



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L NO. 471 OF 2013

MARTHA KIGEN.....PLAINTIFF

VS

JOHANA TIBINO.....DEFENDANT

(Suit seeking orders to have an interred body exhumed from suit land; suit land having been declared the plaintiff's husband in the process of adjudication; defendant claiming the same land through a title that was declared irregular by the Adjudication Officer; whether the plaintiff could file suit without consent of Adjudication Officer; whether plaintiff could file suit without first having letters of administration; trespass; whether one needs to have title to land to sue for trespass; suit by plaintiff succeeds)

JUDGMENT

A. INTRODUCTION AND PLEADINGS

This suit was instituted through a plaint filed on 7 October 2013. In the plaint, it is pleaded that the plaintiff and her family have been and are the bona fide owners of land described as LR No. 1104 Kapluk Adjudication Area (Baringo Adjudication Area). It is averred that around March 2011, the defendant started laying claims of ownership over the land which led to a dispute before the Baringo District Land Adjudication Settlement Officer (DLASO) . It is pleaded that the DLASO by an award of 23 March 2011, awarded the said land to the plaintiff. The defendant was dissatisfied, after which he filed a Judicial Review application, being Eldoret High Court JR No. 28 of 2011 (later Eldoret Environment & Land Case No. 6 of 2013) which was dismissed on 21 August 2013. It is pleaded that on 14 June 2013, the defendant unlawfully interred the remains of his father one Kaptumo Tibino on the suit land. The plaintiff has therefore sought the following orders :-

- (1) An order directing the defendant to exhume the remains of his father Kaptumo Tibino interred in the suit land.*
- (2) A permanent injunction restraining the defendant from occupying or dealing with the suit land.*
- (3) Costs of the suit.*
- (4) Any other further relief that the court may deem fit and just to grant.*

Upon being served, the defendant filed Defence and Counterclaim which was later amended. In his Amended Statement of Defence and Counterclaim, he has pleaded that the decision of the DLASO is

ultra vires the Land Adjudication Act and that it is subject to Eldoret E&L Case No. 6 of 2013 which is stated to be still pending. It is further pleaded that the plaintiff's avenue for redress got closed after the plaintiff moved the court in the case E & L No 6 of 2013 and that this matter is *sub judice*. It is pleaded that this suit cannot be heard, so long as that case is pending, and that the defendant will seek that this suit be consolidated with E & L No 6 of 2013. It is also pleaded that the plaintiff lacks capacity to file this suit as she does not have the requisite letters of administration. It is pleaded that the land is still under an Adjudication Section, and leave of the Adjudication Officer ought first to have been sought before filing suit. It is further stated that the decision to inter the remains of the deceased on the suit land were informed by Tugen customary law as an elderly person is interred at designated sites. In his counterclaim, the defendant averred that the suit land is their ancestral land and that the Adjudication Officers adjudicated it in his favour and that the plaintiff never raised objection. It is further pleaded that the DLASO acted in contravention of the law by purporting to expunge the parcel No. Kapluk Adjudication Section No. 3969 registered in the name of the defendant and by merging it with the parcel No. 1104. The defendant thus sought the following principal orders :-

(a) A declaration do issue that the defendant is the lawfully registered owner of the parcel of land known as Kapluk Adjudication Section Parcel No. 3969.

(b) A declaration that the orders of the DLASO expunging the defendant's name and parcel No. 3969 and merging the same with parcel No. 1104 was ultra vires the Land Adjudication Act and an order to set aside that decision of the DLASO.

The plaintiff filed a Reply to Defence and Defence to Counterclaim in which she pleaded inter alia that the suit Eldoret E & L No. 6 of 2013 had been fully determined and dismissed on 21 August 2013. It is stated that the parcel No. 3969 no longer exists.

