



**Lemlem v Muket & 2 others (Environment and Land Appeal  
E010 of 2022) [2023] KEELC 17189 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17189 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL E010 OF 2022**

**L WAITHAKA, J**

**APRIL 27, 2023**

**BETWEEN**

**BENJAMIN PKATEI LEMLEM ..... APPELLANT**

**AND**

**SIMON PKIYACH PKATEY MUKET ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES DOMOKAMAR ..... 2<sup>ND</sup> RESPONDENT**

**DAVID PKIYACH LOTUKEI ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal from the Judgment of SPM Iten Law  
Courts Hon. Charles Kutwa delivered on 6th July 2022)*

**JUDGMENT**

**Introduction**

1. By a plaint dated 4<sup>th</sup> May 2020 and filed on 6<sup>th</sup> May 2020 the plaintiff/appellant herein instituted a suit in the lower court to wit Iten SPMCC ELC Case No.11 of 2020 seeking judgment against the defendants/respondents for a declaration that the transfer of the parcel of land known as Cherangany/Kapkanyor/156 (hereinafter referred to as the suit property) from Tourieni Muket (deceased) to the 1<sup>st</sup> defendant/respondent was irregular, illegal and null and void; that the subsequent transfer of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents by the 1<sup>st</sup> defendant/respondent was null and void ab initio; and that the title should be nullified, cancelled and reverted back to the deceased.
2. The appellant averred that the suit property was registered in the name of the deceased and contended that it was irregularly transferred to the 1<sup>st</sup> defendant/respondent who subsequently transferred it to the 2<sup>nd</sup> defendant/respondent thereby prejudicing his beneficial interest therein (he was in use and occupation of the suit property when it was transferred to the defendants/respondents).



3. The appellant averred that upon learning about the irregular/illegal transfer of the suit property, he placed a caution on the register of the suit property to restrain dealing with it; that on 1<sup>st</sup> May 2020, he was served with a directive from the area chief sanctioning the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants invasion of the suit property; that later on, he learnt that the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents had purportedly obtained title to the suit property.
4. As a result of the above circumstances, the appellant instituted the suit referred to herein above seeking the aforementioned reliefs.
5. Upon being served with summons to enter appearance, the respondents filed a statement of defence and counterclaim, dated 3<sup>rd</sup> July, 2020.
6. In their statement of defence and counterclaim, the 1<sup>st</sup> respondent denied the appellant's contention that the suit property was irregularly/illegally transferred to him and contended that it was legally transferred to him by the deceased during his lifetime. The 1<sup>st</sup> respondent acknowledged that the appellant was in occupation of the suit property but contended that he invaded it in 2015 and attempted to remove him from the suit property.
7. In the counterclaim, the 1<sup>st</sup> respondent reiterated his contention that the suit property was transferred to him by the deceased and stated that he participated in acquisition (purchase of the suit property). He averred that in 2016, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents acquired the suit property from him by way of purchase. Terming the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents absolute proprietors of the suit property, the 1<sup>st</sup> respondent laments that the appellant has denied the 2<sup>nd</sup> and 3<sup>rd</sup> respondents their right to the suit property by constant invasion of the suit property. The 1<sup>st</sup> respondent also laments that the appellant has ignored notices sent to him requiring him to vacate the suit property.
8. Through the counterclaim, the respondents sought an order of eviction against the appellant, his servants, employees, agents, persons claiming under him and purported beneficiaries from the suit property. The respondents also sought an order of permanent injunction to restrain the appellant, his servants, employees, agents, persons claiming under him and purported beneficiaries from interfering with the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents ownership and occupation of the suit property.

## **Evidence**

9. When the matter came up for hearing, the plaintiff/appellant who testified as P.W.1, relied on his statement dated 4<sup>th</sup> May 2020, after it was adopted as his evidence in chief.
10. He stated that the 1<sup>st</sup> respondent is his young brother; that he does not know the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents and that the suit property belongs to his father, (deceased). He further stated that he took possession of the suit property when his father was alive. Later, he learnt that the suit property had been transferred to the 1<sup>st</sup> respondent. He talked to the 1<sup>st</sup> respondent who became angry. He put a caution in the register of the land. He produced a copy of the title deed for the suit property as Pexbt 1; the caution as Pexbt 2; grant of letters of administration in respect of his father's estate as Pexbt 3 and the chief's letter, dated 30<sup>th</sup> April 2020, as Pexbt 4. He further stated that he is aware that the suit property had since been sold by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> and the 3<sup>rd</sup> respondent.
11. He informed the court that his father and mother were not aware of the transfer of the suit property to the 1<sup>st</sup> respondent. Claiming that the caution he registered was not lifted, he asserted that the transfer of the suit property to the respondents was irregular.
12. In cross examination, he stated that they purchased the suit property in 1994. He contributed one cow to purchase it. He was the only one who contributed the purchase price. He applied for letters of



