



**Ngetich v Ngetich & 2 others (Environment & Land Case 67 of 2018)  
[2023] KEELC 21609 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21609 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 67 OF 2018  
MC OUNDO, J  
NOVEMBER 16, 2023**

**BETWEEN**

**LINUS NGETICH ..... PLAINTIFF**

**AND**

**CECILIA CHELANGAT NGETICH ..... 1<sup>ST</sup> DEFENDANT**

**PAUL KIPNGETICH KORIR ..... 2<sup>ND</sup> DEFENDANT**

**BOMET COUNTY LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Complaint dated 29<sup>th</sup> August 2018, the Plaintiff herein sought for the following orders;
  - i. A permanent injunction order to restrain the Defendants either by themselves or by their servants and/or agents or any other person acting for and/or on their behalf from evicting or otherwise interfering with the Plaintiff's peaceful use and quiet occupation of that parcel of land known as Kericho/Chemagel/488.
  - ii. An order directing the 3<sup>rd</sup> Defendant to cancel the title deed issued to the 2<sup>nd</sup> Defendant.
  - iii. An order declaring the Plaintiff as the legal owner of the parcel of land known as Kericho/Chemagel/488.
  - iv. Compensation for damages done to the sewerage, water system and compound on the suit land known as Kericho/Chemagel/488.
  - v. General damages.
  - vi. Cost of the suit.
  - vii. Any other relief that the court may deem fit to award.



2. Pursuant to the service of the pleadings upon the Defendants herein, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their respective defences while the 3<sup>rd</sup> Defendant neither entered appearance nor filed any defence.
3. The 1<sup>st</sup> Defendant's defence was that the Plaintiff lost any legal, joint or proprietary interest over the suit land when the bank sold the same by way of public auction in its bid to recover monies lent and advanced to him wherein he ceased to be the registered owner of the suit property in April 2005. That he could not therefore have been the registered owner of the same as at 25<sup>th</sup> May, 2018 unless the said registration had been secured through fraud. That she had acquired the suit land at a public auction on 18<sup>th</sup> October, 2001 through an agent who had later transferred the said suit land into her name on 29<sup>th</sup> May, 2018. That the Plaintiff was thus a licensee on the land after she had sold the same to the 2<sup>nd</sup> Defendant.
4. The 2<sup>nd</sup> Defendant on the other hand in his defence denied the allegations contained in the Plaintiff's Plaint putting the Plaintiff to strict proof thereto.
5. Parties having complied with the provisions of Order 11 of the Civil Procedure Rules, the matter proceeded for hearing on 15<sup>th</sup> February, 2021 where the Plaintiff herein, Linus Kiplangat Ngetich testified as PW1 to the effect that he lived at Kaplong and was a farmer. He adopted his Witness Statement dated 29<sup>th</sup> January, 2019 as evidence in chief and proceeded to testify that the 1<sup>st</sup> Defendant was his beloved wife to whom he had married in a Kipsigis tradition ceremony in December, 1983. That they had subsequently wed in church on 12<sup>th</sup> April, 1986 and had been blessed with 6 children. That as husband and wife, they had established their matrimonial home in Kaplong on Land parcel no. Kericho/Chemagel/488 (the suit land), where he had lived to date.
6. He denied selling the suit land to the 2<sup>nd</sup> Defendant and explained that he bought the suit land in the year 1983 from the wife of the late Kibet Langat. That the succession of the estate of the said Kibet Langat took place in the year 1987 and that he had been living peacefully on the suit land until the 2<sup>nd</sup> Defendant informed them in September, 2018 that he had bought the land.
7. That the 2<sup>nd</sup> Defendant has gone on the suit land one morning in the company of police officers and other people who had power saws whereby he had informed him that he had bought the suit land from the 1<sup>st</sup> Defendant. That he had also arrived with Lorries which started offloading building materials and the said people started cutting down the trees in the compound. This exercise went on for a whole day.
8. That he had filed the instant suit before court whereby he obtained an injunction from the court. That the 2<sup>nd</sup> Defendant also obtained an order in a Misc. Civil Case No. 23 of 2018 which case he (Plaintiff) was not a party.
9. When he was referred to the Sale agreement between the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants, he stated that he was not a party to the sale agreement and therefore did not append his signature thereon. He produced the said Sale Agreement as Pf Exh 1.
10. He proceeded to testify that on hearing that the land had been sold, he had gone and conducted a search where he had confirmed that the land had indeed been transferred to the 2<sup>nd</sup> Defendant. He produced the search certificate dated 14<sup>th</sup> August, 2018 as Pf Exh 2 and proceeded to testify that he was also given a green card, which he produced as Pf Exh 3. That he also sought a valuation of the property whereby he had been issued with a valuation report dated 22<sup>nd</sup> October, 2018 which report he had marked as PF MFI 4.
11. He reiterated that he had since separated with the 1<sup>st</sup> Defendant in separation proceedings filed in court around the month of November/December 1999. That although on paper they had separated, they



- had been relating as husband and wife. He was categorical that they had never divorced. That since the 1<sup>st</sup> Defendant was still his wife, he would have been consulted in case of any sale of property.
12. He prayed that the suit land be reverted back to the family because there had neither been payment of the stamp duty by the Defendants, nor a spousal consent obtained or consent from any Land Control Board in respect to the purchase and transfer of the suit land.
  13. On being cross-examined by Counsel for the 1<sup>st</sup> Defendant, he reiterated that he had purchased the suit land in the year 1983 whereby he had executed a sale agreement which was not produced in evidence. He also reiterated that he married the 1<sup>st</sup> Defendant in the year 1983 and thereafter conducted a civil marriage in year 1986 and that he understood the consequences of contracting a civil marriage. His evidence was that he and the 1<sup>st</sup> Defendant had formally separated in the year 1999 in an ex-parte proceeding filed at Sotik Court wherein they had lived separately since that year.
  14. He explained that although he had given the 1<sup>st</sup> Defendant the title to the suit land, he did not transfer the same. He also admitted that he had taken a loan in the year 1989 using the title deed to the suit land as security, but clarified that they had taken the said loan together with the 1<sup>st</sup> Defendant. That in the year 1995 there had been a subject charge in favour of Barclays Bank because of a default in repayment of the loan occasioned by the 1<sup>st</sup> Defendant who had left the said loan unpaid when they separated since at the time she was the only one working. He maintained that even though he had been the one who had applied for the loan as the head of the family, yet they had taken the loan as a family. He confirmed that property was sold by the bank on 18<sup>th</sup> October, 2001.
  15. His further evidence was that together with the 1<sup>st</sup> Defendant, they had re-bought the suit land at a cost Kshs. 600,000/= whereby his contribution was Kshs. 220,000/=. That he gave the 1<sup>st</sup> Defendant Kshs. 200,000/= cash and Kshs. 20,000/= cheque from Kenya Corporative Creameries (KCC). That he had no evidence on this account because it had been a family matter.
  16. He responded that he redeemed the property through a friend called Nancy Cheronno Muge whereby he paid Kshs. 600,000/= before the property was sold. He contended that there was no auction as nobody bid for the land. That he instructed the said Nancy to hold the suit land for them as she was the one who had given the cheque to Barclays bank. That the property was subsequently transferred to Nancy on 6<sup>th</sup> April 2005 because she had wanted to take a loan using the suit land. That after he had realized that the property had been registered in the name of Nancy in the year 2005, he had informed the 1<sup>st</sup> Defendant that the title had been transferred to which she then registered a caution over the suit land in the year 2006. He further testified that he had then gone to Nancy's home to find out what had happened whereby they agreed to settle the matter out of court.
  17. He admitted that he knew Clara Chepkemoi Ruto and explained that when the 1<sup>st</sup> Defendant left, Clara went and stayed with him as his wife, although he did not marry her. That when the said Clara left around the year 2007/2008, he married one Rose Rotich in the year 2009 with whom they have lived with on the suit property.
  18. On cross-examination by counsel for the 2<sup>nd</sup> Defendant, the Plaintiff confirmed that the 2<sup>nd</sup> Defendant went to the suit land to take possession of the same using an order from the Sotik Law Court. When he was referred to the said Court Order, he confirmed that parties to the case were Paul Korir and Cecilia Chelangat Ngetich. He protested that although order did not give the 2<sup>nd</sup> Defendant the right to destroy his property, the said 2<sup>nd</sup> Defendant had gone ahead and destroyed his property.



