



**Chemitei v Yano & 2 others (Environment & Land Case 12 of 2020)  
[2023] KEELC 16950 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16950 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 12 OF 2020**

**EO OBAGA, J**

**APRIL 20, 2023**

**BETWEEN**

**TRUPHENA J CHEMITEI ..... PLAINTIFF**

**AND**

**PIUS KIPTUM YANO ..... 1<sup>ST</sup> DEFENDANT**

**REUBEN KIPKEMOI KOGO ..... 2<sup>ND</sup> DEFENDANT**

**JOSPHAT KIPROTICH KIKONO ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit against the Defendants in which she sought the following reliefs: -
  - a. An order of declaration that the Defendants and their agents and or servants are trespassers on the Plaintiff's parcel of land known as Title Nos. Cherangany/Kapkanyor/58 and LR. No. Elgeyo/Marakwet Cherangany/Kapkanyor/59.
  - b. An order of eviction against the Defendants, their servants and or agents, evicting the Defendants and their servants and or agents from all that parcels of land comprised in Title Nos. Cherangany/Kapkanyor/58 and LR. No. Elgeyo/Marakwet Cherangany/Kapkanyor/59.
  - c. An order of permanent injunction restraining the defendants, their servants and/or agents from being on, entering, re-entering, occupying or continued occupation or possession, ploughing, cultivating the plaintiff's parcel of land referenced as Title Nos. Cherangany/Kapkanyor/58 and LR. No. Elgeyo/Marakwet Cherangany/Kapkanyor/59 and /or from doing anything that will and or violate the plaintiff's proprietary rights and or quiet possession over the said Title Nos. Title Nos. Cherangany/Kapkanyor/58 and LR. No. Elgeyo/Marakwet Cherangany/Kapkanyor/59.
  - d. Damages and mense profits.



- e. Costs of this suit.
  - f. Any other relief that this Honourable court deems fit to grant.
2. The Defendants filed a defence and raised a counter-claim in which they seek the following reliefs: -
- i. A declaratory order to the effect that the 1<sup>st</sup> Defendants late husband Vincent Chemitei acquired titles to parcel Cherangany/Kapkonyor/58 & 59 fraudulently.
  - ii. An order directing the 3<sup>rd</sup> Defendant to revoke titles relating to parcel Cherangany/Kapkonyor/58 & 59 currently held by the 1<sup>st</sup> Defendant as the same were acquired fraudulently.
  - iii. An order directing the 3<sup>rd</sup> Defendant to issue a title in the name of Gikono Kibor alias Kikono Bon for the parcel of land known as Cherangany/Kapkonyor/40.
  - iv. A declaratory order to the effect that subdivisions Cherangany/Kapkonyor/58 & 59 were part and parcel of Cherangany/Kapkonyor/40 and should revert back to Cherangany/Kapkonyor/40 in the name of Kikono Bon.
  - v. A permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants restraining their agents and servants from entering, remaining or occupying or continued occupation, cultivating or in any way interfering with the parcels of land known as Cherangany/Kapkonyor/58 & 59.
  - vi. General damages for trespass and mental anguish suffered by the plaintiffs including being charged with criminal offences relating to the suit herein.
  - vii. Costs of the suit.
  - viii. Any other relief that this Honourable court deems fit and just to grant.

### **Background;**

- 3. The genesis of the dispute in this case can be traced from LR. No. Cherangany/Kapkonyor/40 which was owned by Gikono Kibor alias Kikono Bon whom I shall hereinafter refer to as Kikono. Kikono was born in 1901, he was illiterate and had a deformed left hand. LR. NO. Cherangany/Kapkonyor/40 measured about 50 acres.
- 4. In 1991, Kikono filed a suit against Vincent Chemitei and Kiptanui Kimaget alleging that the two had fraudulently had his property subdivided into Cherangany/Kapkonyor/58 and 59. Cherangany/Kapkonyor/58 was allegedly transferred to Kiptanui Kimaget whom I shall hereinafter refer to as Kimaget who later allegedly transferred it to Vincent Chemitei whom I shall hereinafter refer to as Chemitei.
- 5. Chemitei allegedly purchased LR. No. Cherangany/Kapkonyor/59 from Kikono. Eldoret HCCC No. 51 of 1991 between Kikono as Plaintiff and Chemitei and Kimaget as Defendants was partly heard when Chemitei and Kimaget died. While the suit was pending substitution of Chemitei and Kimaget, Kikono also died.
- 6. The Plaintiff in this case is the second wife of Chemitei. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are sons of Kikono. The 1<sup>st</sup> Defendant is the one who assisted Kikono to file HCCC No. 51 of 1991 and claims to have purchased 12 acres out of Kikono's land. The 1<sup>st</sup> Defendant is one of the persons to whom a limited grant of letters of administration of the estate of Kikono were given limited to filing and defending a suit on behalf of Kikono's Estate.



