



**REPUBLIC OF KENYA**

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

**E&L 936 OF 2012**

*Formerly HCC 75/2011*

**NENGEWA ARAP KIPYEGON.....PLAINTIFF**

**VS**

**JOHN KIRWA TANUI.....DEFENDANT**

**JUDGMENT**

This suit was commenced by way of plaint filed on 6 May 2011 which was amended on 12 September 2011. The plaintiff has described himself as the administrator/personal representative of the estate of Kipyegon arap Choge (deceased) who is father to the plaintiff. In the amended plaint, the plaintiff has pleaded that in the year 1972, his father, purchased the land parcel Nandi/Kaboi/709 (the suit land) from one Elisha Kiprotich Bira. It is further pleaded that the deceased settled on the land with his family, including the plaintiff, and lived on the land until he died on 4 January 1990 and was buried on the land. It is stated that the family of the deceased continued to live on the land until they were forcefully evicted in the year 2006. It is averred that the plaintiff then checked at the lands registry and discovered that the defendant had fraudulently transferred the suit land into his name. The following particulars of fraud are pleaded against the defendant :-

- (a) Obtaining registration of a parcel of land he knew very well to belong to the plaintiff's deceased father secretly and without notifying the plaintiff and his late father's family who are in occupation of the land.*
- (b) Falsely presenting himself to the land control as a bona fide purchaser of the whole parcel of land.*
- (c) Deliberately telling lies to the provincial administration and to the land control board and thereby obtaining registration by fraud.*
- (d) Using forged documents to obtain registration of the said land into his name.*
- (e) Using forged documents to evict the plaintiff and the other members of family from the said land.*

*The prayers sought in the plaint are as follows :-*

- (a) Cancellation of the defendant's name from the register of the land parcel Nandi/Kaboi/709.*
- (b) A declaration that the plaintiff are in adverse possession of land parcel Nandi/Kaboi/709.*
- (c) Costs of this suit plus interest.*

*(d) Any other or further relief this Honourable court may deem to grant.*

The defendant did not bother to either enter appearance or file a statement of defence. A hearing date was taken and the defendant was served, but he did not appear in court. The matter thereafter proceeded with the plaintiff being the sole witness.

In his evidence, the plaintiff stated that his deceased father, Kipyegon arap Choge, who died on 4th January 1990, was originally from Kericho, sold his land in Kericho and bought the suit land from one Kiprotich arap Bira in the year 1972. This land was 10 acres and he purchased the same for the sum of Kshs. 6,000/=. He moved in with his family, built a home, planted trees and farmed the land. He lived on the land for a period of 16 years until the year 1986 when he was evicted by the defendant. At this time Kiprotich Bira was still alive. The father of the plaintiff confronted Kiprotich Bira but the latter never offered the plaintiff's father alternative land. He testified that his late father made a complaint to the elders who made a decision that the land belongs to his father.

The plaintiff produced the green card and a search of the said land as exhibits. He also testified that Kiprotich Bira transferred the suit land to the defendant as a gift. A copy of the transfer was also produced as an exhibit. He testified further that the defendant evicted them from the land through a court order which was produced as an exhibit. He also produced a letter from the District Commissioner written in the year 1993 asking them to vacate the land.

The plaintiff stated that he now wants the defendant evicted from the land because that land had been bought by his father. He asked that the title of the defendant be cancelled and the same be issued to him.

With the above evidence, the plaintiff closed his case. I invited counsel to file written submissions and he did so. In his submissions, Mr. Okara for the plaintiff reviewed the evidence adduced and argued that the plaintiff has proved his case.

It is with the above pleadings, evidence and submissions, that I have to make a decision on this case.

The plaintiff's case as I have understood it is that his father bought the suit land in 1972. He lived on it upto the year 1986. It is not clear from the evidence whether the plaintiff's father was evicted in the year 1986 or later. It however does not matter. The plaintiff is now attempting to claim back this land on the basis that the same properly belonged to his late father because his late father purchased it. It will be noted that the plaintiff has filed this suit describing himself as administrator of the estate of his late father.

This suit must fail.

First, the plaintiff has not produced any grant of letters of administration to support the allegation that he is the administrator or personal representative of the estate of Kipyegon arap Choge (deceased). The plaintiff therefore lacks the requisite capacity to institute this suit on behalf of the deceased. On this ground alone, the suit fails.

The suit also fails on merits. One of the exhibits produced by the plaintiff is an eviction order dated 26th May 1988 issued by the Kapsabet Senior Resident Magistrate's Court in Civil Suit No. 58 of 1985. That order is addressed to the District Commissioner, Nandi District. It states as follows :-

*WHEREAS, John Kirwa Tanui by judgment of this court dated 17th December 1987 was found to be the rightful owner of parcel number Nandi/Kaboi/709 AND WHEREAS the plaintiff KIPYEGON ARAP CHOGE has not complied with the Court's Order by removing himself and his belongings from the said plot WHEREFORE you are directed to remove the said KIPYEGON ARAP CHOGE together with his family servants or agents as well as his or their belongings as the case may be including any person bound by the said decree who may refuse to vacate the said plot AND for doing so this shall be sufficient warrant or authority.*

*GIVEN under my hand and seal of this court this 26th day of May 1988.*

*Resident Magistrate*

*Kapsabet.*

It will be seen from the above order, that there had been litigation between the plaintiff's father and the defendant over the same parcel of land. I have not had the benefit of the pleadings but it is clear from the above order, which the plaintiff himself produced as an exhibit, that the plaintiff's father lost the suit and was ordered to be evicted from the suit land. I have also seen the letter dated 24th March 1993 written by the District Commissioner to the plaintiff asking him to vacate the suit land within 14 days. It seems therefore that the family of Kipyegon arap Choge were evicted from the suit land through a court order, after they had failed to convince the court that they were entitled to the suit land. It is clear that there had been litigation between the plaintiff's father and the defendant which the former lost. This matter is therefore res judicata by dint of the provisions of Section 7 of the Civil Procedure Act, CAP 21, which provides as follows :-

*S. 7 : 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.*

The plaintiff is barred from litigating the issues afresh as such issues were the same issues that were dealt with in the former suit.

It will also be seen that none of the evidence led went to prove any of the alleged particulars of fraud. Even if the suit was not res judicata, it would still fail. It has not been shown to me that the defendant obtained registration of the suit land by way of fraud.

No evidence has also been led to support any claim by adverse possession, forgetting for a moment, that this is not the manner in which claims of adverse possession are instituted.

I think I need not say more. The long and short of it, is that the plaintiff's case is hopeless. I dismiss the same. I make no order as to costs as the defendant never appeared in the matter.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2013

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Read in open court***

***In the presence of:-***

***Mr. Mbeja holding brief for Mr. Okara for the plaintiff.***

***N/A for defendant who never entered appearance.***