19. He explained it was at the time he had gained access to the sale agreement that he had discovered that the title was in the name of the 1<sup>st</sup> Defendant. That since their separation, he had been staying on the suit land alone although the 1<sup>st</sup> Defendant occasionally went to the house to check on how he was fairing.
20. He was adamant that the 1<sup>st</sup> Defendant did not go to the Land Control Board but when he was referred to an application to the Land Control Board, his response was that the said document was a fake. He proceeded to state that he had also gone through the land inventory in Sotik and the reference number in the said application to the Land Control Board was not on record in the Land Registry.
21. That even though the document showed an approval signature of 3<sup>rd</sup> June, 2018, the number of the Land Control Board was fake since even the Land Registrar had refuted the said document. He was further referred to the Land Control Board letter of consent where he maintained that the same was also fake. That the Land Control Board had refuted the same as it did not bear the land serial numbers. The 2<sup>nd</sup> Defendant marked the application for land consent as DMF 1 and the consent dated 13<sup>th</sup> June, 2018 as DMF2.
22. The Plaintiff proceeded to submit that the 2<sup>nd</sup> Defendant was in possession of a fake title to the suit land because he had seen a copy of the title that had been issued by the former Bomet Land Registrar. His evidence was that on 9<sup>th</sup> June, 2018 they had had a family meeting which had been attended by several people including the 1<sup>st</sup> Defendant. That one of the agendas in that meeting had concerned sharing of their properties where he had informed the gathering that the 1<sup>st</sup> Defendant held the suit land in trust for the family.
23. When prompted further, he confirmed that Zacharia was just a neighbor from whom they had acquired one-acre parcel of land. That he was not the original owner of the suit land. He further testified that the secretary of the said meeting had been Hillary Rono. When referred to minute 4 of the meeting, he confirmed that had been the position. That he was not disputing the minutes of the meeting since he and the 1<sup>st</sup> Defendant had signed the same.
24. He explained that as per the finding of the family meeting, the suit land belonged to the 1<sup>st</sup> family upon which the 2<sup>nd</sup> Defendant's had placed his building materials. He also confirmed that he had been summoned at Sotik Police Station on 3 occasions wherein he had been coerced under tight security to surrender the suit land to the 2<sup>nd</sup> Defendant.
25. He testified that he was living with his children on the suit land, and that although the 1<sup>st</sup> Defendant's children were grownup and married, they had not consented to the selling of the suit land by the 1<sup>st</sup> Defendant. He also testified that the anti-fraud police were investigating the instant matter because he had filed a complaint and had an OB to that effect. The minutes of the family meeting were marked as DMFI 3.
26. On being re-examined in reference to DMFI 3, and he confirmed that in those minutes dated 9<sup>th</sup> June 2018, the 1<sup>st</sup> Defendant had been referred to as his wife. That the minutes did not state that he had agreed to the sale of the suit land.
27. When he was referred to minute No. 4 of the minutes, he testified that the suit land belonged to their children. He was also referred to PF Exh 1 whereby he confirmed that the agreement was dated 11<sup>th</sup> June 2018 which was two days after the family meeting. He clarified that in the instant suit, he was the only contesting the sale of the suit land to the 2<sup>nd</sup> Defendant and that the arrest and intimidation did not change his stand on the sale of the suit land.



28. Upon being referred to the order from Sotik Law Courts, he confirmed that it was a consent order by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and added that he was not a party to the said proceedings yet the orders affected him. That he ought to have been consulted.
29. On being examined by the court, his response was that he did not appeal against the said order as things happened very fast. That he also did not witness the signing of the sale agreement with the 2<sup>nd</sup> Defendant.
30. When he was referred by his Counsel to DMF2, he confirmed that the same was a form dated 13<sup>th</sup> June, 2018 and that the title was dated 18<sup>th</sup> June, 2018.
31. On further examination by the court, he testified that at the time he bought the land, he was working with the National Cereals and Produce Board as Provincial Internal Auditor between the years 1983-1994.

**The Plaintiff thus closed his case.**

32. The Defence case opened with the testimony of one Cecilia Chelangat Ngetich, the 1<sup>st</sup> Defendant herein as DW1 who testified that she lived in Nakuru County Rongai constituency, was a retired teacher and currently a farmer. That the Plaintiff was her ex-husband to whom she had been married to traditionally in the year 1983 and they had formalized the same in a wedding in a catholic church on 12<sup>th</sup> April, 1986. That later in the year 2000, they had legally separated via proceedings in Sotik Magistrate's court case No. 8 of 2000 which proceedings she had misplaced and could not get a copy because the court at Sotik had burnt down destroying all the documents.
33. She further testified that she had read and understood the claim against her by the Plaintiff who had alleged that she sold their matrimonial property being Kericho/Chemagel/488 (the suit land) without his consent.
34. She confirmed that the suit land had been acquired jointly when they got married in the year 1983 while she was in her final year at the university. That the same had subsequently been registered in the Plaintiff's name as the head of the family. That they had lived on the suit land from the year 1983 to the year 2000 when they legally separated.
35. Her evidence was that in the year 1993, the Plaintiff took a loan with Barclays bank but failed to service it. That the land had been auctioned in the year 2001 in a public auction where she had purchased it using an agent by the name Nancy Cherono Muge as she had sentimental attachment to the said land and because she needed a home for her children. That prior to the public auction there had been Notices and certificate of sale to that effect.
36. She referred to a copy of the certificate of Sale dated 18<sup>th</sup> October, 2001 and clarified that the original certificate was given to the purchaser therefore she could not trace it. She produced the copy of the certificate of sale dated 18<sup>th</sup> October, 2001 as Df Exh 1 and a copy of the Memorandum of Sale dated 18<sup>th</sup> October, 2001 as Df Exh 2.
37. She proceeded to testify that after the purchase, the suit property had been duly transferred to her agent one Mercy Cherono Muge as per the land consent dated 15<sup>th</sup> July, 2004 which she produced as Df Exh 3. That the said Nancy had ceased to be the registered proprietor of the suit land on 25<sup>th</sup> May, 2018 after she transferred the suit land into her (1<sup>st</sup> Defendant's) name wherein after, she had decided to sell it.
38. That before she could effect the sale, her father-in-law Mr. Joseph Cherangoi who was like the head of the clan, had called for a family meeting on 9<sup>th</sup> June, 2018 in which the Plaintiff was in attendance in



addition to other family members. This was because the Plaintiff had secured a loan using the title of his uncle one Richard Cherangoi and the family had come together to try and see which land could be sold to service the loan. That they had listed the parcels of land that were available that were jointly owned by herself and the Plaintiff which parcels of land included Kericho/Chemagel/488 registered in her name, Kericho/Chemagel/489 registered in the name of Zacharia Ruto and Kericho/Chemagel/481 registered in the name of Arap Mibei.

39. Her evidence was that they had jointly purchased land parcel numbers Kericho/Chemagel/489 and Kericho/Chemagel/481 although the said parcels of land had not been transferred into their names. She maintained that in the said meeting, she had clearly stated that Land parcel number Kericho/Chemagel/488 (the suit land) was not jointly owned hence should not be discussed. That since the other two parcels of land were not in the Plaintiff's name, her father-in-law had decided to sell his piece of land from the ancestral land which land she did not know its registration number.
40. That the suit land had also been discussed where it had been agreed that she was the sole proprietor and that the Plaintiff was in its occupation as a licensee.
41. She testified that whereas she and the Plaintiff had separated in the year 2000, the suit land was purchased in the year 2001 and that she had never lived on it since their separation in November 2000. She explained that after they had separated in the year 2000, the Plaintiff had married a second wife by the name Clara in the year 2003 and they had been blessed with 3 children. When Clara left in year 2012, the Plaintiff had married another woman by the name of Rose Chelangat with whom they had 2 sons and together but they were living with on the suit land.
42. That her children never had an opportunity to live on the suit land because there were other occupants. That during the family meeting, she had requested for the subdivision of whatever they had together because she had been afraid that the Plaintiff would take a loan with the land parcel numbers Kericho/Chemagel/489 and Kericho/Chemagel/482. That consequently she had been given land parcel No. Kericho/Chemagel/489 while the Plaintiff was given parcel number Kericho/Chemagel/482.
43. Her further evidence was that she had clearly stated in the said meeting that the Plaintiff relocates with his family to land parcel number Kericho/Chemagel/482 wherein the Plaintiff had not objected. That it was not true that the Plaintiff had opposed to the transfer of land parcel number Kericho/Chemagel/488 to her name. She produced the said Minutes of the meeting dated 9<sup>th</sup> June 2018 Df exh 4 and went on to state that the suit herein had been filed in bad faith because after the suit land had been sold, and registered in the name of Paul Korir, the 2<sup>nd</sup> Defendant herein, it ceased to be a matrimonial home. She thus prayed that the Plaintiff's case be dismissed with costs.
44. On cross-examination by counsel for the Plaintiff, the 1<sup>st</sup> Defendant stated that she had master's degree in business and Education and an Honorary Doctorate from Technical University of Kenya. She further testified that she was the first woman representative of Bomet County from the year 2013 to the year 2017. That it was not true that whilst she conducted her campaign in the year 2013, she was living in the house located on land parcel number Kericho/Chemagel/488.
45. That she was working in Nakuru as the Principal of Lanet School and that from the year 2000 to the year 2006 she had been working in Mogotio before she went to Narok. She explained that she had been a teacher in Kaplong Boys School between the years 1988 and 1993 after which she had proceeded to Kaplong Girls School between the years 1993 and 2000 hence she was not a stranger to the people of Bomet County.
46. Her evidence was that apart from the legal separation proceedings, she was not aware of any other legal pleadings between her and the Plaintiff. That the Sotik law court had granted her custody of their