7. Kikono who died on 24/11/2008, his wife and three children were interred on a portion known as LR. Cherangany/Kapkanyor/59. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are in occupation of part of LR. No. Cherangany/Kapkanyor/59. The filing of this suit was triggered when the Defendants started felling trees which were on LR. No. Cherangany/Kapkanyor/59. The Plaintiff resides on LR No. Cherangany/Kapkanyor/58.
8. The Plaintiff sent goons who evicted the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and stole their animals. A report was made to Kapcherop Police Station but nothing happened. When this suit was filed, the Plaintiff also filed an application for injunction. This application was heard and the same was granted. The Defendants were restrained from interfering with LR. No. Cherangany/Kapkanyor/59 other than the Sacres which the Plaintiff had allowed them utilize.

**Plaintiff's case;**

9. The Plaintiff testified that her husband purchased 20 acres comprised in LR. No. Cherangany/Kapkanyor/58 from Kimaget and 30 acres comprised in LR. No. Cherangany/Kapkanyor/59 from Kikono. The two properties were registered in Chemitei's name. Chemitei stayed in the suit property with his first wife until 1994 when she re-located. The Plaintiff came to the suit properties in 1987.
10. The Plaintiff later carried out succession jointly with her co-wife. The two properties were later transmitted into her name. she has remained in possession until the year 2020 when the Defendants started clearing trees and burning the vegetation on LR. No. Cherangany/Kapkanyor/59 beyond the 5 acres which the Plaintiff had allowed them to utilize.
11. The Plaintiff sought the help of the village elder who came and warned the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants against destroying her trees. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants told her that they were going to report her to the Police. The Plaintiff and the village elder were summoned to Police where they found the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Police told her that as she did not have a court order stopping them from doing what they were doing, she should let them proceed.
12. The Plaintiff testified that the 1<sup>st</sup> Defendant has never been on the suit property. The Plaintiff called PW2 David Kiplagat Chemilil who testified that his late father was a neighbor of Kikono. He stated that he remembers in the 70's, Chemitei went to their home and told them that he had purchased land from Kimaget and that he was now their neighbor. They welcomed Chemitei and even helped him dig holes when he was fencing his land. Chemitei later went back and told them that he had also bought land from Kikono. He stated that Kikono sold his land because he wanted to relocate to Kamoi area. He stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are utilizing a small portion of Cherangany/Kapkanyor/59.
13. The Plaintiff also called Thomas Cheboi Chebii who used to be an assistant chief. He testified that there is a time Chemitei wrote a letter to him complaining that Kikono had refused to move out of his land. He went and convened an elders meeting and Chemitei was asked to give Kikono 5 acres which he accepted. He stated that he served as an assistant chief upto 1994.
14. The Plaintiff called her last witness Samwel Kipmwetich Cheboi who testified that he is a retired teacher. He used to teach at Kapteber primary school where Chemitei's first wife Pauline used to teach. Chemitei was a veterinary officer. Kimaget who was a parent at Kapteber primary told him that he had purchased 20 acres from Kikono. Kimaget later told him that he had sold his 20 acres to Chemitei.
15. Chemitei and his wife Pauline occupied the 20 acres until Pauline was transferred to Uasin Gishu after serving for five years at Kipteber primary school. He stated that had Vincent wanted to settle his wife



Pauline, he would have asked him to accommodate her within his land which was next to Kipteber Primary school.

