



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 63 OF 2013 (OS)**

**JOSEPH MALAKWEN CHELULE ..... 1ST APPLICANT**

**SAMMY MARINDANY CHELULE ..... 2ND APPLICANT**

**VERSUS**

**JOHN KIPKEMOI RUGUT ..... RESPONDENT**

**JUDGEMENT**

1.The substantive matter in this proceedings is the Originating Summons dated **11th February, 2013** taken out by **Joseph Malakwen Chelule** and **Sammy Marindany Chelule** hereinafter referred to as the Applicants, in which they sought for the following orders:

- a) **The 1st and 2nd Applicants be declared as the legal owners of Land Parcels Reference Nos. Molo South Kuresoi Block 5/721 and 722;**
- b) **The Respondent be barred from laying any claims on title to the said land parcels either by himself, his servants, agents and/or employees;**
- c) **The 1st and 2nd Applicants be registered as the sole proprietors of Land Parcels Reference Nos. Molo South Kuresoi Block 5/721 and 722; (hereafter referred to as suit properties).**
- d) **Costs of this application be provided for.**

2.The application is supported by the grounds on the face of it and supporting affidavit of **Joseph Malakwen Chelule** sworn on **11th February, 2013**. In it he claims that **Molo South Kuresoi Block 5/721 and 722** were allotted to his father, **Koros Arap Chelule** (deceased) through his shareholding in Kalenjin Enterprises Limited in 1980. Since then the two properties have been utilized as family land. That sometime in **April 2012**, the Respondents claimed that he was the registered owner of the suit properties. The appellants denied having sold the land to the Respondent.

3. The Respondent filed a Replying Affidavit sworn by **John Kipkemoi Rugut** on 4th February, 2014. He avers that he is the registered proprietor of the suit properties; that he was allotted the suit properties by Kalenjin Enterprises Limited and has been in occupation of the suit land since **14th March, 1992**.

4.On the 20th January, 2014 the learned counsel, **Mr. K'opot** and **Mr. Ogeto** representing the Applicants

and Respondent respectively proposed to the court that the matter be disposed off by way of affidavit evidence; That the annexures to the affidavits be admitted in evidence and that both parties to file written submission in support of their case. The court adopted the directions as recorded by the parties.

5. The Respondent's written submissions are dated **2nd May, 2014**. He submits that he is the registered proprietor of the suit parcels following an allotment by Kalenjin Enterprises Limited. That he acquired the said properties and registration documents without fraud or mistake by all the parties involved. Further counsel submitted that the applicants had not demonstrated through supporting documents, their claim over the suit properties. Moreover no succession document had been presented to ascertain that the applicants are beneficiaries of the deceased. According to counsel the applicant have no *locus standi* and their claim is based on unsubstantiated allegations.

6. Further counsel submitted that the applicants have also not demonstrated the requisite elements of adverse possession to enable them acquire the suit properties. He contends that the Respondent has been using the suit properties exclusively for grazing cattle and farming; that he also settled on the land and has the actual possession of the same without interference from the applicants. Counsel thus urges the court to find that the applicants are not entitled to the orders sought and the case be dismissed with costs.

7. As at the time of writing this judgment the Applicants had not filed their submissions.

8. The entire applicants' affidavit makes no reference to any documentary evidence to support their claim that the suit land was allotted to the applicant's deceased father by Kalenjin Enterprises Limited nor have they attached any evidence that they are registered owners or in occupation of the suit properties. They have only made unsubstantiated claims over the suit properties.

9. On the other hand, the Respondent has attached in his affidavit copies of title deeds for **Molo South Kuresoi Block 5/721 and 722** which were issued in his favour on **the 23rd February, 2012 and 14th March, 2012** respectively by the Land Registrar. The law is clear in the manner in which the courts should treat the production of a title deed in a claim of ownership of land. This is to be found in **Section 27 and 28 of the Registered Land Act Cap 300** (now repealed) and replicated in sections 24 and 25 of the Land Registration Act No 3 of 2012 which provide as follows:

**24. (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

**(b) .....**

**25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this 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—**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

10. The courts are required under Section 26 to take title deeds as *prima facie* evidence. Section 26 provides:

**26 (1) the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by**

**all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-**

**a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b) where the certificate of title has been acquired illegally, nonprocedurally or through a corrupt scheme.**

11. The two title deeds to the suit properties were issued under the Registered Land Act by the Land Registrar to the Respondent. Based on the above legal provisions, this court finds that the title deeds annexed are prima facie evidence that the Respondent is the registered owner of the suit properties.

12. Further the Respondent has demonstrated that he was a shareholder in Kalenjin Enterprises Limited which he claimed allotted to him the suit properties. To my mind therefore the balance of convenience tilts in favour of the Respondent.

13. As I said herein above, the applicants' supporting affidavit to his originating summons did not have annexed to it any evidence to the suit land claimed. Save what the applicant deposed to it, the certainty of occupation and proprietorship of the suit land could not otherwise be guaranteed. An order declaring the applicants as the legal owners of Molo **South Kuresoi Block 5/721 and 722** is therefore not capable of being granted. It is for this reason only that I dismiss the applicants Originating Summons dated **11th February, 2013** with costs to the Respondent.

**Dated, signed delivered in open Court at Nakuru this 4<sup>th</sup> day of July 2014.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

N/A by plaintiff's counsel

Applicant present: Joseph Malaika Chelule, Sammy Chelule

Mr Kamene holding brief for Mr Ogeto for the Defendant

**L N WAITHAKA**

**JUDGE**