



**Sigilai & another v Kering (Environment & Land Case 79 & 83 of 2017
(Consolidated)) [2023] KEELC 18356 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18356 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 79 & 83 OF 2017 (CONSOLIDATED)**

MC OUNDO, J

JUNE 15, 2023

BETWEEN

AGNES KOE SIGILAI 1ST PLAINTIFF

**LOICE CHEPKOECH BETT (SUING AS THE PERSONAL REPRESENTATIVE
TO THE ESTATE OF DAVID CHERUIYOT BETT) 2ND PLAINTIFF**

AND

KIMALEL ARAP KERING DEFENDANT

JUDGMENT

1. By consent which was adopted in an order dated February 10, 2021, ELC 83 of 2017 was consolidated with ELC 79 of 2017 whereby ELC 79 of 2017 was to be the lead file. In the said consolidated matter, the Plaintiffs' claim against the Defendant was that they were entitled to exclusive and unimpeded right of possession and occupation of the suit properties LR No Kericho/Kipchimchim/2441 and 2442 and therefore there be issued an eviction order against the Defendant from their suit parcels LR No Kericho/Kipchimchim/2441 and 2442. The Plaintiffs also sought for general and special damages to be assessed as well as for costs of the suit together with interest thereon.
2. The suit was opposed by the 2nd Defendant's defence and counterclaim in which the Defendant denied the contents of the Complaint and put up a counter claim to wit that Title Numbers LR Kericho/Kipchimchim/2440, 2441 and 2442 were nonexistent in the registry map because they were title numbers which had been illegally issued as they had not authorized any subdivision to be effected on the original title namely LR Kericho/Kipchimchim/834 which belonged to himself and his two brothers. He thus sought that the titles issued to the Plaintiffs be declared null and void and the same be cancelled forthwith.
3. Subsequently after both parties had complied with the provisions of Order 11 of the Civil Procedure Rules, the matter had been set down for hearing.



The Plaintiff's case

4. The 1st Plaintiff Agnes Koe Sigilai testified as PW1 to the effect that she lived in Kapchebtoror within Ainamoi constituency in Kericho County. That she had bought land from the Defendant who had afterwards uprooted the tea bushes she had planted therein and proceeded to fence off part of the land she had bought from him. The Plaintiff then adopted her witness statement as her evidence in chief.
5. In her cross examination, she confirmed that having bought the land which measured 3 (three) acres from the Defendant in a year she could not remember, he had transferred the same into her name. That they had visited the land office where she had been issued title to the same being LR Kericho/Kipchimchim/2441 and the old title had been torn. She was referred to the Green card to LR Kericho/Kipchimchim/834 which she did not comprehend and the same was marked as DfMFI 1.
6. She confirmed that she knew Taptabei W/O Serem who was the Defendant's mother but that she did not know Kipruto Arap Chumo. She also confirmed that she knew Chesengeny arap Kering as the husband to Taptabei but that she did not know that he was the father to the Defendant and his brothers.
7. She was referred to the Registry Index Map sheet No 4 which contained LR Kericho/Kipchimchim/834 to which she did not comprehend and the same was marked as DfMFI 2. She was prompted that the Map had showed that the land had not been subdivided to which she had responded that it had been the Defendant who had brought the title deed to the lands office wherein the land had been subdivided into three parcels and the old title had been destroyed.
8. She was categorical that the Defendant had sued her irrespective of the fact that she had bought land from him and she owed him no debt. She also sought that her title should not be canceled.
9. At this juncture, the court sought to know the Plaintiff's age to which she produced her identity card showing that she was born in 1939. The court noted that although she was an elderly woman and was incoherent, yet she was truthful.
10. The next witness PW2 was one David Kiprono Chamndany who testified that she was the son of PW1 and that the Defendant was a brother to Kiplangat arap Korgen who had sold the suit land to his mother in a sale agreement. He attempted to produce a copy of the same which was objected to by the defense as they sought to have the original agreement.
11. That after the Defendant's brother had sold the land to his mother around the year 2013, the Defendant had complained that PW1 had taken occupation of part of the reserve road. That subsequently there had arisen a dispute to which the Defendant had also wanted part of the land and which dispute had been taken before the chief who had advised that there be a survey conducted on the land to establish the acreage which every party processed.
12. That indeed the surveyors had visited the land and measured the same wherein the Plaintiffs land No LR Kericho/Kipchimchim/2441 had been found to be larger than the Defendant's land which was parcel No LR Kericho/Kipchimchim/2440.
13. He also testified that after his mother had bought the land from Kiplangat, there had been no complaint raised and that he had been living on his mother's land for 43 years since he was born until 2013 when the Defendant raised the complaint.
14. In cross examination, the witness testified that PW1 had bought the land from Kiplangat arap Korgoren on 20th June 1975 before he was born and that the dispute had been between his mother and