### **1<sup>st</sup> Defendant's case**

16. The 1<sup>st</sup> Defendant testified that sometime in 1988, Kikono approached him to buy part of his land then known as Cherangany/Kapkanyor/40. He accompanied Kikono to the Eldoret Lands Registry where he sought to ascertain whether the land belonged to Kikono. Once at Eldoret, it turned out that Kikono's name in the ID and that in the title differed. The Land Registrar asked them to apply to have the name corrected or for change of name. They did as requested.
17. On 7/1/1989, he entered onto a sale agreement for purchase of 12 acres from Kikono at a consideration of Kshs 36,000/= . He then proceeded to the Land Control Board of Chebiemit where Kikono's land was to be subdivided into four portions of 38 acres and 3 portions of 4 acres each. The Land Control Board approved the subdivision on 7/3/1989. He proceeded to clear the land rates for the year 1977 to 1989. He then proceeded to Iten survey office where he paid survey fees.
18. The surveyors went to the ground where they were supposed to subdivide Kikono's land to be Cherangany/Kapkanyor/81,82,83 and 84. He therefore took possession of his 12 acres. He put up two houses.
19. In 1990, Chemitei razed down one of his houses. He reported him to Police who charged Chemitei and another for arson before Kitale Chief Magistrates Court in Criminal Case No. 2695 of 1990 Republic vs- Vincent Chemitei and James Kokwani Tuwei.
20. When the 1<sup>st</sup> Defendant went to the Land Control Board to have his 12 acres transferred to him, Chemitei appeared before the board and showed them two titles. Chemitei was asked to show a sale agreement or evidence of payment but he did not have any. The District Commissioner then advised Kikono to go and file a case at Eldoret High Court to challenge the titles held by Chemitei.
21. The 1<sup>st</sup> Defendant went on to testify that Kikono proceeded to file Eldoret HCCC No. 51 of 1991. Kikono testified in that case. He also testified and a member of the Land Control Board also testified. The two Defendants in that case died before conclusion of the case. As Kikono was ailing, he gave him a power of attorney to proceed with the case. Before he could start, he tried to issue citation to the families of the Defendants to accept to administer the estates of the deceased persons. Unfortunately, Kikono died. He later moved to the succession court to challenge the grant issued to the Plaintiff and her co-wife but the matter is pending before the Family Division court at Eldoret.
22. The 1<sup>st</sup> Defendant testified that he had planted potatoes and cypress on his 12 acres but the Plaintiff's family ploughed the land thus destroying the potatoes. The 1<sup>st</sup> Defendant prayed that he be compensated for the loss he incurred when the Plaintiff's family destroyed the fence separating his land and that of the plaintiff. He prays that the two titles held by the plaintiff be cancelled so that the title reverts to the estate of of Kikono from the where he will get his 12 acres.

### **2<sup>nd</sup> and 3<sup>rd</sup> Defendants' case;**

23. The 2<sup>nd</sup> Defendant testified on behalf of his brother the 3<sup>rd</sup> Defendant. He stated that Kikono their father owned LR. No. Cherangany/Kapkanyor/40. He stated that sometime in 1975, Kikono entered into an oral agreement with Kimaget for sale of 20 acres of his land. When Kikono and Kimaget appeared before Chebiemit Land Control Board, the board deferred the application for subdivision until Kikono brought his wife and Kimaget brought additional Kshs 8,000/= to make it Kshs 18,000/=