- administration of his father's estate in 2015. The transfer of the suit property was done in 2016. He had good relation with the 1<sup>st</sup> respondent. He took possession of the suit property in 2013. He encountered resistance from his father's servants. He blamed the 1<sup>st</sup> respondent for instigating the resistance.
13. He acknowledged that the family has land in Marakwet but stated that it has not been allocated to the children of the deceased. He was not aware of a case at chesoi police station. He was never called for hearing of his caution. He did not have any report to show that his father was sick and could not tell whether his father went to the land control board.
  14. He never made any report to the police to investigate the transfer documents. He had never seen an application for transfer or consent for transfer by his father. He could not tell whether stamp duty was paid in respect of the impugned transfer.
  15. In re-examination, he stated that his father was sick, 90 years old, and could not walk for 90 kms. His father's condition is the reason for saying that he was sick. He lives near his father. He went to the Registrar but did not see the transfer documents. He was given authority to transfer the land which explains the reason for coming to court.
  16. Joel Muket, relied on his statement recorded on 24<sup>th</sup> June, 2021 after it was adopted as his evidence in chief.
  17. He informed the court that the plaintiff and the defendant are his brothers. That the dispute in court is about transfer of the suit property; that the land belonged to his late father. He was in occupation till 2014. He was 94 years then. His father was a polygamist. He is from the 2nd family. His father died in 2016. The last wife of his father is his mother. She died in 2020. Her mother had recorded a statement before their advocate. He was there when she recorded her statement. He is aware of the contents of her statement. She states that she did not give consent for the transfer of the suit property.
  18. The plaintiff (appellant) was the one in possession of the land. In 2016, the 1st respondent invaded the land. The appellant placed a caution against register of the suit property.
  19. He stated that the 1<sup>st</sup> respondent was not given the land as a gift by their father. His mother did not go to the land control board. He stated that the suit property belongs to their father.
  20. Upon being shown copy of the green card, MFI 4, he acknowledged that the 2nd and the 3rd the respondents are the registered owners of the suit property but maintained that the process of transfer of the land to them was irregular.
  21. He could not tell whether his father and mother went to the land control board. He stated that when his father gave him land, he called all the family members. He also involved administrators, and the 1st respondent.
  22. He explained that his father would involve all family members whenever he gave his land to his sons.
  23. He stated that each of his father's sons were given land by their father.
  24. The 1<sup>st</sup> respondent was given 82 acres while he was given 30. The appellant was given 90 acres. The parcels given were ancestral land.
  25. He acknowledged that the suit land was bought by their father and that it was not part of the ancestral land.
  26. They filed a succession cause for the estate of their father. The appellant is the administrator. The suit property is listed as one of the properties in their father's estate.



