



**REPUBLIC OF KENYA**

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

**E&L 965 OF 2012**

**WILLIAM SONGIO .....PLAINTIFF**

**VS**

**BENJAMIN SONGIO & ANOTHER.....DEFENDANT**

*(Suit by plaintiff claiming that 4 acres of suit land was owned by his late father and that he should be given 2 acres out of it; no grant of letters of administration; no evidence that the plaintiff's late father owned the land; evidence showing that 1st defendant the plaintiff's brother acquired the land and sold it to 2nd defendant before adjudication; 2nd defendant first registered owner since 1967; suit filed in 2012 which is out of time; suit having been determined by the tribunal and matter having gone on appeal all of which the plaintiff lost; suit res judicata; suit is hopeless and dismissed with cost)*

**JUDGMENT**

This suit was instituted by the plaintiff vide plaint. In the plaint, it is pleaded that the plaintiff and 1st defendant are brothers and the sons of the late Songio Kipnyau who was the registered owner of the land described as Cherota Marichor No. 249 measuring approximately 4 acres. It is pleaded that when their father died in the year 2001, the 1st defendant sold 2 acres of the said land to the 2nd defendant yet the said land was supposed to be sub-divided equally between the plaintiff and the 1st defendant, each meant to get 2 acres. It is pleaded that the plaintiff has on several occasions requested for the two acres but to no avail hence necessitating this suit. It is disclosed in the plaint that there was a previous suit which went to the Land Disputes Tribunal, but which did not succeed, because the 2nd defendant had not been enjoined and that now the suit has been properly lodged. The plaintiff has asked for the following orders :-

- (i) Claim of the suit land
- (ii) Costs and Interest.
- (iii) Any other relief this court may deem fit to grant in the circumstances.

At this juncture I think I need to point out that the plaintiff has along been acting in person and the plaint is said to have been drawn by himself.

The defendants entered appearance and filed defence through the law firm of M/s Tarus & Company Advocates. They denied that Songio Kipnyau (deceased) ever owned land known as Cherota Marichor No. 249. It was averred that the defendant is the registered owner of the land parcel Mosop/Cherorgei/249 measuring about 8.86 hectares which land has never been registered in the name of the 1st defendant, or the plaintiff, or their father, Kipnyau. It is also pleaded that the plaintiff has no locus to file suit for the estate of the late Kipnyau. It is stated that there have been numerous other cases before the land disputes tribunal and the Rift Valley Provincial Appeals Committee, culminating in Eldoret HCCA No. 58 of

2010, all of which the plaintiff lost. The defendants asked that the suit be dismissed.

The plaintiff testified as the sole witness. He testified that the suit land is 21 acres but that his father was entitled to 4 acres, which ought to be shared equally, between himself and the 1st defendant. He stated that the 1st defendant sold it without his knowledge. He also testified that he wants 1.8 acres of a parcel No. 314. In cross-examination, it emerged that the 1st defendant became registered as proprietor of the land parcel Mosop/Choronget/249, which I consider to be the suit land, in the year 1967, and that the plaintiff was born in the year 1950. The plaintiff and 2nd defendant are not relatives. The plaintiff contended that he lived on this land from 1954 to 1967 and that he made a "singira" (traditional hut) in the year 1959. He conceded that he has never lived on the land since it was registered, but asserted that his father lived on the land before moving to another location. He further conceded that before his death, their father never filed any dispute on the subject land. Neither was any complaint made when the land was adjudicated. He also conceded that the land was sold by the 1st defendant to the 2nd defendant before demarcation. He also agreed that he had filed a similar case before the land disputes tribunal claiming 4 acres.

In his defence, the 1st plaintiff testified that their father, died in the year 2001. He himself was born in the year 1937. He agreed that he sold land to the 2nd defendant but this land was not ancestral land. He himself acquired the land by occupation, lived on it for about 10 years, and sold it before adjudication. When adjudication was done, the 2nd defendant had already taken up possession and the land was registered directly into the name of the 2nd defendant. He asserted that neither his father, nor any of his siblings, ever lived on the subject land. He produced the tribunal proceedings to demonstrate that the issues herein have already been settled.

PW-2 was one Noah Chepsholei. He testified that when the subject land was being adjudicated, he was among the adjudication committee members. He testified that the 1st defendant was the first occupant of part of the suit land and that he sold it to the 2nd defendant before adjudication.