24. Kikono never went back and Kimaget never brought Kshs 8000/= as advised by the board. The sale therefore did not go through. In or around 1977, Kimaget introduced Chemitei to the family of Kikono. Chemitei's first wife Pauline had been transferred to Kipteber Primary school and she had nowhere to live. Chemitei then requested Kikono to allow him to put up a house on his land where his wife will reside as she attended school. Kikono agreed and Chemitei proceeded to put up a house.
25. When Pauline, Chemitei's wife was transferred from Kipteber Primary school in 1984, she vacated the house on Kikono's land. The house was re-occupied by the Plaintiff. Chemitei then gave Kikono 750/= to appease him as the Plaintiff had not been formally allowed to come in. Chemitei told Kikono that since he had newly married the Plaintiff, it was not good for him to take her to where his first wife Pauline was.
26. The 2<sup>nd</sup> Defendant stated that in 1988 Chemitei came to their home drunk. He requested to see Kikono. Kikono came out of the house. He heard Chemitei calling Kikono a squatter. It is at this time that Kikono decided to sell a portion of his land to the 1<sup>st</sup> Defendant so that he would ascertain its status. Kikono entered into a written agreement with 1<sup>st</sup> Defendant in which the 1<sup>st</sup> Defendant purchased 12 acres.
27. Kikono took the 1<sup>st</sup> Defendant to the Land Control Board for subdivision of his land into four portions. While at the board, Chemitei appeared and claimed that he had two titles to the whole land. It is at this juncture that the District Commissioner advised Kikono to go and file a suit challenging how Chemitei acquired the two titles.
28. Kikono proceeded to file Eldoret HCCC No. 51 of 1991. After the case was partly heard, the Defendant in that case died. The 1<sup>st</sup> Defendant tried to follow up the case in vain as it had abated. In February 2020 the Plaintiff trespassed to the portion occupied by him and his brother as well as the 1<sup>st</sup> Defendant. The matter was reported to Kapcherop Police station. The Plaintiff was warned not to interfere with them.
29. However, on 19/4/2000, the Plaintiff sent a group about 40 goons who came and chased away the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from the land. They also chased away the 1<sup>st</sup> Defendant's wife. They stole 2<sup>nd</sup> and 3<sup>rd</sup> Defendants cows and destroyed maize which they had planted. He reported the incident to Kapcherop but no action was taken. His lawyers wrote letters to the DCIO and Land Fraud Unit but there was no assistance. The 2<sup>nd</sup> Defendant maintains that his father was not paid even a cent for the land by Chemitei. He prays that the titles held by the Plaintiff be cancelled as the subdivision of Kikono's land was undertaken fraudulently.
30. The Defendants called DW3 Reuben Kipkorir, a surveyor with Elgeyo/Marakwet County. He testified that he had been summoned by court to come and produces documents which were in the survey records of the county. He produced letter of consent dated 7/3/1989 in which Cherangany/Kapkanyor/40 was to be subdivided into four portions. He also produced a mutation. He also produced a letter dated 1/8/1990 from the survey office which confirms that the survey office of Elgeyo/Marakwet were never involved in the subdivision of LR. Cherangany/Kapkanyor/40.

### **Analysis and determination;**

31. The parties were directed to file written submissions. The Plaintiff filed her submissions on 28/11/2022. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their submissions on 10/1/2023. I have considered the evidence adduced by the parties herein as well as the submissions filed. The issues which emerge for determination are firstly, whether there was subdivision of LR. No. Cherangany/Kapkanyor/40 at any given time. Secondly, whether Kimaget lawfully sold LR No. Cherangany/Kapkanyor/58 to



Chemitei. Thirdly, whether Kikono ever sold LR. No. Cherangany/ Kapkanyor/59 to Chemitei. Fourthly, whether there was lawful title which would have vested in the Plaintiff's name by way of transmission. Fifthly, whether the counter claim is statute barred. Sixthly, are the Plaintiffs and the Defendants entitled to their respective claims. Lastly, which order should be made on costs.