the Defendant which dispute had stated in 2013 and had escalated to the Chief wherein the surveyors had visited the suit land in 2016.

15. He confirmed that he neither had the title nor the green card to land parcel No Kericho/Kipchimchim/2441 which was his mother's land but that he knew according to the sale agreement that the land was a subdivision of land parcel No 834 which land was registered to the Defendant and his two brothers.
16. The witness was referred to DMFI 1 to which he read the names on the green card and proceeded to testify that the said agreement did not contain the names of the other two brothers. That after the agreement had been executed, the land had been transferred to his mother although he did not see any transfer on the green card. He confirmed that a caution dated November 16, 1989 had been placed on the land by his mother.
17. He was also referred to DMFI 2 where he confirmed that he could see title 834 on the map dated July 25, 2018 of which title was intact and title number 2441 did not reflect thereon but reiterated that the three brothers had subdivided the land wherein the surveyor had confirmed that the land that had been sold to his mother measured 2.3 acres, but from the sale agreement, Korgoren had sold 3 acres to her.
18. In his re-examination, he reiterated that the surveyors had gone to the land to confirm the acreage of the portion of land that each person had received including his mother, Arap Kones and Arap Karing.
19. PW3 Loice Chepkoech Bett, who was the next witness and the 2nd Plaintiff in the suit testified that she was a primary school teacher and knew the Defendant who was her neighbor. That she had sued him for having placed a fence on almost 0.4 acres of her parcel of land during the month of June 2017.
20. That she had filed the suit on behalf of the deceased's husband who was the registered proprietor of parcel of land No Kericho/Kipchimchim/2442. She produced the Letters of Administration as Pf exh 1 and proceeded to testify that her late husband had bought the land measuring 0.8 hectares from one Wilson Kones in the year 2001 as per the sale agreement which she produced as Pf exh 2 and her statement as Pf exh 3.
21. That after her husband had purchased the land, he had been issued with a title deed in the year 2004 which title deed she produced as Pf exh 4.
22. That it had been when the Defendant and some boys had gone to her land to put up a fence that she had been called on phone and informed of the same wherein she had sent someone to stop them. That the Defendant had not explained to that person why he had gone to put up the fence on her land.
23. She marked the mutation forms dated June 11, 1992 as PMFI and confirmed that although the land had been subdivided, yet the Defendant had removed their fence and replaced it with his own after she had refused to sign the mutation forms that he had sent his son to take to her because the same were not in her name.
24. On cross examination, she confirmed that she had been issued with the grant on 18th of October 2010 which grant had been confirmed after filing of the case. She confirmed that there was no relationship between the Defendant and Kones and that the Defendant had taken his children to subdivide the land. She reiterated that the land that had been sold to them was Kericho/Kipchimchim/2442 measuring approximately 2.4 acres.
25. In re-examination, she testified that she did not know whether Mr. Wilson Kones had any other title before the sale of land and that she did not have the Registry Index Map although she had visited the land registry to find out if her piece of land was on the map. That she did not understand issues relating to maps and therefore could not locate her land on DMFI 2. She also stated that she did not know the



original land that had given rise to parcel No 2442 and therefore was not aware that the property she was claiming was on land parcel number 834.

