbeyu & Another C.A. Civil Appeal No. 145 of 1990 (unreported) it was held by the Court of Appeal that where a party seeks to file a suit on behalf of the estate of a deceased person, he must, of necessity, obtain letters of administration.

On the issue of lack of capacity by the plaintiffs due to failure to obtain a grant of letters of Administration raised by Mr Ndarua, this court finds that there is no dispute that the late Ruto Chesire who was the absolute owner of the parcel of land is deceased. His son Julius Kipyego Ruto a donee of a

power of Attorney also died at the same time with his father. In the letter by the Chief Sergwen Location dated 2nd November, 2014 addressed to whom it may concern and entitled “the late Ruto Chesire” and annexed to the Plaintiffs supporting affidavit, it is stated that:-

The late Ruto Chesire, a resident of Korongo sub-location, Senguer Location Kapcherop division, Marakwet sub county died in the year 2003. His children and wives were:

1. ***Saniako Ruto - Wife***
2. ***Pius Kiberen Ruto - son***
3. ***Paulina Ruto (deceased) - Daughter***
4. ***Vincent Ruto - son***
5. ***Christina Ruto - Daughter***
6. ***Kibitok Ruto (Deceased) -Son***
7. ***Juliana Ruto - Daughter***
8. ***Elizabeth Ruto - Daughter***
9. ***Kimoi Ruto - (2nd wife)***
10. ***Julius Kibiego Ruto (deceased) - Son***
11. ***Esther Ruto - Daughter***

Kindly accord them all the necessary assistance for the succession of the property of their late father (signed).

It is clear from the said letter that the Plaintiffs were beneficiaries of the Estate of the Late Ruto Chesire.

In the extract of title in respect of the disputed parcel of land, it is indicated that the registration was opened on 30.9.1972 in the name of Ruto Chesire and a land certificate issued in 1979. The land was transferred to the Agricultural Finance Corporation on 21.11.1990 and title deed issued promptly. Subsequently the same was registered in the name of Samuel Kipkosgei Keitany on 6.7.2007 and title deed issued immediately.

In the encumbrance section, it is indicated that a Notice of Charge dated 9.7.1979 by Agricultural Finance Corporation was registered on the 6.8.1979 to secure a sum of Kshs 18,000/=, on the 12.11.1979, another Notice of Charge by Agricultural Finance Corporation to secure a loan of Kshs.20,000 was registered. On the 21.11.1990, a discharge was registered.

I do not find any support to the allegation by the Plaintiffs that during land adjudication, the subject land was assigned to the 1st Plaintiff but registered in the name of Ruto Chesire. The Plaintiffs appears to contradict themselves by stating that under Kalenjin Customary Laws women had no capacity to own property and at the same time state that the land was assigned to the 1st Plaintiff. It is clear and indisputable that the land was registered in the name of the late Ruto Chesire, before being transferred to the *Agricultural Finance Corporation* and ultimately to Samuel Kipkosgei Keitany. The plaintiffs' claim is based on fraud and not customary trust and therefore the registration of the property in the name of the deceased Chesire Ruto and donation of power of Attorney to his son ***Julius Kibiego Ruto was never challenged and is not being challenged. Moreover charging the property to Agricultural Finance Corporation was never challenged and is not being challenged. The plaintiff on seek to be allowed to redeem the property.***

Section 82 of the Law of Succession Act Cap 160 Laws of Kenya provides that a personal representatives shall subject only to any limitation imposed by their grant have the power to enforce by suit or otherwise all causes of action which by virtue of any law survive the deceased or arising out of his death. The interpretation section of Cap 160 defines a personal representative as the executor or administrator as the case may be of the Estate of a deceased person. I have gone through the records herein and do not see any evidence that the plaintiffs are executors or administratrixes of the estate of the deceased.

In the instant case, there is no indication that the plaintiffs obtained letters of administration before filing this suit. The plaintiffs did not therefore have *locus standi* or capacity to file this suit. For this reason and the reasons stated earlier in this ruling, the preliminary objection raised by the defendants is hereby upheld. The plaintiffs' suit is hereby struck out with costs to the defendants.

On the second issue of *Res judicata*, I do find that the principles of Res judicata are clearly spelt in the Civil Procedure Act Cap 21 Laws of Kenya Section 7 provides that No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

I have considered the submissions of all counsel and do find that the issues in *Eldoret Environment And Land Court Case No. 378 of 2012* formerly HCCC NO. 147 of 2007 are not the same as the issues herein as the former was a claim based on adverse possession while the latter is a claim based on fraud though parties are the same. Therefore the principles of Res judicata do not apply.

On whether the Plaintiffs are estopped from claiming fraud after having admitted in *Eldoret Environment And Land Court Case No. 378 of 2012* that the title herein was good, I do find that having commenced a claim on adverse possession the plaintiffs acknowledged the defendant's title to the property as good and therefore they are estopped from commencing this suit on the basis of fraud.

Last but not least, the court finds that the suit is an abuse of court process as it was brought after the dismissal of *Eldoret Environment And Land Court Case No. 378 of 2012* and intended to reverse a judgment of the court which can only be reversed on appeal or review.

The upshot of the above is that the Preliminary Objection is upheld and the suit is struck out with costs.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF NOVEMBER 2015.

JUSTICE OMBWAYO ANTONY

ENVIRONMENT AND LAND COURT AT ELDORET