**Whether there was subdivision of LR. No Cherangany/Kapkanyor/40 at any given time;**

32. The Plaintiff testified that LR No. Cherangany /Kapkanyor/40 was subdivided into two portions of 20 acres and 30 acres respectively and that Chemitei purchased LR. No. Cherangany/Kapkanyor/58 from Kimaget. The evidence on record is that Kikono and Kimaget appeared before Marakwet Land Control Board where Kikono wanted to subdivide his land into two portions of 8.0 hectares and 12.0 hectares. The Land Control Board which convened its meeting at the District officer's office on 22/1/1976 deferred the matter to the next meeting to enable Kikono to bring his wife and Kimaget to add Kshs 8,000/= for the 8.0 hectares which Kimaget intended to purchase to make a total of Kshs 18,000/=
33. There is no evidence which was adduced to show that Kikono and Kimaget returned to the Land Control Board as directed. The directions of the Land Control board are contained in minute No. 9 of 1976 which minutes were produced as defence exhibit 22. There is a letter dated 1/8/1990 from the District surveyor Iten which confirmed that there was no subdivision which was carried on LR. No. Cherangany/Kapkanyor/40 which would have resulted in LR. No Cherangany/Kapkanyor/58 and 59.
34. When Kikono testified in Eldoret HCCC No 51 of 1991, he stated that he attended the Land Control Board together with Kimaget but they were asked to go back later. He testified that Kimaget had only paid him Kshs 4,000/= out of the agreed amount of Kshs 18,000/= for the 10 acres he intended to sell to Kimaget. Kikono's evidence is that he never went back to the Land Control Board but he later learnt that there were titles which came out and that Kimaget had sold a portion of his land to Chemitei. The proceedings from Eldoret HCCC 51 of 1991 were produced as defence exhibit 2.
35. The 1<sup>st</sup> Defendant testified that he entered into a sale agreement with Kikono in which Kikono agreed to sell to him 12 acres out of the 50 acres at a price of Kshs 36,000/=. The sale agreement is dated 7/1/1989. The agreement was produced as defence exhibit 9. An application for consent of the Land Control Board was made. This was produced as defence exhibit 10. A consent of the Land Control Board was given which was produced as defence exhibit 11. A mutation was prepared which was produced as defence exhibit 12.
36. The 1<sup>st</sup> Defendant went on to state that a surveyor went to the ground and put beacons in place. Kikono's land according to the 1<sup>st</sup> Defendant was subdivided into 4, 4, 4, and 36 acres respectively which were given numbers 81, 82, 83 and 84. The 1<sup>st</sup> Defendant testified that he took possession of his 12 acres, built two houses, planted 400 cypress trees and potatoes. Chemitei came and razed down his houses including the house of Kikono. When he went to the lands office to have the transfer of the 12 acres effected, he was informed that Chemitei had two titles over the 50 acres which belonged to Kikono.
37. I have perused the application for consent of the Land Control Board dated 4/3/1989. This application was neither signed by Kikono nor the 1<sup>st</sup> Defendant. The letter of consent dated 7/3/1989 was signed by the District Commissioner. The mutation which was produced was not registered. When Kikono testified in Eldoret HCCC No. 51 of 1991, he was categorical that he had not given any land to the 1<sup>st</sup> Defendant. He stated that the 1<sup>st</sup> Defendant in this case had given him money to facilitate Eldoret HCCC No 51 of 1991 and that they had agreed with the 1<sup>st</sup> Defendant that once he succeeded in the



case, he was going to sit down with the 1<sup>st</sup> Defendant and agree with him how much land he was to give him.

38. The 1<sup>st</sup> Defendant did not produce any minutes of the Land Control Board. While the 1<sup>st</sup> Defendant was being cross examined in Eldoret HCCC No. 51 of 1991, he stated that Kikono had agreed to give him twelve acres if he won the case. This therefore confirms that there was no subdivision of Kikono's land in 1989 as alleged. The 1<sup>st</sup> Defendant testified in Eldoret HCCC 51 of 1991 on 30/3/1994. There is therefore no way he would have entered into an agreement with Kikono in 1989 and Kikono subdivided his land in 1989 as the 1<sup>st</sup> Defendant alleges.
39. From the above analysis, it is clear that Kikono's land was neither subdivided at the instance of Kimaget nor the 1<sup>st</sup> Defendant in this case.

#### **Whether Kimaget lawfully sold LR. No Cherangany/Kapkanyor/58 to Chemitei;**

40. According to the extract from the register, the register for parcel No. Cherangany/Kapkanyor/58 was opened on 22/3/1977. The land was then transferred the same day to Kimaget who transferred it to Chemitei on 8/10/1977. Chemitei obtained title deed on 26/3/1990, over 13 years after transfer into his name.
41. While dealing with issue number one hereinabove, I made a finding that there was no subdivision of LR. No. Cherangany/Kapkanyor/40. During the hearing of Eldoret HCCC 51 of 1991, two members of the Land Control Board testified. These were Kimining Suter and Herman Kiptugen Yano. It emerged that there were two different sets of minutes of the Land Control Board. One of the board members, Kimining Suter claimed that he was present in 1976 while Kikono and Kimaget appeared before the board but it is clear from the minutes of the board of 21/1/1976 that he was absent without apology. He claimed that the minutes of the same day which had 8 members including his name were the correct ones.
42. When Herman Kiptugen Yano testified in Eldoret HCCC No. 51 of 1991, he claimed that in 1976, Kikono appeared before the Board and sought to sell his 20 acres to Kimaget. He claimed that Kikono was granted the consent and that his name appeared on number 6 on the list of members present. According to the minutes of 22/1/1976, this witness's name appears in number 4. It is therefore clear that the minutes where his name appeared as number 6 were parallel to the minutes in which his name appears as number 4. This witness conceded that at times, the minutes of the Board can be imitated.
43. As there was no subdivision of LR. No. Cherangany/Kapkanyor/40, there is no way Kimaget would have transferred what he did not have to Chemitei. The Plaintiff's title which stemmed from title held by Chemitei had its origin from Kimaget who claimed to have purchased the land from Kikono. This is the title which is under challenge. It was incumbent for the Plaintiff to show by evidence that the title was obtained by Chemitei in a genuine way. The Plaintiff could not dangle the title as proof of ownership without showing that the same was obtained in a genuine manner.
44. In *Munyu Maina –Vs- Hiram Githae* (2013) eKLR, it was held that when any title to land is under challenge, it is not enough for one to merely wave the said title and expect a court to uphold his or her claim of ownership. The law requires such a party to prove to the required standards the validity and integrity of the title so held.