26. When referred DMFI 1, she confirmed that neither her husband's name nor Wilson Kones' name reflected on the document. She also confirmed that she had neither been summoned by the police or received a complaint that the title held by her husband to the suit land was fraudulent.

The Plaintiff then closed its case.

27. The Defendant's case was opened by the Defendant Kimalel Arap Kering as DW1 who produced the Registry Index Map to land parcel Kericho/Kipchimchim/834 as Df exh 1 and proceeded to testify that the said land was registered to Kipruto arap Chumo, Kiplangat arap Korgoren and Kimalel arap Kering as evidenced in the green card which he produced as Df exh 2.
28. He proceeded to testify that he did not participate in the issuance of the titles produced by the Plaintiff and had only come to learn that they were in possession of the titles. That his two brothers with whom they were registered to the land jointly were now deceased and he now wished to have an opportunity to be allowed to subdivide the land to his deceased brothers' children.
29. In cross examination, he reiterated that he did not subdivide the land and neither did his brothers and therefore he was unaware of the parcels of land numbers 2440-2442. That he was also not aware that the court had directed a surveyor to visit the suit land and prepare a report. That as much as he was concerned, the original land had not been sub-divided, there were no mutation forms and neither had his brother sold the land as they still were in possession of the title deed in the name of Taptebui who had given them the land. That he was unaware of how the Plaintiffs obtained their title deeds. That the Plaintiffs were the ones who had destroyed their fences themselves. He denied knowing Agnes Sigilai, having a neighbor by the name of Agnes Koe Sgilai or having sold land to the said Agnes.
30. When the Defendant was re-examined, he reiterated that he had not participated in the subdivision of parcels number 2440 -2442 reiterating that parcel of land No 834 was their land and that the same had not been subdivided. That both his brothers were deceased and he did not know who had signed the mutation form. He also confirmed that Taptebui was their mother and that she was the one who had given them the land which was not sold to the Plaintiff.
31. When examined by the court, he confirmed that his elder brother had died about two years ago whereas his younger brother had died 1¹/₂ years later.
32. The defence then closed their case and parties were directed to file their written submissions.

Plaintiffs' Submissions.

33. The 1st Plaintiff's submission was that she was the registered proprietor of land parcel No Kericho/Kipchimchim/2441 having purchased the same from one Kiplangat A. Korgoren via Land Sale Agreement dated June 20, 1975 wherein in the year 1992 he had transferred the same to her. That sometime in the year 2016, the Defendant attempted to forcefully enter into the said land claiming part of it. That on June 22, 2017, the Defendant had informed the Plaintiff that they wanted to subdivide her land wherein she had refused and the Defendant together with his agents went ahead and destroyed her fence and erected a new one which cut across her property.
34. The 2nd Plaintiff's case on the other hand was that she had filed the suit as an Administrator to the estate of her late husband David Cheruiyot Bett who was the registered proprietor of the parcel of land known as L.R No Kericho/Kipchimchim/2442 having purchased the same from one Wilson