B. EVIDENCE OF THE PARTIES

(i) The plaintiff's Evidence

The plaintiff testified as the first witness. She testified that the defendant is son to Tibino Kaptum (deceased). She stated that Tibino Kaptum sold to her the suit land, in portions, starting the year 1984. First he sold one acre. Later he approached the plaintiff's husband for some money because his son had been arrested. This money was assigned as purchase price for more land. Later Tibino came with one of his sons Julius Tibino and sold more land. The plaintiff's husband gave out a cow as consideration. In total they purchased 5 acres in 1984. They had 15 acres of their own, and after purchasing the 5 acres, their land became 20 acres. The 15 acres was designated parcel No. 1104 and the 5 acres parcel No. 1102 but the land was utilized as one. Later in the year 1984, the defendant started laying claims over the land and ploughed a small portion. The dispute went before the Chief, Elders and Lands Officers, all of whom decided in favour of the plaintiff. At this time the plaintiff's husband was still alive but he later died in the year 2002. The dispute culminated in a verdict by the DLASO dated 22 March 2011 in favour of the plaintiff. It is this decision that was subject of challenge in Eldoret E & L Case No. 6 of 2013. The plaintiff testified that Tibino Kaptum died and the defendant buried him on the suit land in June 2013 while the case No. 6 of 2013 was still pending. She stated that he was not supposed to be buried on that land.

In cross-examination, the plaintiff testified that her husband was Willy Labat Kigen and that she has not taken out letters of administration for his estate. She testified that the land was bought from the late Kaptum, but she had no sale agreement. She affirmed that adjudication was done in the area where the land falls and was done according to how people had settled. She stated that Kaptum was buried unusually late in the evening although she did not attend the burial.

PW- 2 was Christopher Labat, first born son to the plaintiff. He stated that he is well aware of the dispute. He testified that they had their own ancestral land of 15 acres and that they purchased additional 5 acres in three phases from Tibino Kaptum. He stated that he witnessed the latter two transactions. His father then merged the parcels into one to make 20 acres in the year 1988. In 1992 the defendant started

encroaching into their land; his father reported to the Chief and the defendant was repulsed. The defendant then built a grass thatched house in a road reserve between what they owned and a church parcel No. 1099. Later in the year 2003 the defendant again started encroaching on both their land and the church land. PW- 2 then wrote to the Principal Land Adjudication Officer who sent officers on the ground. A tribunal was eventually set up in the year 2011 to settle the issue between the plaintiff's land parcel 1104, the church land parcel 1099, and the defendant's alleged claim to a parcel No. 3969. The tribunal decided in their favour, and expunged the parcel No. 3969, and affirmed the merger of 5 acres into the initial 15 acres to form parcel No. 1104 for 20 acres. He stated that the parcel No. 3969 had been issued fraudulently and was the same as a parcel No. 1102 for 5 acres. He stated that this parcel No. 1102 formed the 5 acres that they had purchased. He testified that it was unusual to have a land parcel No. 3969 in between the series of 1102, 1103, 1104. He testified that the defendant's challenge filed in Eldoret E & L No.6 of 2013 was dismissed and he produced the proceedings. He testified that when the defendant's father died, they heard of plans to bury him on the suit land, but that by the time they rushed to court to obtain a stay order, the deceased had already been buried.

In cross-examination, PW- 2 repeated that the land was bought in 3 phases. He was about 7 years old when the first portion was sold, but he witnessed the latter two transactions. The original 15 acres that they had was partly ancestral land, and partly what his father had bought from other persons, and it was already together when he was born. The extra 5 acres that was bought from the defendant's father was merged in the year 1988.

PW-3 was Simeon Amdany Magiror , a village elder. He testified that they had sat as village elders in the 1990s over the current dispute and that they decided in favour of Willy Kigen, the plaintiff's husband. He testified that the deceased was buried in the land that was sold to Willy Kigen. In cross-examination, he stated that Tibino Kaptum, had not vacated the land despite having sold it, and that he had built a grass-thatched hut where he was living alone. He had two wives, one of whom was alive but he was not living with her.

PW-4 was Tomno Chesire. His evidence was that the body of Tibino Kaptum was supposed to be interred in the home of Julius Tibino, his son, but that when the body came, the defendant insisted that he be interred where he used to live. He testified that Kaptum used to live between the fence of AIC Muchukwo and the land of Willy Kigen. He had made a grass thatched house and was living alone.

PW- 5 was Martin Odhiambo, the Land Adjudication and Settlement Officer, Baringo County. He testified that the land in dispute is in Kapluk Adjudication Area under his jurisdiction. Kapluk was declared an adjudication section in the 1980s. Before that, the land was trust land held communally. He testified that it is through the adjudication process that they identify individual interests. Land is first demarcated according to households which are then given numbers. A register is then prepared. If a person is aggrieved, he refers the dispute to the Land Committee and if not satisfied by any decision, he can go before the Arbitration Board. After the register is complete, one can file an objection in 60 days of the publication of the register. Such objection is heard by the Land Adjudication and Settlement Officers. After expiry of 60 days, the records are referred to the Director of Land Adjudication and Settlement in Nairobi.