- children. That the said court had also granted them legal separation hence she was still legally married to the Plaintiff by virtue of them not having divorced.
47. She reiterated that she bought the suit land through a proxy called Nancy which suit land had initially been acquired during the subsistence of their marriage. That although they bought the suit land jointly with the Plaintiff, she had neither given him consent to take the loan nor challenged the said loan. She insisted that the Plaintiff had lived on the suit land as a licensee although she had no documentary evidence of such an Agreement.
  48. When she was referred to the Df Exh 4, she confirmed that the same were minutes of the meeting dated 9<sup>th</sup> June, 2018 but clarified that the suit land was transferred to her on 25<sup>th</sup> May, 2018 before the said meeting. She explained that the meeting was called for a different issue and not for her to seek consent. In relation to minute 4 of the said meeting, she confirmed that the document had been in her custody for over 4 years and that although the minutes did not state that she was the sole owner of any specific land, the said information had been given to the committee.
  49. She was further referred to the Df exh 3 for which she confirmed that the same was a consent to transfer the suit land from herself back to Nancy. That although she neither produced a consent letter from Nancy to herself nor a consent letter from Sotik Land Board to the 2<sup>nd</sup> Defendant, she had produced a title to the suit land issued was on 29<sup>th</sup> May, 2018.
  50. Her evidence was that she was not aware that the land Registrar who issued the said title had been charged and interdicted. That she was also not aware that the claim against the said Land Registrar stood undefended. She clarified that the consent for sale of the suit land to the 2<sup>nd</sup> Defendant was not signed by the Plaintiff because the land was not Plaintiff's land.
  51. That they had sat down as a family in the year 2018 because at the time she was still a family member to the Plaintiff and that she was taking care of the interest of her land and her children since the Plaintiff had already married Clara in the year 2012, and in the year 2018, Rose. That her conviction was that that marriage could be proved by cohabitation of more than 5 – 10 years as well as the presence of children.
  52. Her further evidence was that the land she had sold to the 2<sup>nd</sup> Defendant was not related to the instant suit since she had neither sold land parcel number Kericho/Chamagel/482 nor Kericho/Chemagel/489 to the said 2<sup>nd</sup> Defendant. That she had not produced an agreement to show that the Plaintiff had taken a loan using Richard Cherangoi's land because she was not asked for the same and was not a party to what had transpired between the two of them apart from what was said in the meeting.
  53. She confirmed to having attended the board meetings to have the suit land transferred to the 2<sup>nd</sup> Defendant. She also contended that the marriage between herself and the Plaintiff did not exist since they had been separated for 22 years and the Plaintiff had married other women. That she believed she was not legally married to the Plaintiff despite them having been married in a catholic church.  
There were no questions from the 2<sup>nd</sup> Defendant.
  54. On being re-examined, the 1<sup>st</sup> Defendant explained that given the Plaintiff's conduct, lapse of time the fact that the Plaintiff had re-married despite them having contracted a monogamous marriage, she did not consider that they still had a subsisting marriage. Her conviction was that despite not having submitted a consent to transfer the suit land from Nancy to herself, there had been no specific pleadings raised by the Plaintiff on the issue of consents.



55. Kipngetch Arap Cherangoi testified as DW 2 to the effect that he lived in Kaplong within Bomet County and was a farmer. That the Plaintiff was his son while the 1<sup>st</sup> Defendant was his daughter-in-law. That the two of them were in court over a parcel of land located in Kapsimotwo area within Kaplong which they had bought together sometimes back. He confirmed that both the Plaintiff and the 1<sup>st</sup> Defendant had conducted a traditional marriage followed by a church wedding around the year 1982. That they had initially lived together peacefully until they started fighting whereby they had separated and the 1<sup>st</sup> Defendant went to teach in Mogotio.
56. That he did not know in whose name the title was registered to but that at the time they bought the suit land they were friends and therefore the title must have been registered in the Plaintiff's name. That he came to learn of the issues affecting the suit land when his brother, Richard Charengoi had informed him that the Plaintiff had taken and sold his land. When he had inquired from the Plaintiff, he had informed him that he had paid the loan and that the people who had gone to repossess the land had been comen.
57. That consequently he had called a family meeting of about 50 people where they had talked about Richard's land and the Plaintiff had owned up to having had used it as security to take a loan. It had been agreed that they would sell his land. He confirmed that the Plaintiff had 3 parcels of land; the first one they bought together with 1<sup>st</sup> Defendant, the second land was purchased from one Chebergus, while the third land which was boarding the first land, belonged to one Zacharia Arap Korir. That they wanted to sell a small portion from the first land which had been bought from the bank.
58. He clarified that the said first land was registered in the 1<sup>st</sup> Defendant's name after she had bought it from her friend who had bought it from the bank. That before that, the Plaintiff had told him that he had taken a loan from the bank which now wanted to sell the house and the land for which he had wanted to sale another land he had bought to repay the loan.
59. That one person called Joseph, who worked with post office had wanted to buy the said land but the Plaintiff had sold the lands to some other people. That he had accompanied the Plaintiff in the company of Clara and other people to a hotel at Sotik where the Plaintiff had been paid the purchase price. That after they had eaten lunch and counted the money, the Plaintiff had given the money to Clara and together they had gone into the bank to pay the loan as he waited on the roadside. He could not confirm whether or not they had actually paid the loan.
60. That he had realized that the loan had not been paid when the Bank announced that they wanted to sale the land a second time. That when he met with the 1<sup>st</sup> Defendant at a funeral, the said 1<sup>st</sup> Defendant had asked him why they had sold the land wherein he had told her that it had been the Plaintiff who had sold the land to repay the loan. That he did not take any action but had informed his wife. That later he had heard that the suit land had been sold by the bank where it had been bought by somebody else using the 1<sup>st</sup> Defendant's money. That even after the bank had sold the land, the Plaintiff had been living there with his third wife called Rose with whom they had 3 children. He explained that before the Plaintiff married Rose, he had another wife called Clara with whom they lived with in the house on the suit land and had sired 4 children.
61. That the 1<sup>st</sup> Defendant did not return to the house on the suit land and none of her children lived on the land. He explained that the house on the suit land was built by both the Plaintiff and the 1<sup>st</sup> Defendant at a time when the 1<sup>st</sup> Defendant was teaching at Kaplong Secondary School.
62. He testified that at the family meeting at the Plaintiff's house, he had given out part of his land, which was supposed to be the Plaintiff's share of land, to be sold so that he could pay his brother. That in regard to the suit land, they had decided that since the 1<sup>st</sup> Defendant had bought it, the same was hers



and at time she had the title to the suit land. That they had told the Plaintiff to go back to the 1 ½ acre piece of land in Cheberges wherein he had accepted but stated that since it had no road that a road be opened for him on that land. That the Plaintiff's request had been accepted but afterwards he had refused to move out of the suit land where he was living, to date. That when the 1<sup>st</sup> Defendant indicated that she also wanted land for her children, they had given her that land that was registered to Zacharia Arap Korir measuring 1 acre.