- Kiplangat Kones via Land Sale Agreement dated December 15, 2001, land which they had been cultivating ever since it was purchased.
35. That sometime in or around the year 2017, the Defendant while laying claim to it, forcefully entered onto the said property, destroyed the fence and fenced off part of her land which contained tea bushes.
 36. Both the Plaintiffs' contention was that the Defendant's claim that titles to parcels No Kericho/Kipchimchim/2440, 2441 and 2442 were fake and illegally issued as no sub-division had been effected on the original title, being No Kericho/Kipchimchim/834, did not hold water as he had failed to prove the said assertion.
 37. The Plaintiffs framed their issues for determination as follows;
 - i. Whether the suit properties LR No Kericho/Kipchimchim/2441, and No 2442 belong to the Plaintiffs?
 - ii. Whether the Defendant trespassed onto the part of the suit properties LR No Kericho/Kipchimchim/2441 and 2442.
 - iii. Whether the Plaintiffs are entitled to the reliefs sought.
 - iv. Who shall bear the cost of the suit?
 38. On the first issue for determination, the Plaintiffs submitted that whereas the 1st Plaintiff had been registered as proprietor of land parcel No Kericho/Kipchimchim/2441 measuring approximately 1.38 hectares and had been issued with a title deed on June 9, 1992, the 2nd Plaintiffs' deceased husband had been registered as proprietor of land parcel No Kericho/Kipchimchim/2442 measuring approximately 0.8 hectares and had been issued with a title deed on August 9, 2004.
 39. The Plaintiffs relied on the provisions of Section 26(1) of the *Land Registration Act*, the sale agreement and the mutation forms tendered in evidence to buttress the fact that they were the registered proprietors of their respective suit parcels of land herein.
 40. They further submitted that the Defendant's claim that he did not agree and/or participate in the subdivision of the original parcel of land No Kericho/Kipchimchim/834 and that the subsequent titles issued were fake and therefore the Plaintiffs could not claim ownership over the resultant parcels of land was not backed by any evidence and neither did he sue or join the issuing authority, being the Land Registrar to the suit.
 41. It was their Submissions that they had proved their case on a balance of probability that they were the legal proprietors of the suit property and as such, the proprietary rights ought to be protected by the court.
 42. On the second issue for determination as to whether the Defendant had trespassed onto their suit property, the Plaintiffs' submission was that they had demonstrated as to how the Defendant had trespassed and destroyed their fences thereby erecting his own fence that had cut cross their land. That efforts deployed to have him vacate from their respective parcels of land had fallen on deaf ears. That it was evident that the Defendant had encroached on and taken occupation of part of their respective parcels of land illegally, without color of right which act amounted to trespass.
 43. On the third issue for determination as to whether the Plaintiffs were entitled to the reliefs sought, they had submitted that having proved their case against the Defendant on a balance of probabilities, they were entitled to the reliefs sought. That trespass to land was actionable without proof of any damage as was held in the case of *Joseph kipchichir Koeh v Phillip Cheruiyot Sang* [2018] eKLR and therefore



the court ought to award them ample general damages for trespass in consideration for the loss and suffering meted upon them by the Defendant.

44. As to who would bear the costs of the suit, the Plaintiffs' submission was that the costs should be catered for by the Defendant as costs followed the events. That the Plaintiffs be declared proprietors to their respective parcels of land, the Defendant to be evicted from therein and his counterclaim be dismissed for lack of merit.

Defendant's Submissions.

45. In opposition to the Plaintiffs' suit and in support of his counterclaim, the Defendant framed his issues for determination as follows;
- i. Whether there was subdivision in respect to LR No Kericho/Kipchimchim/834
 - ii. Whether the Plaintiffs were entitled to the reliefs sought
 - iii. Who should bear the cost of the suit
46. On the first issue for determination, the Defendant relied on the provisions of Section 26 (1) of the Land Registration Act and in the holding in the case of Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another [2013] eKLR amongst others to submit that title in the hands of an innocent third party could be impugned once it was proved that it had been obtained illegally, un-procedurally or through a corrupt scheme as provided for under the provisions of Section 26(1) (a) and (b) of the Land Registration Act and that pursuant to the provisions of Section 80(1) of the Land Registration Act, the court could order rectification of the register if it was satisfied that any registration had been obtained by fraud or mistake.
47. That in the present case, the Plaintiffs had alleged that the parcel of land No Kericho/Kipchimchim/824 had been subdivided giving rise to No Kericho/Kipchimchim/2441 and 2442 which he had disapproved by producing a copy of Map sheet 4 Kericho/Kipchimchim showing that the land had not been subdivided as it still retained its original parcel number.
48. That he had further produced a copy of the green card for parcel No Kericho/Kipchimchim/834 showing that the land had been registered in the joint ownership by Kipruto Arap Chumo, Kiplangat Arap Korgoren and Kimalel Arap Kering.
49. That the provisions of Section 26 of the Land Registration Act was meant to protect the real title holders from unscrupulous persons whose intention was to benefit where they have not sown. The Defendant led evidence that he neither sold and/or witnessed any sale, nor transferred the suit land to the 2nd Plaintiff which had clearly illustrated that the Plaintiff had obtained the suit land un-procedurally.
50. That Wilson Kones from whom the 2nd Plaintiff had purchased the land from had no relationship with the Defendant and hence the transaction could only have been as a result of fraud and a corrupt scheme.
51. On the second issue as to whether the Plaintiffs were entitled to the reliefs sought, it was the Defendant's submissions that the Plaintiffs had not proved their case beyond reasonable doubt on the manner in which they had acquired the suit land and how the alleged subdivision in respect to No Kericho/Kipchimchim/834 had been done and the subdivisions registered to their names irrespective of the fact that the original title was still intact.