To identify the land occupied by households, they seek assistance of elders and also note the occupation on the ground. The Committee deals with these issues. If land is bought prior to adjudication it is the purchaser who is registered as owner.

He stated that land is numbered sequentially. He produced an extract of the map of the Kapluk area, what he termed as a Preliminary Index Diagram (PID). He stated that it is this map which is referred to Nairobi for the Registry Index Map to be prepared. He also stated that they keep an Adjudication Record, which is used to prepare the title deeds. He produced the Adjudication Record for the parcel No. 1099 and 1104. He testified that the parcel No. 3969 does not exist in the Adjudication Record and was deleted from the Demarcation Register. He testified that there was a dispute, and that the then Adjudication Officer, went to the ground in 2011 and a verdict was made to delete the No. 3969. He produced the verdict and the Demarcation Register. He testified that no objections were raised to the parcels No. 1099, 1104 and 3969.

In his view the parcel No. 3969 does not exist on the ground and does not exist in their maps. He stated that according to their records, parcel No. 1104 is owned by Willy Kigen (husband to plaintiff). He testified that the house of Kaptum Tibino falls in parcels No. 1104 and 1099.

In cross-examination, PW-5 testified that objections were to be made within 60 days of 20 March 1997. He stated that the parcel No. 3969 is supposed to be deleted from the map. He confirmed that the Adjudication Register has already been sent to their headquarters in Nairobi. The parcel No. 3969 was deleted on 29 March 2011 to correct the anomaly. He stated that if the defendant had a problem with his father selling the land, he should have raised an objection.

(ii) Evidence of the Defence

DW-1 was Sote Kiptalam. She is wife to the late Tibino Kaptum. She testified that the deceased was buried on this land about 1 pm (although in cross-examination this changed to 4 pm). She was not aware that the family of Willy Kigen had bought land from her late husband nor did they have a boundary dispute. She was also not aware of any proceedings before the Land Adjudication Officers. She stated that the suit land is their ancestral land.

In cross-examination, she testified that she is the 3rd wife of Kaptum (although in re-examination she stated that she is the 2nd wife) and that she lives in Chepterit some distance from the suit land. Her husband was living alone on the suit land. She stated that her husband gave this land to Julius her son. She was not aware of any sale of the land, and was not aware that Julius was at any time arrested for an offence. She was aware that at some point, Johana, the defendant, fell sick, and a cow was sold, but she was not aware that the said cow was availed by the family of Kigen. She was put through various contradictions in her witness statement and in her evidence.

DW-2 was Julius Tarus Tibino. He is brother to the defendant and an Assistant Chief. He testified that their father had 3 wives and that they are from the first house. They were four siblings but only himself and the defendant are still alive. Their mother died while they were young and was buried in the land in dispute. He testified that the suit land was initially owned by their grandfather. He testified that his father had four parcels of land and that he resides in one which is not the suit land. He was not aware of any sale of the suit land by his father. He stated that they lived on the suit land upto about the year 1972 when they went to live with DW-1 until about the year 1985. He stated that his father came back and cleared the suit land which was then bushy. He built a home and moved with DW-1. Johana was still fairly young and he built a structure after being circumcised in the year 1985. He testified that during adjudication in the 1980s, his father registered the land in the name of Johana (the defendant). He was not aware of any sale to the family of Kigen. Neither was he aware of the meeting of 22 March 2011 called by the Adjudication Officers. He stated that their father was educated, and was a policeman, and understood land transactions, and that if he had sold the land, there would be a written agreement.

In cross-examination, he testified that he was aware that his father had been summoned over a dispute touching on the land, but that he (the father) said that he should not be involved in any dispute. He did not know why his father did not want to be involved. He denied ever having worked for a County Council or having been arrested for any offence related to a County Council. He stated that he did not live with his father as he was employed by KTDA from the year 1984.

DW-3 was the defendant himself. He testified that Tibino Kaptum, his father, died on 9 June 2013. He testified that his father informed him that he had registered the suit land in the defendant's name during adjudication. He was not aware of any sale of the land to the family of Willy Kigen. He stated that parcel No. 3969 was in his name. He stated that his father lived on the land and he has also built a two-bedroomed house on it. He testified that there was nothing unusual about the time that his father was buried.