27. In cross examination, he stated that he is a brother to the appellant and the 1<sup>st</sup> respondent; that the suit land was registered in his father's name; that the suit land was purchased by his father in 1990's; that neither he nor the 1<sup>st</sup> respondent were present when the land was bought; that his father died on 11<sup>th</sup> November 2016; that he does not know when the transfer of the suit property was done; that the green card shows transfer was done on 11<sup>th</sup> March 2016 when his father was still alive; that his mother made a statement when she was sick; that a person can be sick and be able to transact; that his father was sick and could not transact; that his father was 94 years old; that his mother passed on after recording her statement; that the application for consent and letter of consent, MFI 1 and MFI 2 respectively, were signed by the chairman of Kapcherop land control board; that from the records transfer was done; that he doubts whether his father signed the consent and the transfer; that the 1<sup>st</sup> respondent's wife is the one who had custody of all documents; that the 1<sup>st</sup> respondent's wife died in 2007; that he was given land in 1998; that the suit property was the only remaining parcel in their father's name; that the 1<sup>st</sup> respondent tried to transfer the ancestral land in March 2016; that he had no documents in court; that his mother was not living in the suit property; that the land was not in joint ownership; that he had no documents to show that the appellant was living with their father; that the 1<sup>st</sup> respondent works in Nairobi; that the appellant was in a dual possession of the suit property; that he does not know if the appellant drove away the 1<sup>st</sup> defendant's animals.
28. In re-examination, he stated that in 2016 his father was not living with the 1<sup>st</sup> respondent. He was living with Benedict; that at one time, the 1<sup>st</sup> respondent tried to sell the ancestral land; that the 1<sup>st</sup> defendant is not the last born of their father; the last born of their father is James Makut.
29. D.W.1, Simon Pkiyach Pkatey Muket, relied on his statement dated 4<sup>th</sup> March 2021 after it was adopted as his evidence. The statement is to the effect that he is the initial owner of the suit property, Cherengany/Kapkanyor/156; that the suit property was transferred to him by his late father in 2016; that the suit property was purchased by his father but he contributed the purchase price; that the suit property was registered in the name of his father but he was the one in use and occupation of the suit property; that it is not true that the plaintiff had been in use of the suit property since 1995; that the plaintiff invaded the suit property in 2015 and destroyed his property; that he reported destruction of his property to the police but did not follow up the case he reported because he considered family unity paramount; that the plaintiff constructed a house in the suit property after he invaded it in 2015; that the plaintiff has got his own share of family property elsewhere and cannot be heard to claim that he is entitled to a share of the suit property; that due process was followed in transfer of the suit property to him by his father; that his father obtained all requisite consents and clearances; that spousal consent was not required in the transfer; that the suit property is not part of the estate of his deceased father and that his father had good memory and health when he transferred the suit property to him. Further that he sold the suit property to the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants and formal process was equally done; that the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants are genuine purchasers for value; that during the transfer, he learnt that the plaintiff had put a caution claiming beneficial interest and applied to the Land Registrar to have the same removed; that after several invitations and notices to the plaintiff by the Land Registrar to show cause why the caution should not be removed and failure by the plaintiff to show cause why the restriction should not be removed, the caution was removed and transfer effected.
30. He produced the documents contained in their list of documents dated 4<sup>th</sup> March, 2021 after they were admitted in evidence as Dexbt 1-7 respectively.
31. He maintained that he did not transfer the suit property fraudulently. He stated that the land was bought and used for cultivation. It was not their homestead. He sold the land to the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents.



32. In cross-examination, he stated that he did not buy the suit land with his father and mother. He had no documents to show he bought the land in 1992. He told the board that the land was theirs.
33. Dexbt 3 shows that he was given the land as a gift. The land control board was at Kapcherop at the D.O's office. He could not tell the name of the D.O. He did not have the minutes of the board. His mother was not alive. His step-mother was alive. He did not seek for consent from his step mother. The land was registered absolutely in his father's name. He does not know whether the land was cautioned. The cows and employees were his. The appellant was not present when they bought the land in 1992. He was gifted the land.
34. In re-examination, he stated that he is not aware of any fraud case. He maintained that the appellant was not present when they bought the land in 1992. He asserted that he was gifted the land.
35. D.W.2, Charles Domokamar, relied on his statement dated 4<sup>th</sup> March 2021 after it was adopted as his evidence in chief. He told the court that he is the registered owner of the suit property. He bought it from the 1st respondent. He has a title deed.
36. In cross examination, he stated that he bought the suit property in 2016. He went to see the land. There was a house and cows in the land. He did a search in 2016. The caution was put after they bought the land. He was not present when the caution was lifted. The caution was removed by the 1st respondent. He knows that the caution was put by the appellant. The employees belong to the appellant. The appellant claimed that the suit property belongs to the family.
37. In re-examination, he stated that it is the 1st respondent who transferred the suit property to them. He clarified that the employees on the suit property belonged to the 1<sup>st</sup> respondent.
38. On the basis of the foregoing pleadings, evidence and the submissions by the parties, the Learned Trial Magistrate (TM) entered judgment in favour of the respondents. In so doing he stated:-
- “I have considered the pleadings, the evidence and the filed submissions. The issues that arise in this suit are:-
- a. Whether the transfer of the suit land to the defendant was fraudulent;
  - b. Whether the title issued in the name of the defendant should be cancelled;
  - c. What orders should issue as to costs.
39. On whether the transfer of the suit land to the defendant was fraudulent the TM held/stated:-
- “...in the instant case, although the plaintiff's evidence was based on allegations that the 1st defendant had transferred the suit land illegally and unprocedurally, he has not strictly speaking challenged the authenticity of the title held by the 2nd and the 3rd defendants. The green card that was produced in court shows that the land was transferred to the 1st defendant on 11th march 2016 when his father was alive. The restrictions alluded to by the plaintiff were placed on the land way after the transfer had been effected in favour of the 1st defendant by the land registrar. The plaintiff needed to adduce evidence to prove his assertions in default of which his claim would fail...the plaintiff never availed evidence that the transaction was not taken the land control board; that the deceased did not voluntarily execute the application for land control board consent and the requisite transfer forms or at all, or that the 1st defendant forged the documents that were used in registration of the land in his name. In this court's view, there was nothing to bar the deceased from giving the land