52. That there had been no evidence tendered to show that they had obtained consent from the joint owners of the original suit land and no evidence of occupation of the said land had been tendered and therefore they were not entitled to any reliefs sought.
53. On the last issue as to who should bear the costs of the suit, the Defendant relied on the provisions of Section 27 of the Civil Procedure Act to submit that the basic rule on attribution of costs was that costs follow the event to compensate the successful party and therefore the costs in this case ought to be awarded to him. That since he was the only surviving co-owner of the parcel of land No Kericho/Kipchimchim/834, he be allowed to enjoy its quite possession without interference from the Plaintiffs.
54. That the Plaintiffs suit to be dismissed with costs, and there be an eviction order against the Plaintiffs and cancellation of their title in respect to parcel No Kericho/Kipchimchim/2441 and 2442.

Determination.

55. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. I have also considered the fact that this was a consolidated matter emanating from two suits which had been separately filed by the Plaintiffs against a common Defendant.
56. I have also considered the fact that although the 1st Plaintiff Agnes Koe Sigilai who testified as PW1 was an elderly witness whose evidence did not come out clearly, from the totality of the same, her case was that she had bought 3 (three) acres of land parcel No Kericho/Kipchimchim/2441 from the Defendant's brother who had transferred the same into her name and wherein she had taken immediate possession and had been residing and cultivating on the same until later when the Defendant had trespassed on a portion of the same, uprooted some tea bushes she had planted therein before proceeding to fence off that part of the land claiming ownership.
57. From her recorded statement of the 3rd July 2017, which she had adopted as her evidence in chief, she had recorded that she had bought the land from Kiplangat arap Korgoren via a sale agreement of 1975 wherein she had taken possession and had been residing and cultivating on the same since then until 2016 when the Defendant's son by the name Julius sought to have the land sub-divided and when she had refused, the Defendant forcefully trespassed on her portion of land wherein he had erected a fence across the same.
58. The 2nd Plaintiff's evidence was more clearer but similar to the 1st Plaintiff's case in that her deceased husband, in a sale agreement of 1st December 2001, between him and one Wilson Kones, had bought a piece of land measuring 0.8 hectares wherein after he had been issued with a title deed to land parcel No Kericho/Kipchimchim/2441. That they had taken possession of the land until sometime when the Defendant and some boys had trespassed thereon and put up a fence claiming ownership.
59. The Defendant's defence and counter claim was that land parcel No Kericho/Kipchimchim/834 was registered jointly to three brothers namely Kipruto arap Chumo (deceased), Kiplangat arap Korgoren (deceased) and himself as evidenced in the green card. That neither he nor his deceased brothers had participated in its subdivision which had resulted into land parcels No Kericho/Kipchimchim/2440-2442 nor had they participated in the issuance of the titles produced by the Plaintiff, but had only come to learn that the Plaintiffs were in possession of the land. That he was not aware of any mutation forms or the fact that his brother had sold land as he was in possession of the original title deed belonging to Taptebui their mother who was the registered proprietor of the original land and who had given them the same. That he was unaware of how the Plaintiffs had obtained their title deeds and therefore the conclusion had been that the same had been obtained fraudulently, illegally and un-procedurally. He denied having destroyed the Plaintiffs' fences stating that they had done it themselves.