In cross-examination, he testified that he was born in the year 1966. In 1979 he stated that he built a small hut on the suit land. As far as he could recall, they always lived on this land. He denied that the dispute was ever decided by village elders. He agreed that he was called at the meeting of the Adjudication

Officer and he was given an opportunity to testify. He filed a case to challenge the decision of the Adjudication Officer. He testified that he has developed the land and has planted several crops. He started building his house in the year 2010. On the unusual No. 3969 that was given in his favour, the defendant stated that this could have been as a result of double allocations. He stated that he has built in the land parcel No. 3969 and not in the neighbouring land owned by a church nor in a road reserve.

With the above evidence the defendant closed his case.

C. SUBMISSIONS OF COUNSEL

Mr. Mwaka for the plaintiff reviewed the evidence and inter alia submitted that the plaintiff's claim of ownership of the suit land has already been ventilated and finalized by the District Land Adjudication and Settlement Officer (DLASO) through his award of 22 March 2011. He submitted that the application for judicial review to quash the decision of the DLASO was dismissed and that there is no appeal from that ruling. He submitted that the plaintiff has proved having proprietary rights over the suit land. He further submitted that the parcel No. 3969 does not exist as it was expunged from the register. He argued that since no titles have been issued, there was no need for letters of administration in this instance. He cited Section 10 of the Land Adjudication Act to support his arguments.

Mr. Angu Kitigin for the defendant, on the other hand, submitted that it had not been established that there was any valid sale between Willy Kigen and the defendant's father Tibino Kaptum. He submitted that the Law of Contract Act (CAP 23) and Land Act, require that there be a written agreement with witnesses. He also submitted that it was claimed that the purchaser of the land was Willy Kigen, but that no letters of administration have been issued for his estate. He cited the case of **Trouistik Union International v Alice Mbeyu, (1993) eKLR** in support. On the decision of the Adjudication Officer to cancel the parcel No. 3696, he referred to various sections of the Land Adjudication Act and submitted that his action was *ultra vires* as the window for raising objections had closed. He submitted that there needed to be a complaint in writing and the determination must be made within 60 days of the date upon which the notice of completion of the Adjudication Register is published. He stated that the award was not properly rendered. He further submitted that consent of the DLASO was not obtained prior to these proceedings. He relied on the case of **Republic v The Chief Land Adjudication and Settlement Officer-Keiyo District Eldoret High Court Misc. Application No. 15 of 2002**. On the burial of the deceased, it was submitted that this was properly done in accordance with Tugen Customary Law. He urged that the counterclaim be allowed as the DLASO made an award without jurisdiction and that he failed to comply with the Civil Procedure Act when deciding the matter.

D. DECISION

It is with the above pleadings, evidence and submissions that I need to determine the matter. Mr. Mwaka for the plaintiff drew the following issues for determination

- (a) Whether the plaintiff has a bona fide case against the defendant.
- (b) Whether the defendant challenged the decision of the DLASO which awarded the plaintiff the suit land.
- (c) Whether the parcel No. 3969 exists on the ground.
- (d) Whether the defendant's counterclaim is proper before court. Does it have a verifying affidavit ?
- (e) Whether the defendant had a right to bury the deceased on parcel No. 1104.
- (f) Whether this honourable court has unfettered discretion to order for exhumation.
- (g) Who is to bear the costs.

Mr. Kitigin on his part drew five issues as follows :-

- (a) Whether the deceased is the legal owner of parcel No. 3969 by way of bequest.
- (b) Whether a lawful sale was entered and concluded between Willy Kigen and the deceased father to the defendant .
- (c) Whether the plaintiff can properly agitate for the rights of the deceased without letters of administration.
- (d) Whether the proceedings of the DLASO are valid and capable of passing an interest in the land.
- (e) Who is to pay costs.

In my view, I can combine and condense the above issues into the following which I believe should cover all aspects of this case.

- (a) Whether there was a sale between the father to the defendant and Willy Kigen.
- (b) Whether there has been a decision during adjudication on the ownership of the land.
- (c) Whether this decision of the Adjudication Officer should be set aside in these proceedings.
- (d) Whether the land parcel No. 3969 properly exists.
- (e) Who owns the land parcel No. 1104.
- (f) Whether these proceedings are properly before court for want of letters of administration and for want of consent of the DLASO.
- (g) Whether the defendant had a right to bury the deceased on the land.
- (h) Whether the remains of the deceased should be exhumed.
- (i) Whether the Counterclaim should be dismissed for want of a verifying affidavit.