to the 1st defendant as a gift as it was not matrimonial property. I find the 1st defendant's explanation for the transfer to be plausible.....

From the analysis of the evidence earlier set out in this judgment, this court does not deem the evidence of the plaintiff as capable of establishing fraud, illegality or that the suit property is matrimonial. I would not agree with the plaintiff without him giving particulars that the 1st defendant transferred the suit to himself while evidence shows that the transaction happened during the deceased's lifetime and that there was a probability that the plaintiff being absent, the deceased considered the person taking care of him as deserving a gift.

The upshot of the foregoing is that the plaintiff has failed to establish his claim against the defendants on a balance of probabilities in the present suit. I dismiss the instant suit and allow the counterclaim with costs to the defendants.”

40. Dissatisfied by that determination, the plaintiff (now appellant) appealed to this court on six (6) grounds which can be reduced to one broad ground namely, the TM erred by dismissing his suit and allowing the respondent's counterclaim.

41. Pursuant to directions given on 7<sup>th</sup> December 2022 to the effect that the suit be disposed of by way of written submissions, parties to this appeal filed submissions which I have read and considered.

## **Submissions**

### **Appellant's Submissions**

- i) It was irregular and illegal for the 1st respondent to the suit property to himself without the consent of his step mother;
- ii. Appellant was tasked by his father, with the consensus of the family to take care of the suit property;
- iii. The 2nd and the 3rd respondents were not innocent purchasers. They knew the land was cautioned and that the seller was not the one in occupation hence should not have bought it.
- iv. Suit property is family land belonging to the estate of their father, Muket Tourieni.
- v. The caution registered by the appellant to restrict dealing with the suit property was removed irregularly.
- vi. That the suit property was matrimonial property in respect of which spousal consent was required before it could lawfully be disposed of.
- vii. That the issue arising from the appellant's pleadings is irregularity and illegality in the transfer of the suit property and not fraud. The TM is said to have wrongfully framed the issue(s) for the court's determination and as a result arrived at the wrong decision.
- viii. That the TM erred by determining that the deceased had distributed his land to his children. The TM is said to have failed to take into account that the deceased had not distributed or allocated the suit property to any of his children.
- ix. That the TM erred by holding that the appellant had been given 80 acres of land by his father when it is the 1st respondent who was given those acres. That decision is said to have wrongly influenced the decision of the TM .



- x. That the title held by the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents is a nullity ab initio as the 1<sup>st</sup> respondent did not have a good title to transfer to them.
  - xi. Removal of the caution registered by the appellant to restrict dealing with the suit property was irregularly removed. No notice was served on the cautioner before the caution was removed.
  - xii. The TM erred by determining that the suit property was not matrimonial property when it was obtained during the subsistence of the marriage between the appellant's mother and father and for the marriage.
  - xiii. By dint of Section 93 of the *Land Registration Act* 2012, the suit property is matrimonial property and forms part of the estate of Muket Tourieni, deceased.
  - xiv. The 1<sup>st</sup> respondent could not have been given the suit property by the deceased secretly.
43. Based on the decision in the case of *Munyu Maina vs. Hiram Gathiha Maina*, Civil Appeal No. 239 of 2009, it is submitted that the 1<sup>st</sup> respondent cannot dangle the title deed he has in defence of his entitlement to the suit property since the title is under challenge. He must prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.
- He urges the court to find that the appellant had proved his case on a balance of probabilities and allow the appeal.