45. In the case of Alice Chemutai too –vs- Nickson Kipkurui Korir & 2 others (2015) eKLR which cited Elijah Makeri Nyamgwara – vs- Stephen Mungai Njuguna & another (2013) eKLR, justice Munyao stated as follows: -

“First, it needs to be appreciated that for Section 26(1)(b) to be operative, it is not necessary that the title holder be party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26(1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

“... I find that the title of the Defendant having been obtained illegally, unprocedurally and/ or through a corrupt scheme, the same is liable to be cancelled. Regrettably, the doctrines of Estoppel and Equity would not apply in the present instance to sanitize an illegality.”

46. The Plaintiff failed to adduce evidence that the title which Kimage passed to Chemitei and which finally is held by the Plaintiff was obtained in a legal manner. I therefore find that Kimage obtained title unlawfully and through a corrupt scheme. He therefore had no good title to pass to Chemitei who himself was aware of the fraud which was involved in its acquisition.

#### **Whether Kikono ever sold LR. No. Cherangany/Kapkanyor/59 to Chemitei;**

47. There was absolutely no evidence adduced by the Plaintiff to show how Chemitei acquired LR. No Cherangany/Kapkanyor/59 from Kikono. There was no sale agreement produced. There was no evidence of the consideration given to Kikono if any. There was also no application for consent of the Land Control Board which was made and no consent was produced. The two members of the Land Control Board who testified in Eldoret HCCC No. 51 of 1991 stated that they do not know how Chemitei obtained title to LR. No. Cherangany/Kapkanyor/59 as he did not appear before the board for consent to transfer the land.
48. The alleged transfer from Kikono to Chemitei was dated 10/10/1997. The identity card number of Kikono was indicated as 977883. This was not Kikono’s Identity card number. A report from the Registrar of persons showed that Kikono’s identity card number was 7390468 when the alleged transaction occurred. The Registrar of persons could not verify whether the thumbprint on the transfer was that of Kikono. This was the same case with the thumbprint on the application for consent of the Land Control Board which was allegedly made on 10/10/1977. This is because the thumbprint impressions on the two documents were blurred and therefore unsuitable for comparison with what was held at the Registrar of persons’ offices.
49. In David Wachira Kinuu –Vs- Betty Wambua Githu; Kiambu District Land Registrar (Interested party) (2019) eKLR, Justice Gacheru dealt with a case where the Identity card in a transfer form was different from that in the identity card. It was held that this could not be allowed as it was prima facie a case of fraud. The title obtained was found to be fraudulent and the same was cancelled.
50. In a bid to sanitize the fraudulent title which Chemitei obtained, the Plaintiff on 15/2/2005 purported to make Kikono sign an agreement to the effect that as Kikono had sold all his land to Chemitei which rendered him landless, the Plaintiff was willing to give Kikono 5 acres in exchange for him withdrawing Eldoret HCCC No. 51 of 1991 so that a meeting could be convened on how Kikono was going to get the 5 acres out of the land he had allegedly sold to Chemitei



51. During the hearing of Eldoret HCCC No. 51 of 1991, Kikono was categorical that he did not sell his land to Chemitei. Kikono wondered how a family man like him could sell all his land and remain landless. It is the evidence in this case which was damaging to Chemitei's claim to the land which made the Plaintiff to attempt to have Kikono withdraw the suit.