I trust that in the discourse that follows, I will have addressed the above issues and make determinations on them. On the last point, the issue of a verifying affidavit has been raised in submissions. Its absence has not caused any party any injustice. In the circumstances, I refuse to strike out the counterclaim on this ground. Now to the substance.

The plaintiff has asserted that the suit land was purchased by her late husband Willy Kigen who died in the year 2002. The defendant has of course denied that his father ever sold this land to the family of Kigen. I have no written agreement before me. I agree that strictly, for one to enforce a right over land, there needs to be a written agreement as provided by Section 3 of the Law of Contract Act (CAP 23) Laws of Kenya. However, this strict rule cannot apply to land which has been later adjudicated, so that if a determination is made at the time of adjudication, that a particular person is entitled to be declared owner of certain land, then it is not necessary for that person to later prove that he purchased the land. This is because a determination of his rights has already been made, and his proof of ownership is more on the determination made in the adjudication process, rather than by virtue of purchase through agreement. I do not think that in this instance, the plaintiff has filed suit wishing to enforce an agreement for sale, but rather, her case is that it has already been determined, through adjudication, that she owns the suit land and that the defendant has no right over it. The matter of the agreement was only significant in providing the history of how the plaintiff came to be in possession of the suit land. It is therefore my view that failure to adduce an agreement is not fatal to the plaintiff's claim.

This brings me to the second issue which is whether the process of adjudication has already made a determination on who is supposed to be the owner of the suit land. On this score, the evidence of PW-5 is crucial. PW-5 testified that adjudication for the Kapluk area, where the suit land falls, is now more or less completed, as the Adjudication Register, the Preliminary Index Diagram and the Adjudication Record, are ready. It seemed to me that the only process remaining is the issuance of titles and the preparation of the Registry Index Map. Since the land was under adjudication, it fell for the rights of the parties to be determined through the adjudication process. The process was well explained by PW-5. His explanation was well in line with what is provided in the Land Adjudication Act, CAP 284, Laws of Kenya.

Briefly, there is an Adjudication Officer who is in charge of adjudication. He is appointed by the Minister. Under him, are demarcation officers, survey officers and recording officers. These officers demarcate, survey and record interests within the adjudication areas. Under Section 6 of CAP 284, the Adjudication Officer together with the District Commissioner of the area appoint an Adjudication Committee for the area under adjudication. Under Section 13, every person who considers himself to have an interest in land within the adjudication section makes his claim to the recording officer and points out his boundaries to the demarcation officer. If there are two or more conflicting claims to an interest in land, and the recording officer is unable to resolve the conflict, this dispute is submitted to an adjudication committee, as noted in Section 19. The adjudication committee is meant to listen to the conflict and issue a decision. If the committee is unable to reach a decision on a matter before it, it shall refer the matter to an arbitration board. A person affected by a decision of the committee may also make a complaint to the executive officer of the committee and the executive officer is mandated to refer the complaint to the arbitration board. The arbitration board hears and determines the matters referred to it by the committee.

The adjudication officer prepares what is termed as an adjudication register. This comprises the demarcation map and the adjudication record. Under Section 24, when the adjudication register is completed, the adjudication officer is inter alia supposed to give a 60 days notice for the inspection of the adjudication register. Any person who is of the view that the adjudication register is incorrect, may make an objection to the adjudication officer, in writing, within 60 days of the publication of the notice for inspection. The adjudication officer is empowered to determine the objection. He is also empowered to alter the adjudication register from time to time so as to conform to any objections. Any person aggrieved by the determination of an objection, may within 60 days of the determination, appeal to the Minister. After determination of all objections the adjudication register is inter alia forwarded to the Chief Land Registrar alongside any list of appeals. The Land Registrar then causes the registration of the parcels of land. Where there is an appeal, a restriction is to be made and registered on the subject land and is to endure until the determination of the appeal. Appeals are determined by the Minister and his decision is final. On such determination, the register may be altered in accordance with the determination. When all appeals have been determined the Director of Land Adjudication certifies that the adjudication register has become final.