60. Before framing my issues for determination, it must be remembered that Counsel must at all material times be diligent in their calling and therefore give their best whilst representing their clients. Indeed I would borrow the holding in the case of *Omwoyo v African Highlands & Produce Company Limited* [2002]1 KLR, where it had been held as follows:-
- “Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavor.”
61. The court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR had held that;
- “Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.”
62. In *Des Raj Sharma v Reginam* [1953] 19 EACA 310, it had been held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence.
63. Simply put if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.
64. Secondly, it must be remembered that it is trite law that (s)he who asserts must prove her/his case where the burden of proof lies with whoever would want the court to make a finding in her/his favour in support of what (s)he claims.
65. Section 107 of *Evidence Act* succinctly states:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
66. And Section 108 of *Evidence Act*, further states thus:
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
67. Having made these statements which I shall repeatedly refer to later in the judgment, I find the issues that stand out for determination as being;
- i. Whether the Plaintiffs have proved their case.
 - ii. Whether the Plaintiffs title to No Kericho/Kipchimchim/2441 and 2442 were illegally obtained.
 - iii. Whether the Defendant has proved his case in the counter claim.
 - iv. Who should pay the costs



68. As earlier stated I have anxiously considered the evidence adduced by parties in this matter. It is trite law that the foundation of ownership to land is the registration of the same as its proprietor and issuance of a title deed that is free of any illegality, fraud and un-procedural practices and misrepresentation. Indeed it is not enough to dangle a title

69. Indeed the Court of Appeal in the case of *Munyu Maina v Hiram Gatbiha Maina* [2013] eKLR, held as follows:

‘We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.’

70. It was held in the case of *Republic v Senior Registrar of Titles Ex-parte Brookside Court Limited* (2012) eKLR, that statutorily, the sanctity of title to land is assured and protected under Section 24, 25 and 26 of the *Land Registration Act, 2012* produced as herein under’;

71. Section 24 stipulates as follows:

- (a) 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) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

72. Section 25 of the act provides:

- (1) The rights of a proprietor, whether acquired on 1st 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.
- (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.

73. Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

- (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, unprocedurally or through a corrupt scheme.

74. One of the ingredients of impeaching the title of an owner of property on the grounds of fraud or misrepresentation is that the owner has to be proved to have been party to the acts of fraud and misrepresentation.
75. In the present case, although the 1st Plaintiff's case was that she had bought 3 (three) acres of land from the Defendant's brother one Kiplangat arap Korgoren via a sale agreement of 1975, wherein she had been issued with a title deed to land parcel No Kericho/Kipchimchim/2441, there was neither the production of the title deed nor the sale agreement in support of her evidence. To this effect and in reference to the authorities herein cited above as well as the law, the 1st Plaintiff had not proved proprietorship of parcel of land No Kericho/Kipchimchim/2441 and although she could be excused for her age, yet the law is what it is keeping in mind that she had representation by Counsel. Her suit must therefore fail.
76. The 2nd Plaintiff's case was that she was pursuing the matter on behalf of her deceased husband David Cheruiyot Bett as per the Grant of Letters of Administration produced as Pf exh1, who was the proprietor of land parcel No Kericho/Kipchimchim/2442 measuring 0.8 hectares as evidenced by the title deed herein produced as Pf exh 4. That her late husband had bought the land from on Wilson Kiplangat Kones via a sale agreement of 1st December 2001 herein produced as Pf exh 2. That the Defendant had without color of right, trespassed on almost 0.4 acres of a portion of the said parcel of land wherein he had erected a fence. She sought for his eviction from thereon.
77. The Defendant's counterclaim was that the parcels of land numbers No Kericho/Kipchimchim/2441 and 2442 were sub-divisions of the original parcel of land No Kericho/Kipchimchim/834 which had been registered to him and his two brothers. That there having been neither a subdivision sanctioned by them, a sale of the same nor a consent presented, the Plaintiffs titles were fraudulent and the same ought to be cancelled for being null and void.
78. Since the Defendant pleaded fraud and illegality on the part of the Plaintiffs (more so the 2nd Plaintiff whose title was produced as an exhibit) in the manner in which they had obtained the suit land, the onus was on him to prove those allegations as fraud is a serious matter which must be proved to the required standard. In R.G Patel v Lalji Makanji 1957 E.A 314, the Court of Appeal had stated as follows:
- “Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.
79. I find that the Defendant did not attempt to prove how the Plaintiffs had engaged in fraud in the acquisition of their title deeds. There was no evidence from the custodian of the records, the Registrar of Lands office to testify on the illegality or otherwise of the titles. And a further look at the Green card