63. On cross-examination by counsel for the Plaintiff, the witness confirmed that the 1<sup>st</sup> Defendant was still the Plaintiff's wife. That if the property was jointly owned, then she ought to have sought for consent from the Plaintiff but no such consent was required if the property was hers. He reiterated that the Plaintiff and the 1<sup>st</sup> Defendant built a house on the suit land together and lived together. That when she was the woman representative of Bomet Country, she used to live in Sotik in a plot she had bought. That she was not living on the suit land because the Plaintiff had brought many women to the house.
64. That the 1<sup>st</sup> Defendant and her children were present in the meeting. That he had paid dowry to Clara and Rose's people because they were the Plaintiff's wives. That they had the power to share the property as parents and although he knew that the court could divide matrimonial property, the family should have mediated before the issue was brought to court. That he did not have documents to show that the Plaintiff had Richard's loan although all documents were in the file but he knew what they talked had about. That he was not present when they negotiated neither did he want to inquire about the money as he did not want any part of the money. That the Plaintiff and the 1<sup>st</sup> Defendant's children were not present as well. That he was not paid to come to court since he had just come to court using a lift. He confirmed that he was in a good relationship with both the Plaintiff and the 1<sup>st</sup> Defendant.
65. The 2<sup>nd</sup> Defendant herein, Paul Kipngetich Korir testified as DW 3 to the effect that he lived in Sotik town, was a businessman and knew the Plaintiff as a husband to the 1<sup>st</sup> Defendant. He adopted his witness statement as evidence in chief and proceeded to testify that on or around 10<sup>th</sup> and 11<sup>th</sup> June, 2018 he had met his friend David Koskei who was a land and vehicle broker, wherein the said David had informed him of a land that was up for sale in Kapsimotwo. That he had inquired about the owner of the said land when the said David had told him that it was the 1<sup>st</sup> Defendant's land. That he knew the 1<sup>st</sup> Defendant as a politician so he asked David how he could meet her. Consequently, they called her via phone and together with David they had gone to her house and met her. That they negotiated over the price of the land but she opined that he visits the land before they could talk further. That she had then asked David to take him to the land where they had met the Plaintiff who had invited them inside the gate. That the Plaintiff took him round the compound and informed them that the land would cost Kshs. 200,000/= per point.
66. That after agreeing on the purchase price, they had called witnesses including DW2. That he conducted due diligence by going to the land and also perusing the documents. That the title was registered to the 1<sup>st</sup> Defendant. He produced a search dated 14<sup>th</sup> June, 2018 in reference to Kericho/Chemagel/488 as DMFI – 5 and a copy of title issued on 29<sup>th</sup> May, 2018 as DMFI – 6. He explained that when he inquired why the Plaintiff was not present during the transaction, the 1<sup>st</sup> Defendant had told him that they had their own differences. She gave him the minutes of a meeting held on 9<sup>th</sup> June, 2018 but he did not want to get into the details of their squabbles. He produced the said minutes as Defendant Exhibit 4.
67. That the 1<sup>st</sup> Defendant had then informed him that her children who were abroad had signed a consent in relation to the suit land which consent had been marked as DMFI 7. That after he was satisfied with his due diligence, he and the 1<sup>st</sup> Defendant and drafted a sale agreement dated 11<sup>th</sup> June, 2018 which he marked as DMFI-8.



68. That resultantly, he had paid the 1<sup>st</sup> Defendant the purchase price as agreed in the Sale Agreement. That he then applied for the Land Control Board consent via an application dated 13<sup>th</sup> June, 2018 to which he got a consent on the same date. The application for consent and consent both dated 13<sup>th</sup> June, 2018 were marked as DMFI 9(a & b). Subsequently he had been issued with a title registered on 18<sup>th</sup> June, 2018. The said title was marked DMFI 10.
69. That after he had been issued with a title deed, he had again visited the suit land where he had found the Plaintiff who had restrained him from accessing the same. He consequently got a court order from Sotik law court giving him access onto the land. He produced the Court Order dated 28<sup>th</sup> August, 2018 as 2<sup>nd</sup> Df Exh11. That he had deposited building materials being ballast and stones whose value was about Kshs. 400,000/=, on the site but did not start the construction because the Plaintiff had also obtained an injunction against him. He marked the photographs of the said building materials as DMF1 12(a-h).
70. He proceeded to testify that subsequently the Plaintiff had issued him with death threats upon which he had reported the matter to the CID as per the copy of the police abstract dated 20<sup>th</sup> August, 2018 from Sotik Police Station which he marked as DMFI-13. That subsequently he and the Plaintiff had reconciled and whereas the Plaintiff had informed him that he would talk to the family over the sale of the suit land, he had instead instituted the instant suit. That were the case not filed, he would have developed the suit land. That he had suffered a lot in the 4 years because the Plaintiff's Counsel had been buying time. He sought that the Plaintiff's case be dismissed and he be paid costs.
71. On being cross-examined by Counsel for the Plaintiff, he reiterated that being a businessman, he paid the purchase price in cash. When he was referred to Df exh 11, he confirmed that the parties in the said case No. 23 of 2018 were himself and the 1<sup>st</sup> Defendant and that the Plaintiff was not a party to those orders. That the Plaintiff was not a witness to the sale agreement between himself and the 1<sup>st</sup> Defendant where the properties involved had been parcel no. Kericho/Chemagel/488 and Kericho/Chemagel/5692.
72. He clarified that although Kericho/Chemagel/5692 had no access road, it was not the same land to which a road was to be opened for the Plaintiff. That the suit land was not the 1<sup>st</sup> property he was buying. That he knew that a consent could be obtained from the Land Control Board the same day of application depending on the workload at the Board. He maintained that he went to the Land Control Board where he had applied for and was issued with a consent on 13<sup>th</sup> June, 2018 on the same day which consent had been executed by the Deputy County Commissioner, Sotik who was the Chairman of the Land Control board. That although he knew that the Plaintiff was the 1<sup>st</sup> Defendant's husband, he had not produced a consent from the Plaintiff.
73. When he was referred to DMFI 7, he testified that the 1<sup>st</sup> Defendant's children via the undated consent had agreed that the land be sold although not specifically to him. He confirmed that he was issued with the title deed on 18<sup>th</sup> June, 2018. He consented to not having produced minutes of Land Control Board, Spousal consent and the copies of the transfer forms. That he was not aware that the Land Registrar had been interdicted and was facing criminal charges and neither had he filed a counter-claim.
74. In re-examination, he confirmed that the title deed was original and lawful and that he followed all the procedures to get it. That the consent from the 1<sup>st</sup> Defendant's children was open, that he also bought land parcel No. Kericho/Chemagel/5692 and that all documents were proper. That from the minutes of the family meeting, it had been agreed that the suit land belonged to the 1<sup>st</sup> Defendant. He maintained that he had bought land before hence he knew the process that the transfer forms, stamp duty and minutes of the Land Control Board remained with the Lands office although he had the



minutes. He thus prayed that the Plaintiff's suit be dismissed because he was suffering as he had spent so much and would wish to live on his land.