Under Section 30, no person is to institute civil proceedings, except with the consent of the adjudication officer, concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final. If a person is aggrieved by the refusal of the adjudication officer to give consent, he may appeal against the refusal within 28 after the refusal, in writing to the Minister, whose decision shall be final.

In his evidence, PW-5 stated that there were no objections raised to the interests demarcated in the parcels No. 1104, 1099, nor 3969. He stated that objections stopped being received on 20 May 1997. I on my part have seen that the Adjudication Record for the parcel No. 1104, produced as plaintiff's exhibit No. 1 (b), is dated 13 May 1993. There is no record that there was ever any complaint raised by the defendant, or his father, when the adjudication process was ongoing. In cross-examination the witness stated that the Adjudication Register has already been forwarded to their head office in Nairobi, although when pressed as to why the cancellation of the parcel No. 3969 was made in 2011, 14 years after the window for objections had closed, he stated that the final register has not been prepared. He stated that the Adjudication Officer was acting to correct an anomaly when he deleted the parcel No. 3969 as that parcel did not exist on the ground.

I think from the evidence before me, the process of adjudication already determined the rights between the family of Kigen and that of the defendant. The land was adjudicated in favour of Willy Kigen. There is no record of any objection by the defendant. I on my part cannot fault the Adjudication Officers for holding that the land properly belongs to the family of Kigen. If the defendant felt that that decision was not proper, then he ought to have appealed to the Arbitration Board and to the Minister as noted in the Land Adjudication Act. I have no evidence that any such appeal was lodged.

I cannot also fault the Adjudication Officer for correcting the anomaly concerning the parcel No. 3969. In his evidence, he stated that the said parcel could not be in existence within or near the parcels No. 1104. It was his evidence that the entry was erroneously made, as the said parcel number, was not existing in their maps, nor could it be identified on the ground, hence the correction. I do not think that at that moment in time, the Adjudication Officer was exercising his powers under an objection, but rather, he was only rectifying an anomaly. If the defendant was aggrieved by this rectification of an anomaly, then he ought to have sued the Adjudication Officer for remedy. I do not think that he had any right to engage in the law of the jungle, and forcefully claim land that was not demarcated to him and for which he had made no objections.

To be fair to the defendant, it is true that he attempted to nullify the decision made in 2011 by the Adjudication Officer through the judicial review application registered as E & L No. 6 of 2013. But that suit was dismissed as it was filed out of time. No other suit has been filed to nullify the decision of the Adjudication Officer. I am unable to consider that these proceedings are proceedings to nullify that decision, for the Adjudication officer is not a defendant to the counterclaim raised by the defendant. There is therefore no suit before me, with which I can properly make a determination, that the decision of the Adjudication Officer was wrongful. The determination so far, is that the land parcel No. 3969 does not exist. I on my part have no material tendered by the defendant that the said land parcel truly exists on the ground, and if so, what acreage it should be. In the face of the evidence of the Adjudication Officer, that the said parcel does not exist in their maps nor in their registers, I am unable to make the holding that the said land parcel exists and that it belongs to the defendant.

Let me now address the issue of whether these proceedings are properly before court. I will start with the submission that the consent of the Adjudication Officer first needed to be sought before the proceedings were filed. This argument is founded on the provisions of Section 30 of the Land Adjudication Act, which provides as follows:-

Staying of land suits

- (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.
- (2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.
- (3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.
- (4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.
- (5) A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is

such land.

(6) Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.

In my view, Section 30 is to be applied when the rights of the parties are still the subject of determination in the adjudication process. The reasoning behind Section 30 is so that the process of determining rights of people in an adjudication area is left to the mechanism set out in the Land Adjudication Act and not to the courts. It is the people on the ground who best know who is entitled to what area of land that is the subject of an adjudication process. The effect of Section 30 is to remove that determination from the jurisdiction of the court, so that the court does not determine any conflicts touching on interest over the land without the party aggrieved first seeking the permission of the Adjudication Officer. But where the Adjudication process has already determined the rights of the parties, I do not see any bar to a person filing a claim in court, alleging an interference in the property, without the need of consulting the Adjudication Officer. In my view, the case of ***R v The Chief Land Adjudication and Settlement Officer - Keiyo District*** cited by counsel for the defendant is distinguishable. In that case, a suit was filed when the Land Adjudication Officer was still in the process of determining the persons who were entitled to the land in dispute, and in fact, the applicants had raised objections to the register. Before the objections could be heard, they filed suit. The court, Ochieng' J, held that the case could not be sustained as their objections were still pending determination.