DW-3 was the 2nd defendant. He testified that he is the registered owner of the suit land and he produced its title deed and search as exhibits. He testified that the land was demarcated in the year 1967 and that the whole land measures about 21.5 acres. He stated that he bought the land from different persons. From the 1st defendant, he purchased 3.5 acres and he amalgamated this portion to what he bought from the other people to make up the 21.5 acres. He testified that when he bought the land, there was no issue, but that the plaintiff emerged to claim the land after the death of this father.

DW-4 was one Daniel Komen. He is a brother to the plaintiff and 1st defendant. He testified that the subject land was never owned by their father but that it exclusively belonged to the 1st defendant, who later sold it to the 2nd defendant. He testified that when their father was alive, there was no issue over the land.

With that evidence the parties closed their respective cases. None of the parties wished to make submissions and left the matter with the court to decide.

I have looked at the pleadings and the evidence tendered by both plaintiff and defendants. The plaintiff described the suit land as Cherota Marichor No. 249 but I am prepared to hold that the proper description of the suit land is Mosop/Cherorget/249 as all parties proceeded on the basis that the latter is the proper description of the suit land. It is not in contention that the land measures about 21.5 acres and that the disputed portion is about 4 acres. It is the case of the plaintiff that the 4 acres was owned by his father, and that the same should revert back to his estate, so that it can be shared equally between himself and the 1st defendant who is his brother. If it is the intention of this suit to claim what belonged to the estate of a deceased person, then this suit is incompetent for it is not in dispute that the plaintiff does not hold letters of administration for the estate of his deceased father.

But even if the plaintiff held letters of administration, I do not see how he would have succeeded in his case, given the evidence tabled. It is the case of the plaintiff that the suit land belonged to his late father and by virtue of that, he is entitled to 2 acres out of it. However, the evidence shows the contrary. There is

overwhelming evidence, some from the siblings of the plaintiff, that their late father never owned any part of the suit land. The evidence is categorical that the 4 acres in dispute were first acquired by the 1st defendant and the same did not form part of what their father had. The acquisition was done in the 1950s when the plaintiff was still a boy of not more than 10 years. Save for the plaintiff's empty statement that their father owned the land, the plaintiff did not place any material to show that their father had any interest in the suit land. In the absence of this, I have no reason to doubt the evidence of the several witnesses called by the defendants, including PW-2 who was a member of the adjudication committee, that 4 acres of the suit land which are the same 4 acres in dispute, were acquired by the 1st defendant who sold his interest to the 2nd defendant. I have seen the title deed which shows that the 2nd defendant is the 1st registered owner of the suit land, having become the proprietor on the 9 May 1967. I do not therefore agree with the allegations of the plaintiff that the 4 acres in dispute were ever owned by his father.

The plaintiff cannot also succeed, even assuming that their father held the 4 acres, owing to limitation of time. This suit was filed in the year 2012, 45 years after the 2nd defendant became registered as proprietor. Section 7 of the Limitation of Actions Act, CAP 22, provides that actions for the recovery of land have to be brought within 12 years. This suit is therefore hopelessly out of time and the plaintiff has not alleged any disability on his part that would have entitled him to an extension of time.

It is also clear that this suit is *res judicata*. The issues herein have already been determined in Keiyo Land Dispute Tribunal Case No. 18 of 2005. I have looked at the proceedings and findings of the land disputes tribunal and there is no doubt in my mind that the issues in that case are the same issues in this case. At the tribunal, the plaintiff was claiming 4 acres of the land in dispute on the same reasons tendered in this case, that the said 4 acres belonged to his late father. The tribunal came to the finding that the land belonged to the 1st defendant who sold it to the 2nd defendant. Dissatisfied, the plaintiff appealed against the said decision before the Rift Valley Appeals Committee in Appeal No. 42 of 2009. He lost the appeal. Undeterred, the plaintiff filed a second appeal to the High Court at Eldoret being Eldoret HCCA No. 58 of 2010. He lost the appeal. He has now filed this suit. I do not see how this suit cannot be said to be *res judicata*. The issues have already been settled and this suit offends the provisions of Section 7 of the Civil Procedure Act, CAP 21 which bars a court from trying a suit in which the matter in issue was directly and substantially in issue in a former suit.

The case of the plaintiff is hopeless whichever way you look at it. It is the classical frivolous and vexatious case. I do not deem it necessary to say more.

For the above reasons, I dismiss the plaintiff's case with costs to the defendants.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF MARCH 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

*Delivered in the presence of:*

*The plaintiff - acting in person*

*Mr. J.R. Tarus – Acting for the defendants*