75. DW 4, Andrew Kiprono Birech testified that he was an Advocate of the High Court of Kenya practicing as such in Sotik under the firm of Birech Ngetich and Associate Advocates. That he had been in practice for almost 14 to 15 years and his registration number was P105/5646/04. That he knew both the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants for whom he had drawn a sale agreement on 11<sup>th</sup> June, 2018 where the 1<sup>st</sup> Defendant was the vendor while the 2<sup>nd</sup> Defendant was the purchaser. That the sale agreement was in respect to land parcel numbers Kericho/Chemagel/488 and Kericho/Chemagel/5692. That parcel No. Kericho/Chemagel/488 measuring 3.0 acres, contained a permanent house and developments therein, while parcel number Kericho/Chemagel/5692 measured 1.050 acres. Both parcels of land combined measured a total acreage of 4.050 acres.
76. He testified that the agreed purchase price cumulatively was Kshs. 12,600,000/= and that at the time of the said agreement, the purchaser confirmed that they had already paid the purchase price and the seller confirmed receipt of the purchase price hence they were only formalizing their agreement. That both parties had executed the agreement before him in the presence of 6 witnesses. He produced the said agreement as Pf Exhibit 8.
77. Upon being cross-examined by Counsel for the Plaintiff, he admitted that he did not conduct any due diligence. That his instructions were limited to drawing the agreement. He conceded that as a matter of procedure being an Advocate, he should have concluded due diligence. He confirmed that he relied on the information given to him by the parties that land parcels Kericho/Chemagel/488 and Kericho/Chemagel/5692 were registered to the 1<sup>st</sup> Defendant who was the vendor. That he was not aware that parcel number Kericho/Chemagel/ 5692 was registered to a deceased person, one Zachariah Chumo. That further, the agreement was not signed by the Plaintiff since his role was between the seller and buyer who were the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendants in the instant suit.
78. The Land Registrar Bomet County one Kennedy Bosire, testified as DW 5 to the effect that he was and had been in Bomet for 1<sup>1/2</sup> years. That according to their records, the current owner to parcel No. Kericho/Chemagel/488 was the 2<sup>nd</sup> Defendant to which entry had been made on 18<sup>th</sup> June, 2018 under entry 14. He produced the title as Df exh 10. That the said 2<sup>nd</sup> Defendant was not the original owner. That the land had been registered to its original owner, Kibet Langat on 23<sup>rd</sup> July 1975 and had since the changed ownership severally.
79. That on 23<sup>rd</sup> March 1987, the land been transferred by transmission to Linus Kiplangat Ngetich, the Plaintiff herein where on 27<sup>th</sup> March, 1987, the certificate was issued to him. That on 4<sup>th</sup> December, 1989, the registered proprietor charged the property to Agricultural Finance Corporation (AFC) for Kshs.49,400/= wherein on 6<sup>th</sup> September, 1995, the land had been discharged. That on 19<sup>th</sup> September, 1995, the land was charged to Barclays Bank for Kshs.120,000/= wherein on 30<sup>th</sup> August, 1996 the charge was up stamped to secure an amount of Kshs. 320,000/=.
80. He further testified that on 20<sup>th</sup> March, 1998 the charge was further up stamped to cover advances of Kshs.800,000/= and on 6<sup>th</sup> April, 2005 the land had been transferred by the chargee to one Nancy Cherono Muge where the discharge was executed through the transfer on 6<sup>th</sup> April, 2005. That on 10<sup>th</sup> February, 2006, a caution had been registered by the 1<sup>st</sup> Defendant claiming beneficiary interest and while the caution was still in existence, the land was on 9<sup>th</sup> February, 2017 transferred to the Plaintiff and a title deed issued.
81. That on 29<sup>th</sup> May, 2018, the land was transferred to the 1<sup>st</sup> Defendant and a title deed issued the same day. That the transferor had been one Nancy Cherono Muge while the transferee had been the



- 1<sup>st</sup> Defendant. He testified further that on 18<sup>th</sup> June, 2018 the land had been transferred to the 2<sup>nd</sup> Defendant where on 17<sup>th</sup> November, 2022, a title deed had been re-issued to the 2<sup>nd</sup> Defendant through regularization.
82. That with regards to the transactions on the suit land, he had the certified copies of documents which he produced as follows:
- i. Green card/Land Register for parcel No. Kericho/Chemagel/488 as Df Exhibit 14.
  - ii. Transfer forms by way of transmission as Df Exhibit 15.
  - iii. Transfer forms by charge as Df Exhibit 16.
  - iv. Copies of Caution forms as Df Exhibit 17.
  - v. Transfer form from Nancy Cheronu Muge to the 1<sup>st</sup> Defendant together with the consents as Df Exhibit 17 (a – b).
  - vi. Transfer forms for transfer from Cecilia Chelangat Ngetich (the 1<sup>st</sup> Defendant) to Paul Kipngetich Korir (the 2<sup>nd</sup> Defendant) and their consents as Df Exhibit 18 (a-b)
  - vii. Copies of charge documents forms and discharge forms as Df Exhibit 19 (a – b).
83. He clarified that the title deed issued on 10<sup>th</sup> July, 2018 was not in respect to Kericho/Chemagel/488, but was as a result of partition of land parcel No.489.
84. On cross-examination by Counsel for the 1<sup>st</sup> Defendant in reference to Df Exhibit 14 (Entry No.9, 10 & 11) and he confirmed that there were no documents in relation to that entry and that he could not tell who had transferred the suit land to the Plaintiff. That there were no documents that supported that entry since the transaction was affected despite there being an existing caution hence one could not tell the basis of the said transfer/entry.
85. Upon being cross-examined by Counsel for the Plaintiff, he stated that he came to court because he was summoned and that he had not been aware that the office of the Land Registrar was a party to the suit who would have been represented by the State Counsel. That he also did not know whether the said office had filed any defence.
86. When referred to Df Exhibit 10, he confirmed that there had been consent from the Land Control Board at the time the title deed was given to the 2<sup>nd</sup> Defendant. He explained that before the Land Control Board sat, one was required to book and pay for the application. That the receipts of the Land Control Board were not part of his records but formed records of the Land Control Board. He further explained that the County Commissioner or anybody delegated by him could sign the Land Control Board Consent and that although they did not have receipts of letters of consents, the stamp duty was paid later but before the transfer. He explained that the stamp duty was a tax that one could pay anytime. He confirmed that the 2<sup>nd</sup> Defendant had paid the stamp duty on 17<sup>th</sup> November, 2022 while the case was ongoing.
87. When he was referred to Df Exhibit 6, he confirmed that at the time of transfer, there had been made payment of stamp duty although he could not confirm with certainty because he did not have the documents since receipts were not part of his documents. In reference to Df Exhibit 9 (a), he confirmed that the documents were part of the transfers but stated that he could not commit himself to documents that were not there. When referred to Df Exhibit 14, he confirmed that entry No.10 was made on 9<sup>th</sup> February, 2017 in respect to the Plaintiff and the same had never been cancelled. He



explained that the subsequent entry No.2 which was made in respect to the 1<sup>st</sup> Defendant made the previous entry in respect of the Plaintiff obsolete hence the said entry had been indirectly cancelled.

88. He further explained that the Plaintiff could have made the transfer to the 1<sup>st</sup> Defendant but in the instant matter he did not and therefore, in the absence of the transfer from the Plaintiff to the 1<sup>st</sup> Defendant, the current holders of the title was a genuine holder. His evidence was that a title deed was issued and supported by evidence and that if there were no documents to support the entry, then the title deed was null. He explained that the stamp duty payment was not a prerequisite for registration as one could be called upon to pay the stamp duty at any time even 30 years later and if it was less, one could then be asked to pay the penalty.
89. That even if the land was a matrimonial property, it was not a prerequisite to have a spousal consent to transfer at the time of registration since if it was not disclosed to them that the land was matrimonial property when they registered it. He confirmed that there was no spousal consent executed by the Plaintiff and that at the time of registration, they were not aware that the Plaintiff was a spouse to the 1<sup>st</sup> Defendant.
90. When he was referred to Df Exhibit 9, he confirmed that the same was a title deed issued on 27<sup>th</sup> March 1987 to the Plaintiff and explained that the bundles of documents given to Barclays bank were not given to the land's office as they were only given the charge. His further evidence was that he became aware of the instant suit after he had been served with summons and that even if he was aware of the proceedings, he would have still done the regularization which was only done for stamp duty and not the documents that were prepared. He emphasized that spousal consent could not be considered unless in cases of joint proprietorship. Upon being referred to Df Exhibit 14. (Entry No.6) he maintained that there was no transaction between the Plaintiff and Nancy.
91. DW6, No.77710 CPL Sammy Langat testified to the effect that he was currently stationed at Kaptembwa police station but in the year 2018, he was formerly stationed at Sotik police station, crime investigation duty. His testimony was that on 20<sup>th</sup> August, 2018 while at the office, the current OCS Chief Inspector Kennedy Allosa had instructed him to investigate into a matter vide OB No.39/20/2018 concerning a case of threats to kill whereby the complainant was the 2<sup>nd</sup> Defendant. That he met the complainant and summoned the Plaintiff who was the suspect. That he had issued the Plaintiff with a police form No. P52 to appear before him on 21<sup>st</sup> August, 2018 at 9:00am. That the said form had been delivered to the Plaintiff who had appeared before him in the company of about 5 other men whom he could not remember their names. That he had a meeting with them together with the complainant where the Plaintiff had confirmed that he had threatened the complainant, and had apologized. That the parties had then agreed verbally that they would settle their issues at home. That upon the complainant agreeing to forgive the suspect, the matter had been finalized at the police station and since then, there had been no complaint. He confirmed that he was the author of form P.52 and produced the same as Df exh 13.
92. On being cross-examined Counsel for the Plaintiff, he reiterated that the Plaintiff had honored the summons. He explained that even if there had been a dispute over land, the matter had been settled and land issue had not been reported to their station. That the Plaintiff had been remorseful about the threat issue.