#### **The Respondents Submissions**

- 44. According to the respondents, the only issue for determination is whether the TM committed the alleged errors to warrant setting aside the judgment.
- 45. Concerning that issue, it is submitted as follows:-
  - i. Burden was on the appellant to prove that the transfer of the suit property to the respondents was irregular and illegal;
  - ii. No evidence was adduced capable of proving that the consent of the Land Control Board was not obtained;
  - iii. No evidence was adduced to show that the deceased did not sign (thumbprint) the transfer documents.
  - iv. The trial court had the right to frame the issues for the court's determination in the manner it did because fraud was predominantly imputed during trial;
  - v. Issue of the deceased having shared his land to his children arose in the evidence hence there was nothing wrong in the TM's determination that the deceased had shared his land amongst his children during his life time;
  - vi. That there is no evidence that the TM determined that the appellant got 80 acres and that, that determination influenced the decision of the court;
  - vii. It is submitted that the TM did not determine that the caution registered by the appellant was rightly removed but observed that it was filed after the suit property was registered in the name of the 1<sup>st</sup> respondent. It is submitted that, in the circumstances of this case, the Land Registrar rightly exercised his power to remove the caution.



viii. No proof was provided that the suit property was matrimonial property.

Reliance is placed on the case of Eviline Karigu (suing as administratrix of the estate of late Muriungi M'Chuka alia M'Chuka alias Miriungu M'Gichuga) v M'Chabari Kinoro (2022) e KLR where it was held/stated:-

“To succeed in claiming fraud, the plaintiff not only need to plead but also particularize it by laying out water right evidence upon which the court would make such finding. It is therefore trite law that any allegation of fraud must be pleaded and strictly proved”.

### **Duty of this Court as the first Appellate Court**

46. As the first appellate court, it is the duty of this court to examine and re-evaluate the evidence on record, assess it and make its own conclusion, bearing in mind that this court has neither seen nor heard the witnesses and make due allowance for that. This court has also to take into account the circumstances upon which this court may differ with the Trial Court on findings of fact namely, if it appears either that the Trial Magistrate has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. See the case of *Selle & Another v. Associated Motor Boat Co. Ltd & others* (1968) EA 123 thus:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

### **Analysis and Determination \_**

47. The suit that forms the subject matter of this appeal was filed on 6<sup>th</sup> May, 2020. As at that time, the suit property was registered in the names of the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents in this Appeal, having been registered in their names and a title deed issued to them on 6<sup>th</sup> March, 2020.
48. The registration of the suit property in favour of the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents was done pursuant to a transfer of the suit property to them by the 1<sup>st</sup> respondent.
49. The 1<sup>st</sup> respondent acquired title to the suit property on 11<sup>th</sup> March, 2016. The green card in respect of the suit property shows that registration of the suit property in favour of the 1<sup>st</sup> respondent was by way of transfer by the previous owner, Muket Tourieni.
50. Close to two years after the suit property was registered in favour of the 1<sup>st</sup> respondent, the appellant herein registered a caution to restrain dealings with the suit property claiming beneficial interest in the suit property. The caution was removed by the Land Registrar, on 28<sup>th</sup> February, 2020 (shortly before the suit property was transferred to the 2<sup>nd</sup> and the 3<sup>rd</sup> respondent) purportedly in exercise of the powers conferred on him under Section 73(3) of the *Land Registration Act*, 2012.

What was the legal position regarding the suit property as at the time the suit forming the subject matter of this appeal was filed?



51. The answer to the above question is captured in Sections 24, 25 and 26 of the [Land Registration Act, 2012](#) thus:-

“ 24. Subject to this Act-

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 belonging or appurtenant there to; and

b. ....

25. the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by 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 any other encumbrances and to conditions and restrictions, if any, shown in the register; and

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

2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26 (1). The certificate of title issued by the Registrar upon registration 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 party;

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

52. Since the suit property was registered in the name of the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents as the registered proprietors of the suit property when suit that forms the subject matter of this appeal was filed, to succeed in impugning the title held by them, the appellant must prove one or more of the grounds contemplated in Section 26 of the [Land Registration Act](#) supra.

53. In the suit filed before the lower court, the appellant contended that the suit property was irregularly transferred to the 1<sup>st</sup> respondent who subsequently transferred it to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents thereby prejudicing his beneficial interest therein. The appellant averred that upon learning about the irregular/illegal transfer of the suit property, he placed a caution on the register of the suit property to restrain dealing with it. He complained that on 1<sup>st</sup> May 2020, he was served with a directive from the



area chief sanctioning the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents' invasion of the suit property. He averred that he later learnt that the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents had purportedly obtained title to the suit property.