52. On 3/8/1990, Kikono caused cautions to be registered against the titles for LR No Cherangany/Kapkanyor/58 and 59. Despite there being cautions on the two titles, the Plaintiff was registered as proprietor of the two suit properties by way of transmission on 27/7/2011. Four months later, the cautions were removed on 30/11/2011 and titles issued to the Plaintiff. The Land Registrar invoked the provisions section 133 of the Registered Land Act CAP 300 (Now repealed) which stated as follows: -

- “(1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.
- (2) (a) The Registrar may, on the application of any person interested, serve notice on the cautioner warning him that his caution will be removed at the expiration of the time stated in the notice.
- (b) If at the expiration of the time stated the cautioner has not objected, the Registrar may remove the caution.”

53. As at the time the cautions were removed, Kikono had long died and the Plaintiff was aware of his death. In her evidence, the Plaintiff claimed that she did not know how the cautions were removed. There is no evidence that the Registrar gave any notice for removal of the cautions. Kikono was not there to remove the cautions and there was no court order for removal of the cautions.

54. In the case of Gordon Otieno Muna –Vs- Dennis Ongeso Ojany & 4 others (2021) EKLR Justice Ombwayo held as follows: -

“This court finds that the registration of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was effected while a caution was registered and therefore the transactions were highly irregular, illegal, null and void. On the 2<sup>nd</sup> issue as to whether the suit was statute barred, I do find that the Appellant's claim is based on illegality, fraud and irregularity.”

55. In the Case of Farley (AUST) proprietary Limited –Vs- J.R Alexander & sons (Queensland) Proprietary Limited (75 C.L.R.) 482, which cited the English case of Jonesco –Vs- Beard (1930) A. C. 298 at page 301, 302, Williams J stated as follows: -

“Fraud is conduct which vitiates every transaction known to the law. It even vitiates in judgment of the court. It is an insidious disease and if clearly proved spreads to and infects the whole transaction.... In most cases a registration obtained in fraud of the rights of another would also involve a fraud on the Registrar... where original registration was procured by fraud, the use to which the monopoly so obtained was subsequently put could not cure the initial invalidity.”

56. In the English case of Lazarus Estates Limited –Vs- Beasley (1956) 1 ALL ER 341, Dennis L.J stated as follows:-

“No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgement of a court, no order of a Minister, can be allowed to stand if it has been



obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever.”

57. It is clear from the above analysis that Kikono never sold LR. No. Cherangany/Kapkanyor/59 to Chemitei. Chemitei obtained the title by way of fraud which has been proved. I therefore find that Kikono never sold LR. No Cherangany/Kapkanyor/59 to Chemitei.

**Whether there was lawful title which would have been passed to the Plaintiff by way of transmission;**

58. While dealing with the second and third issues hereinabove, I found that both Kimaget and Chemitei obtained their titles in a fraudulent way. Kimaget had no good title which he could pass to Chemitei. Chemitei also obtained title to LR. No Cherangany/Kapkanyor/59 in a fraudulent manner. Chemitei therefore had no good titles which could be passed to the Plaintiff by way of transmission.
59. Infact the Plaintiff was part of the fraudulent transfer of the two titles by way of transmission. She had herself registered as owner of the two properties well knowing that there were cautions lodged against the titles even though she pretended that she did not know how the cautions were removed.