The Defence closed its case and parties were directed to file their written submissions to which I shall herein summarize as follows;

### **Plaintiff's submissions.**

93. The Plaintiff framed his issues for determination as follows:



- i. Whether the Plaintiff and the 1<sup>st</sup> Defendant are legally married.
  - ii. Whether the suit land Kericho/Chemagel/488 is a matrimonial property.
  - iii. Whether the transfer of the suit land Kericho/Chemagel/488 from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant is null and void
  - iv. Whether the 3<sup>rd</sup> Defendant should cancel the title issued to the 2<sup>nd</sup> Defendant
  - v. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
  - vi. Who should bear the cost of the suit?
94. On the first issue for determination, the Plaintiff submitted in the affirmative and contended that the 1<sup>st</sup> Defendant was waving a separation order she sought vide Resident Magistrate's Court Separation and Maintenance Cause No. 28 of 2000 to try and mislead them into thinking that her marriage to the Plaintiff ended then. He thus submitted that the said order did not even remotely point to the dissolution of their marriage hence the said marriage was still subsisting. Reliance was placed on the holding in the decided case of T M W vs. F M C [2018] eKLR to submit that despite the Plaintiff and the 1<sup>st</sup> Defendant being at loggerheads with each other, they had not officially divorced and as such had been married since the year 1983 and were thus still legally married. That the lack of a decree nisi or decree absolute to show the dissolution of marriage meant that the said marriage within the scope of Kenyan law was still in subsistence.
95. On the second issue for determination as to whether the suit land was a matrimonial property, the Plaintiff submitted in the affirmative and stated that it was an uncontroverted fact that the said suit property was purchased by the Plaintiff in the year 1983 during the subsistence of his marriage to the 1<sup>st</sup> Defendant. Reliance was placed on a combination of the provisions of Section 2 of the *Matrimonial Property Act*, 2013 and the holding in the decided case of PKM vs. JNK & Another [2020] eKLR on the definition of matrimonial property, to submit that the suit property was acquired by the Plaintiff in the early stages of their marriage and registered under his name, thus it fell under matrimonial property since he and the 1<sup>st</sup> Defendant were still married to date. He further submitted that the 1<sup>st</sup> Defendant being the registered owner of the suit land did not in any way exclude his interest in the said suit land. That being the Plaintiff's spouse, she was holding the suit land in trust. That it was a rebuttable presumption that although the 1<sup>st</sup> Defendant alleged to have re-acquired the suit land on her own after the statutory sale by the bank, according to the provisions of Section 14 of the *Matrimonial Property Act*, 2013, the suit land was matrimonial property. He contended that all the issues were contested including the purported sale by the bank and that the court was yet to hear from the purported buyer and/or auctioneer.
96. On whether the transfer of the suit land from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was null and void, the Plaintiff submitted that the said transfer was illegal for lack of a spousal consent, that although the 1<sup>st</sup> Defendant presented some minutes signed by her as some form of consent, the same could only have been construed as consent if it bore the signature of the Plaintiff but it did not as the entire transaction was intentionally made behind the Plaintiff's back. To buttress the foregoing assertion, reliance was placed on the provisions of Section 12(1) of the *Matrimonial Property Act*, 2013 as well as the holding in the decided case of PKM vs. JNK & Another (supra) to urge the court to hold that the transfer of the suit land by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was null and void.
97. On the fourth issue for determination as to whether the 3<sup>rd</sup> Defendant should cancel the title issued to the 2<sup>nd</sup> Defendant, the Plaintiff submitted that given the severity of the illegality and the un-procedural



- transfer which was the backbone of the instant suit, the 3<sup>rd</sup> Defendant should indeed cancel the title deed issued to the 2<sup>nd</sup> Defendant. He placed reliance on the provisions of Section 26 (b) of the [Land Registration Act](#) and the holding in the decided case of M W K vs. S K K & 5 others [2018] eKLR.
98. The Plaintiff's further submission was that he had filed a notice to produce dated 29<sup>th</sup> January, 2020 asking the 3<sup>rd</sup> Defendant to among other documents produce the stamp duty and transfer fee receipts but the same had not been produced, hence the credibility of the title deed without the statutory requirement of the stamp duty being paid had been put to question. That from the testimony of the 2<sup>nd</sup> Defendant, stamp duty had been paid after the institution of the instant suit as an afterthought. That the transfer of the suit land from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was thus fraudulent. In support of the above assertion, reliance placed on the holding in the decided case of Mary Gathoni Kihara vs. Joseph Karua Ngareh & 2 others [2019] eKLR.
99. As to whether the Plaintiff was entitled to the orders sought in the Plaint, his submission was in the positive so as to protect his interests as the 1<sup>st</sup> Defendant's spouse and an occupant of the matrimonial home (the suit land herein). That he was also entitled to an order to have him registered as the legal owner of the suit land as he was better placed to hold it in trust for the 1<sup>st</sup> Defendant and most importantly their children because the 1<sup>st</sup> Defendant had proven that she was incapable of doing the same through her conduct of trying to sell the suit property off. That he was also entitled to damages because the 2<sup>nd</sup> Defendant had trespassed into their matrimonial property. Reliance was placed on the court's holding in the decided case of Rhoda S Kiilu vs. Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR.
100. That the 2<sup>nd</sup> Defendant had trespassed into the suit land and delivered building materials which had destroyed the sewerage, the water system and the compound in the process of demolishing the matrimonial house. That the 1<sup>st</sup> and the 2<sup>nd</sup> Defendant intended to evict the Plaintiff and his children from the suit land yet they had no other place to live in. That this had caused much pain and suffering to the Plaintiff as he faced the prospect of being homeless together with his children, He sought an order for damages to the tune of Kshs. 300,000/=. Reliance was placed on the decided case of Jane Muthoni Mwangi vs. Itrade Company Limited [2020] eKLR.
101. On the issue as to who would bear cost of the instant suit, the Plaintiff relied on the provisions of Section 27 of the [Civil Procedure Act](#) and the holding in the decided case of Republic vs. Rosemary Wairimu Munene (ex parte applicant) Ihururu Dairy Farmers Cooperative Society Ltd (2014) eKLR to submit that costs were at the courts discretion and generally followed the event.

### **1<sup>st</sup> Defendant's Submissions.**

102. The 1<sup>st</sup> Defendant summed up the brief background and facts of the matter as well as the evidence adduced in court before framing her issues for determination as follows:
- i. Whether the suit property was matrimonial property.
  - ii. Whether spousal consent was a prerequisite to the sale of the suit property.
  - iii. Whether the 1<sup>st</sup> Defendant acted fraudulently.
103. On the first issue for determination, the 1<sup>st</sup> Defendant submitted that the suit land ceased being matrimonial property upon its charge and was completely alienated once it was sold, by the Chargee in exercise of its statutory power of sale, to one Nancy Cheronu Muge. Reliance was placed in a combination of the court's holdings in the decided cases of E N W vs. P W M & 3 others [2013]eKLR and Asunta Wamwirua Njoroge vs. Housing Finance Corporation Ltd & another [2018] eKLR to



submit that after the suit property had been tendered as security for the loan borrowed from Barclays Bank by the Plaintiff, it ceased to be matrimonial property at that point and was a commercial commodity as at 18<sup>th</sup> October, 2001 when it was sold by public auction in exercise of statutory power of sale. The 1<sup>st</sup> Defendant referred to Defendant Exhibit 1 and 2 to submit that indeed the 1<sup>st</sup> Defendant produced a Certificate and Memorandum of Sale evidencing that the auction indeed took place, proving that the suit land was legally sold and thus alienated and rendering the purported matrimonial interest moot. She further submitted that the fact that she had purchased the property through one Nancy Cheronu Muge, was immaterial to the issue at hand since both the Plaintiff and the 1<sup>st</sup> Defendant had admitted to having been legally separated from the year 2000 to date.