to land parcel No Kericho/Kipchimchim/834 herein produced by the Defendant as Df exh 2, the same is clear that the land measuring 3.2 hectares was registered to Taptebei w/o Serem on the April 1, 1971 wherein vide succession, the Defendant and his two brothers each got a share of 1/3 of the land on the December 8, 1977. On the September 20, 1989 a title deed was issued wherein on the November 16, 1989 a caution had been placed on the share of Kiplangat Korgoren by the 1st Plaintiff claiming purchaser's interest.

80. Now going by the brief history as stated by the green card to parcel of land No Kericho/Kipchimchim/834, is it possible to confirm that parcels No Kericho/Kipchimchim/2441 and 2442 were a resultant of its sub division in the absence of supporting documents and the custodian of the documents? Secondly it is possible to confirm that the Defendant herein had a stake in the whole No Kericho/Kipchimchim/834 keeping in mind that the same was not registered to him jointly with his brothers and in the absence of any evidence that he had the locus to sue or be sued on behalf of his brothers' estate? I find that apart from making general allegations of fraud, the same was not remotely proved.
81. Indeed, I find that in the absence of proof that the Plaintiffs had obtained their respective Title Deeds fraudulently, or by misrepresentative or through a corrupt scheme, the Defendant's counter claim cannot stand.
82. Having earlier on found that the 2nd Plaintiff had indeed satisfied the legal provision that her deceased husband was the proprietor of the suit land No Kericho/Kipchimchim/2442 and hence had absolute ownership including all rights and privileges appurtenant to it. His legal representative, the 2nd Plaintiff herein was therefore entitled to quiet, peaceful possession and enjoyment of the ownership rights of the subject parcels of land. By forcefully erecting a fence across a portion of her parcel of land, without her authorization and/or consent, it goes without saying that the Defendant was a trespasser on the said parcel of land.
83. Trespass has been defined by the 10th Edition of *Black's Law Dictionary* as;
"an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."
84. Section 3 (1) of the *Trespass Act*, also defines trespass as follows;
"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."
85. In *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR the court held as follows:
"The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No App. 1999).



86. In the case of *Willesden Investments Limited v Kenya Hotel Properties Limited* NBI HCCC No 367 of 2000, it had been held thus:

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case.”

87. In this case the 2nd Plaintiff has not adduced any evidence as to the state or value of her property before and after the trespass. This makes it difficult to assess the general damages.

88. The summation of my finding is therefor as follows;

- i. The 1st Plaintiff's case against the Defendant has not been proved on a balance of probabilities and the same is herein dismissed with costs.
- ii. On the other hand, the 2nd Plaintiff having proved her case against the Defendant on a balance of probabilities, judgment is herein entered in her favour as prayed to wit;
 - a. The Defendant shall by himself and any other person claiming through them vacate forthwith from land parcel LR No Kericho/Kipchimchim/2442 within 30 days upon delivery of this judgment and if they fail to so vacate, an order of eviction be issued against him/them.
 - b. The 2nd Plaintiff is herein awarded general damages of Kshs 100,000/= (one hundred thousand shillings only)
 - c. The 2nd Plaintiff shall have costs of the suit together with interest on clause
- iii. Above to be computed after 30 days from the date of delivery of this judgment.
- iv. The defendant's counterclaim lacks merit and is herein dismissed with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 15TH DAY OF JUNE, 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