In this case, the rights of the parties have already been determined by the Adjudication Officer. The case of the plaintiff, in my view, is not a case seeking a determination of rights of ownership over the suit land during an adjudication process; her case is that the adjudication process has already determined that they own the land, but that a third party, who has no proprietary interests, has interfered with their quiet possession, of what has already been demarcated to them, and has trespassed into their land. In my view, I do not think that there was a violation of Section 30 of the Land Adjudication Act in the circumstances of this case.

The next point is locus of the plaintiff to file this suit. It is true that the plaintiff does not hold any grant of letters of administration over the estate of Willy Kigen. She would have needed to have a grant in respect of the estate of Willy Kigen if she was claiming the land for and on behalf of the benefit of the estate. But, this suit has not been filed for and on behalf of the Estate of Willy Kigen. The suit is not one to claim land, or to have land revert to the estate of Willy Kigen. This in my view is an action for trespass for which it is not necessary for one to be owner of land to file suit. In the text ***Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at p923***, trespass to land is defined as follows :-

"Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another."

The same text gives various examples of trespass one of which is ***"to place anything on or in land in the possession of another..."***.

Page 927 of the same text discusses who may sue for trespass and it states as follows :-

"Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both. A tenant in occupation can sue, but not a landlord, except in cases of injury to the reversion. Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner."

It is therefore enough that the person suing is in possession, and it is enough to demonstrate, that the person against whom the claim is sustained has no right over the land. The action by the plaintiff is therefore perfectly sustainable in as much as she holds no letters of administration for the estate of Willy Kigen. Even if I was wrong in the foregoing, I would still have found it difficult to state that just because the plaintiff holds no letters of administration, then the action of the defendant in interring the remains of his father, should not be interfered with, and that I should not listen to the plaintiff, who is wife to Willy

Kigen. In the unique circumstances of this case, and so that justice is done, I would have sought refuge in Article 159 (2) (d) of the Constitution, which directs courts to do justice to the parties and not to have undue regard to technicalities. But, it is not necessary to do so, given that I am of the view that since the plaintiff is in possession, then she can sustain the claim for trespass against the defendant. It follows that the circumstances of this case are different from the case of *Trouistick Union v Alice Mbeyu* cited by counsel for defendant.

Having regard to the evidence tendered, it is my position that the defendant was wrong in interring the body of his father in land for which he has no interest in. His actions were wrongful and amounted to trespass and this court has no choice but to intervene. Neither can the defendant seek to find a hiding place in custom, that the deceased was entitled vide custom to be buried on the suit land. One cannot be allowed to infringe on the proprietary rights of another by dint of custom. Sad as it may be, there is no other remedy but to order the defendant to disinter the remains of the deceased from the suit land and inter the same in another site. I have no choice but to make this order, and I make it with the utmost of respect for the deceased, who otherwise ought to have been left to rest in peace.

The upshot of the above is that I am of the view that the plaintiff has proved her case on a balance of probabilities and is entitled to judgment in her favor. In the same vein, I am of the view, for the reasons given above, that the defendant has failed to prove his counterclaim. Having lost the suit, the defendant will bear the costs of the suit and the counterclaim.

I therefore make the following final orders :-

(1) That the defendant had no right to inter the remains of his father in the suit land described as L.R No. 1104 Kapluk Adjudication Scheme (Baringo Adjudication Area).

(2) The defendant is hereby ordered to disinter the remains of Kaptumo Tibino out of the land parcel L.R No. 1104 Kapluk Adjudication Scheme (Baringo Adjudication Area) and to do so within the next Fifteen (15) Days. The plaintiff to contact the Public Health Officer Baringo so as to assist and give advice on the exhumation process. In default the plaintiff to be free to apply for an order to exhume.

(3) That an order of permanent injunction is hereby issued, restraining the defendant and/or his servants, agents and/or assigns from occupying, wasting, or otherwise interfering with the plaintiff's quiet possession of the land parcel No.1104 Kapluk Adjudication Scheme (Baringo Adjudication Area).

(4) The defendant shall bear the costs of this suit and of the counterclaim.

It is hereby ordered.

DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF JULY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mr. Rioba Omboto present for the plaintiff.

Mr. J.K. Kiplagat holding brief for Mr. Angu Kitigin for defendant.