**Whether the counterclaim is statute barred**

60. There is no doubt that the suit which was filed by Kikono in Eldoret HCCC No. 51 of 1991 abated by operation of law. No other suit could be brought without reviving the abated suit. Kikono died on 24/11/2008. By 23/11/2009, Kikono’s suit had abated. The cause of action in relation to LR No. Cherangany/Kapkanyor/40 arose on or around 1989 when Kikono discovered the fraud. He filed Eldoret HCCC No. 51 of 1991 the following year. This case proceeded on well until both defendants died. Kikono also died later on.
61. This is a case in which parties involved were clearly taking advantage of an illiterate person who was deformed in his left arm and who appeared to love alcohol. However, notwithstanding the fact that the counter-claim is statute barred, isn’t there a way that Kikono’s land which was clearly fraudulently taken from him can be salvaged?
62. The Defendants counsel has submitted that the issue of limitation was never raised in the defence to counter-claim and in support thereof has cited the case of Stephen Onyango Achola & another –Vs- Edward Hongo Sule (2004) eKLR where the Court of Appeal stated as follows: -
- “The 2<sup>nd</sup> Respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the 2<sup>nd</sup> Respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.” (Emphasis added).
63. I have perused the defence to counter claim and notice that in paragraph 33 of the defence to counterclaim, the 1<sup>st</sup> Defendant has clearly pleaded that if the Plaintiffs had any cause of action, then the same is statute barred.
64. However notwithstanding that the 1<sup>st</sup> Defendant raised a defence of limitation, Justice Kasango in the case of John Nandukule Omukuba –Vs- Nimech P. Shah Bhimji (2008) eKLR cited the case of Ernest & Young (A Firm) ALL ER 471 in which the Chancery Division in England in 1996 had to consider



their section 35 of the Limitations of Actions Act 1980 which is a replica of our section 35 of the Limitation of Actions Act where the Court stated as follows: -

“By virtue of Section 35 of the 1980 Act, a Defendant could use a counter claim as a vehicle immune from existing accrued limitation defences to bring a claim which would be statute barred if brought in separate proceedings, provided the subject matter of the counter claim was not one which, having regard to the interests of procedural convenience, ought to be tried in a separate action...”

65. Following the interpretation of the Chancery Division in the Ernest & Young case (supra) Justice Kasango held as follows: -

“... Not only am I persuaded by that decision but the interpretation of section 35 in my view make it very clear that a counter claim may be filed in the claim where it is pleaded and in so doing the opposite party cannot raise a defence of limitation. I am therefore of the view that the Defendants counter claim hereof is not time barred.” Emphasis added.

66. I am equally persuaded that the interpretation by the Chancery Division squarely applies to the case at hand. It would not have been convenient to bring a separate suit given the fact that the main suit herein is intertwined with the counter-claim and therefore called for a counter-claim in the same case as per the Proviso in the finding of the Chancery Division in the case of Ernest and Young (Supra). I therefore find that the counter claim is not statute barred.

67. The 1<sup>st</sup> Defendant in the counter claim together with Chemitei, her husband have tormented the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in the counter claim. Their house was razed down by Chemitei, who was charged in Kitale Chief Magistrate Criminal Case No. 2695 of 1990 Republic vs. Vincent Chemitei & James Kokwani Tuwei. The 1<sup>st</sup> Defendant also caused the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs to be arraigned in court facing criminal charges.

68. The 1<sup>st</sup> Defendant invaded LR. No Cherangany/Kapkanyor/59 whereby she forcefully ploughed and destroyed the fence separating LR. Cherangany/Kapkanyor/58 and 59. This is despite the fact that she found Kikono and his children residing on parcel No. 59. The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are entitled to general damages for trespass and mental anguish. Doing the best I can, I assess general damages in the sum of Kshs 1,000,000/=

69. The 1<sup>st</sup> Plaintiff did not adduce any credible evidence as against the 1<sup>st</sup> Defendant. His interest appears to get land from the Estate of Kikono for the monies he gave Kikono to enable him prosecute Eldoret HCCC No. 51 of 1991 and for assisting the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff in pursuit of their claim.

### **Disposition;**

70. From the above analysis, I find that none of the Plaintiff's prayers in the main suit can be granted. Consequently, I find that the Plaintiff in the main suit has failed to prove her case on a balance of probabilities. I proceed to dismiss the suit with costs to the Defendants.

71. On the other hand, I find that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in the counter-claim have proved their claim to the required standards. I enter judgement in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in terms of prayer (i), (ii), (iii), (iv), (v) and (vii) of the counter-claim dated 28/5/2020 in addition to general damages of Kshs 1,000,000/=

72. The 1<sup>st</sup> Plaintiff's suit in the counterclaim is dismissed with costs to the 1<sup>st</sup> Defendant.



**DATED, SIGNED and DELIVERED at ELDORET on this 20<sup>th</sup> day of April, 2023.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Ms. Kinyua for Plaintiff.

Ms. Kiptum for Defendants.

Court Assistant –Laban