54. What I gather from the above pleading and the appellant's submissions to the effect that his case was not based on fraud but irregularity and illegality in the transfer of the suit property, is that the appellant's suit was premised on the ground codified in Section 26(1)(b) of the *Land Registration Act*, namely:

“Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

55. Arising from that pleading and submission, the sole issue for determination is found to be whether the appellant proved that the certificate of title held by the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents was acquired illegally, unprocedurally or through a corrupt scheme.

56. Tied to the above issue is whether the 1<sup>st</sup> respondent had a good title to the suit property, which he could transfer to the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents.

57. As the latter issue has a bearing on the former, I will consider and determine it first. In considering that issue, I begin by pointing out that the appellant contended that the 1<sup>st</sup> respondent irregularly transferred the suit property to himself, without consideration and without following the due process of transfer. (see paragraph 5 of his plaint).

#### **Legal propriety or otherwise of that pleading**

58. Order 2 Rule 4 of the Civil Procedure Rules provides for matters that ought to be specifically pleaded thus:-

“4(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident; act of God, any relevant statute of limitation or any facts showing illegality-

- a. Which he alleges makes any claim or defence of the opposite party not maintainable;
- b. Which, if not specifically pleaded, might take the opposite party by surprise; or
- c. which raises issues of fact not arising out of the preceding pleading.”

In the case of *Eveline Karigu supra* the court held:-

“It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated these were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 rule 4 of the Civil Procedure Rules...”

59. In the circumstances of this case, the appellant pleaded illegality in the transfer of the suit property to the 1<sup>st</sup> respondent but failed to provide the particulars of irregularity and/or illegality. Strictly speaking, the only aspect of the pleaded irregularity in the transfer the appellant was entitled to pursue is that of transfer of the suit property without consideration. No particulars are required in respect of that contention as it is self explanatory. The other grounds taken up namely alleged irregularity in the



- process of transfer and failure to follow due process of transfer needed to specifically pleaded and particulars of that which was done constituting an irregularity or violation of due process provided.
60. Turning to the merits of the appellant's case, by way of evidence and submissions, the appellant claimed that his father, Muket Tourieni, who was the registered proprietor of the suit property before it was transferred to the 1<sup>st</sup> respondent did not transfer the suit property to the 1<sup>st</sup> respondent. According to the appellant, their father could not have transferred the suit property to the 1<sup>st</sup> respondent without informing them. The appellant also claimed that their father, on account of advanced age, was 90 years old when the suit property was transferred to the 1<sup>st</sup> respondent, lacked capacity to transfer the suit property to the 1<sup>st</sup> respondent.
  61. The appellant did not prove to the required standard and at all that the transfer of the suit property to the 1<sup>st</sup> respondent was done fraudulently, illegally or even unprocedurally. His claim that the suit property is matrimonial property is not supported by the evidence adduced in the case. None of the deceased spouses was shown to have been living in the suit property to warrant it being called a matrimonial property. That being the case, no consent of any of the deceased's spouses was required before the deceased could transfer the suit property to the 1<sup>st</sup> respondent, if he desired to do so. Just because the deceased had the tendency of involving his children in decision making concerning his property and did not involve them before transferring the instant property to the 1<sup>st</sup> respondent is not evidence that the deceased did not gift and transfer the suit property to the 1<sup>st</sup> respondent.
  62. Being the one who desired judgment on the alleged irregularity and illegality in the transfer of the suit property to the 1<sup>st</sup> respondent, it behooved the appellant to not only plead specifically with particulars of the alleged irregularity and/or illegality but also to prove to the required standard the alleged and particularized actions constituting irregularity and illegality. He failed to discharge that legal duty.
  63. The upshot of the foregoing is that the TM was justified in dismissing his case and allowing the respondents' counterclaim.
  64. Arising from the foregoing determination, I find the instant Appeal to be lacking in merit and dismiss it with costs to the respondents.
  65. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**L. N. WAITHAKA**

**JUDGE**

**Judgment delivered virtually in the presence of:-**

Mr. Maritim for the appellants

Mr. Kurgat for the respondents

Court Asst.: Thomas