104. It was the 1<sup>st</sup> Defendant's further submission that the Plaintiff's assertion that the suit land comprised matrimonial property just because he and the 1<sup>st</sup> Defendant were never legally divorced was at best an ill-conceived attempt at legal sophistry. That the Plaintiff conveniently never disclosed to the court either through his pleadings and/or his evidence in chief that the suit land had been sold off by way of public auction until he was confronted with documentations to that effect during on cross-examination. That upon being thus confronted, the Plaintiff conveniently chose to play along insisting that he had contributed Kshs. 220,000/= towards acquisition of the suit land and that he and the 1<sup>st</sup> Defendant had instructed one Nancy to purchase the suit land on their behalf. Nevertheless, the Plaintiff never tendered any evidence of such contribution and got it all wrong when he insisted that the suit land was never sold by way of public auction in spite of the compelling documentary evidence being copies of the advertisement for the Public Auction by Bell & Hammer General merchants, Certificate of Sale and Memorandum of Sale having been adduced.
105. The 1<sup>st</sup> Defendant thus submitted that the Plaintiff's allegation that the property was matrimonial property by didn't of the fact that it was bought during the subsistence of their marriage was misleading as he had not adduced evidence of his contribution, which was a necessary element in the instant suit. To buttress the above assertion, reliance was placed on the holding in the decided case of Fathiya Essa vs. Mohamed Alibhai Essa C.A. No. 101 of 1995 unreported.
106. It was further submitted by the 1<sup>st</sup> Defendant that even if one was to imply that the Plaintiff held some interest in the suit land, matrimonial or otherwise, his conduct militated against such conclusion as he had settled two of his subsequent wives on the suit land and denied the 1<sup>st</sup> Defendant and her children the right to use and occupy the said land. That the Plaintiff's own assertion that the suit land ought not to have been sold by the 1<sup>st</sup> Defendant as she was holding it in trust for him and their children was another glaring attempt to obfuscate the facts in the instant matter to justify his unwarranted claim on the suit land.
107. That even though the Plaintiff insisted on still being legally married to the 1<sup>st</sup> Defendant with whom he had contracted a monogamous, his own conduct and admission that he had since the year 2009 been married to one Rose Rotich with whom he lived with on the suit land, rendered his claim untenable. That it became clear during the hearing that the Plaintiff had in fact married two other wives since he separated with the 1<sup>st</sup> Defendant in the year 2000. That the Plaintiff's own father, DW2, testified to that effect and even acknowledged in cross-examination that he paid the Plaintiff's dowry for the second and the third wife and that the Plaintiff had children with the said women despite having contracted a civil marriage. In the light of the foregoing, the 1<sup>st</sup> Defendant submitted that the Plaintiff's suit was brought in bad faith and was only designed to deny her what was rightfully hers.
108. In regard to the allegation of the existence of a trust in favor of the Plaintiff and the children, the 1<sup>st</sup> Defendant submitted that the Plaintiff had failed to prove that a trust, or the intention to create a trust



existed. He was not the transferor of the suit land to the 1<sup>st</sup> Defendant and could not therefore claim to have created a trust in favor of himself and the children.

109. On the issue as to whether a spousal consent was a prerequisite to the sale of the suit land, the 1<sup>st</sup> Defendant submitted that having established that the suit land was not matrimonial property, a spousal consent was not a requirement for its sale. Reliance was placed on the provisions of Section 13 of the *Matrimonial Property Act*, 2013 to submit that the suit land having ceased to be matrimonial property as at the date when the charge against the said property came into effect and later sold by way of a public auction, the 1<sup>st</sup> Defendant had a right to acquire, hold and dispose of the said suit land as a commercial commodity, without obtaining spousal consent. The Plaintiff did not submit any evidence of his contribution during its re-acquisition.
110. On the issue as to whether the 1<sup>st</sup> Defendant had acted fraudulently, the 1<sup>st</sup> Defendant's submission was that the transfer of the suit land to the 2<sup>nd</sup> Defendant was not fraudulent. No evidence had been brought forth of any fraudulent conduct that sought to impugn registration by the 1<sup>st</sup> Defendant as proprietor of the suit land and the subsequent transfer of the same to the 2<sup>nd</sup> Defendant. Reliance was placed on the holding in the decided case of Hanniel Gichina Mwangi vs. Joe Mwaniki Mwangi & 2 others [2018] eKLR where the court cited with approval the case of Dhalla vs. Meralli (1995-1998) 2EA 84 (SCU), to submit that it was trite law that fraud was a serious allegation that must be strictly proven by the party that alleged it.
111. That notwithstanding, the 1<sup>st</sup> Defendant submitted that in the instant suit, the District Land Registrar Bomet, DW5, had testified and produced documentation pertaining to the suit land where he had asserted that the land had been duly transferred to the said 2<sup>nd</sup> Defendant. That if any party was to be charged of fraud it would be the Plaintiff as the purported entry No. 9 on the property register made in his favour had been effected in spite of a subsisting caution lodged by the 1<sup>st</sup> Defendant and without any supporting instrument and/or any other justification.

#### **2<sup>nd</sup> Defendant's Submissions.**

112. The 2<sup>nd</sup> Defendant also summed up the brief background and facts of the matter as well as the evidence adduced in court before framing his issues for determination as follows:
  - i. Whether or not the firm of Mugumya & Co. Advocates was properly on record to act on behalf of the Plaintiff without filling and serving the Notice of Change of Advocates.
  - ii. Whether or not the title deed issued to the 2<sup>nd</sup> Defendant was legally acquired.
  - iii. Whether or not the Plaintiff is entitled to injunction orders.
  - iv. Whether or not the suit property is a Matrimonial Property and thus the need for spousal consent.
  - v. Whether or not the title-deed issued to the 2<sup>nd</sup> Defendant can be cancelled for lack of stamp duty.
  - vi. Whether or not the Plaintiff pleaded and proved damages.
  - vii. Whether or not the court has inherent power to order the Plaintiff to vacate and not to enter the suit land.
  - viii. Who is to pay the cost?



113. On the first issue for determination, the 2<sup>nd</sup> Defendant submitted that they had not been served with the Notice of Change of Advocate by the firm of Mugumya & Co. Advocates to represent the Plaintiff in place of the firm of M/s P. Sang & Company Advocates, hence the purported filing of Submissions dated 20<sup>th</sup> April, 2023 by the said firm offended the provisions of Order 9 rule 5 and 6 of the Civil Procedure Rules. That the said submissions should be expunged from the record as they had no effect as it was deemed that the firm of P. P. Sang & Company Advocates were still on record and had not filed submissions on behalf of the Plaintiff.
114. On the second issue for determination, the 2<sup>nd</sup> Defendant submitted that the title deed he had been issued was valid as the legal process needed was adhered to. Due diligence had been conducted, A sale Agreement in writing had been executed by both parties and attested to by witnesses, the Land Control Board consents had been procured, transfer documents were executed followed by the registration of the said transfer, payment of registration fees and issuance of title deed by the Land Registrar. Reliance was placed on the provisions of Section 6 of the *Land Control Act* and the holdings in the decided cases of Hiram Ngethe Githire vs. Wanjiku Munge [1979] eKLR and Richard Oduol Opole vs. Commissioner of Lands & 2 Others [2015] eKLR to submit that in the instant case, the consents to transfer were obtained on 13<sup>th</sup> June, 2018 while the sale agreement was executed on 11<sup>th</sup> June, 2018 hence the dealing was legal, within time and that the execution of transfer documents and the issuance of the title deed were properly executed.
115. The 2<sup>nd</sup> Defendant submitted that the Plaintiff did not demonstrate any fraud on the part of the 2<sup>nd</sup> Defendant since he failed to prove actual fraud yet the law required that participation in the commission of fraud must be proved and that actual fraud included cases of intentional and successful employment of any criminal, deception or artifice used to circumvent or deceive. In support of these assertions the 2<sup>nd</sup> Defendant placed reliance on the holdings in the decided cases of Elijah Makeri Nyagwara vs Stephen Mungai Njuguna & Another [2013] eKLR, and Urmilla t/a Mahandra Shah vs. Barclays Bank International Limited & Another 1979 KLR 76, and the provisions of Section 107 of the *Evidence Act*.
116. It was the 2<sup>nd</sup> Defendant's further submissions that he had produced the documentary evidence to prove that he had satisfied the requirement for obtaining a title deed which evidence was not dislodged by the Plaintiff. That the Land Registrar had further confirmed that he had exercised his powers to rectify the registration upon payment of stamp duty and the title deed was re-issued on 7<sup>th</sup> November, 2022 in compliance with section 19(2) of the *Stamp Duty Act*, hence the title to the suit land held by the 2<sup>nd</sup> Defendant was valid.
117. As to whether or not the Plaintiff should be granted injunctive orders, the 2<sup>nd</sup> Defendant's submission was in the negative where he relied on the provisions of Article 40 of *the Constitution* to submit that there had been no proof of ownership of the suit land by the Plaintiff hence he did not deserve the protection of the law. That instead, the 2<sup>nd</sup> Defendant was entitled to such protection since he had acquired the suit land legally.
118. On the fourth issue for determination as to whether or not the suit land was matrimonial property, the 2<sup>nd</sup> Defendant submitted in the negative too. He relied on the holding in the decided case of ENW vs. PWM & 3 Others [2013] eKLR to submit that it had been proved that the 1<sup>st</sup> Defendant bought the suit land through an agent at a public auction without the participation of the Plaintiff. That it had also not been disputed that the Plaintiff and the 1<sup>st</sup> Defendant had been separated since the year 2000. His further submission was that in the unlikely event that the suit land was a matrimonial property, the Plaintiff needed to prove contribution but he did not, hence the suit land at the time of sale was not a matrimonial property. To buttress the above contention, he relied on the holding in the decided



case of Joseph Ombong Ogentoto vs. Martha Bosibori Ogentoto [2023] eKLR and Section 93(4) of the [Land Registration Act](#). That consequently, the sale of the suit land was not void for lack of spousal consent hence the transfer, registration and issuance of the title deed held by the 2<sup>nd</sup> Defendant was regular. That he was a bonafide purchaser for value.

119. On whether or not the Plaintiff had proved damages, the 2<sup>nd</sup> Defendant submitted that there had been no proof of damages despite the same having been pleaded, hence the said pleadings remained mere allegations.
120. That considering the totality of the evidence and the authorities cited, the Plaintiff had no cause of action and had brought the instant suit as a busy body. That the Plaintiff should thus be ordered to vacate from the suit land and allow the 2<sup>nd</sup> Defendant to enjoy peaceful occupation and possession of the same.
121. On the issue of costs, the 2<sup>nd</sup> Defendant submitted that costs follow the event. That the Plaintiff having not proved his case on a balance of probability, his case ought to be dismissed with costs.

#### **Determination.**

122. I have considered the evidence herein adduced, the authorities cited and the provisions of the law. The gist of matter arising herein and which matters are not in contention revolves around the suit property herein being No. Kericho/Chemagel/488. That on 23<sup>rd</sup> March 1987, the land been transferred by transmission to Linus Kiplangat Ngetich the herein where he had been registered as its proprietor on 27<sup>th</sup> March, 1987 while he and the 1<sup>st</sup> Defendant were still married.
123. It is further not in dispute that the Plaintiff herein had charged the suit property to Barclays Bank who had advanced the Plaintiff a loan facility. That when the Plaintiff defaulted in the repayment of the loan, the Bank had sold the said land to one Nancy Cheronu Muge who was the 1<sup>st</sup> Defendant's agent, in a public Auction on the 18<sup>th</sup> October, 2001. Subsequently Nancy Cheronu Muge had later transferred the said suit land to the 1<sup>st</sup> Defendant who had it registered into her name on 29<sup>th</sup> May, 2018.
124. Later, vide a sale agreement dated 11<sup>th</sup> June, 2018, the 1<sup>st</sup> Defendant had sold parcel of land No. Kericho/Chemagel/488 to the 2<sup>nd</sup> Defendant who was then registered as its proprietor on the 17<sup>th</sup> November, 2022 and a title deed re-issued through regularization. That it had been when the 2<sup>nd</sup> defendant has tried to take possession and/or occupation of his acquired property being the suit land herein, that the Plaintiff had objected and filed the instant suit.
125. It is further not in dispute that the Plaintiff's objection to the acquisition of the suit land by the 2<sup>nd</sup> Defendant herein was based on his allegation that the 1<sup>st</sup> Defendant being his wife, the suit property herein was matrimonial property and therefore could not be sold without a spousal consent. That the disposal of the said suit property was riddled with fraud. The Plaintiff's reasons for objecting to the sale of the suit property and occupation therein by the 2<sup>nd</sup> Defendant shall thus form the issues for determination to wit;
  - i. Whether the suit land herein is matrimonial property.
  - ii. Whether there was need for spousal consent before the sale.
  - iii. Whether there was any fraud in the disposal of the suit property.
  - iv. Whether the 2<sup>nd</sup> Defendant's title is valid.
  - v. Whether the Plaintiff is entitled to the prayers sought in his Plaintiff.



- vi. Who should bear the costs of the suit?
126. I am minded, before considering the merit of the matter before me and with reference to the provisions of Section 1A and 3A of the *Civil Procedure Act*, to consider a vital element raised in the 2<sup>nd</sup> Defendant's submission where it had been alluded that the Plaintiff's submissions had been filed by the firm of Mugumya & Co. Advocates who had not filed their Notice of Change of Advocates to replace the firm of P. Sang & Company Advocates, and therefore were strangers to the proceedings. That the submissions therefore offended the provisions of Order 9 Rule 5 and 6 of the Civil Procedure Rules and should be expunged from the record.
127. The provision of Order 9 rule 5 and 6 of the Civil Procedure Rules provide as follows:  
"A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."
128. Order 9, rule 6 of the Civil Procedure Rules provide as follows:  
"The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it)."
129. In the present case, and having gone through the proceedings herein, it is evident that the pursuant to the filing of the suit by the firm of M/S P. Sang & Company Advocates, the said firm had continued to file pleadings and representing the Plaintiff through Counsel Mr. Rogers Mugumya (of M/S P. Sang & Company Advocates). The impugned Submissions herein were also filed by Counsel Mr. Rogers Mugumya now practicing in the name and style of M/S Mugumya & Company Advocates. This in my humble opinion did not fall within the ambit of all was not averse the provisions of Order 9, Rule 5 and 6 of the Civil Procedure Rules. Indeed the said provisions of the law do not impede Counsel who has been representing a party while in employment of a different law firm from representing that party upon establishing his own law firm and/or upon exiting from the previous firm, but specifically speaks to the change of an advocate as an individual person and therefore this line of argument by the 2<sup>nd</sup> Respondent cannot lie and is hereby rejected.
130. Now back to the main matter for determination. It is not in dispute that the Plaintiff and the 1<sup>st</sup> Defendant had conducted a civil marriage on 12<sup>th</sup> April 1986 and that the said suit property being No. Kericho/Chemagel/488 had been acquired 23<sup>rd</sup> March 1987 during the subsistence of their marriage.
131. It is further not in dispute that the Plaintiff and the 1<sup>st</sup> Defendant had legally separated via proceedings in Sotik Magistrate's court case No. 8 of 2000 in the year 2000 whereby they had been living separately since then.
132. Lastly it is not in dispute that during their separation, the Plaintiff herein had married twice, had sired other children out of the subsequent marriages and was currently living with one of the women on the suit land.
133. At the risk of venturing into the jurisdiction of the family court, I shall not delve on the issue as to whether or not the Plaintiff and the 1<sup>st</sup> Defendant can still be considered as being legally married. I shall however endeavor to substantiate as to whether or not the suit parcel of land herein constituted matrimonial property as at the time it was sold to the 2<sup>nd</sup> Defendant.



134. Matrimonial Property according to the provision of Section 6 of the *Matrimonial Property Act* is;
- (a) the matrimonial home or homes;
  - (b) household goods and effects in the matrimonial home or homes; or
  - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

135. Section 9 of the said *Matrimonial Property Act* provides as follows;

“Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

136. From the evidence available in court, it is not in dispute that the Plaintiff herein was registered as proprietor of the suit property herein being L.R. No. Kericho/Chemagel/488 on 27<sup>th</sup> March, 1987 through transmission and during the subsistence of his marriage to the 1<sup>st</sup> Defendant as herein above stated. Subsequently in the year 1993, he had offered the said parcel of land as security for an advancement of a loan facility by the Barclays Bank of Kenya Limited.

137. He had then defaulted in the repayment of the loan and the suit property was advertised for sale and was auctioned on the 18<sup>th</sup> October 2001 pursuant to the Bank’s remedies as provided for in Section 90(3) of the *Land Act*. I find that that the Plaintiff herein knew that by using the suit land as security, he had converted the same into a saleable commodity with all the risks accruing therefrom in the event of default.

138. In the case of *Matex Commercial Supplies Limited & Another vs. Euro Bank Limited (in liquidation)* [2007] eKLR the court had held as follows:

“ In my view any property whether it is matrimonial home or spiritual house, which is offered as a security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured. This court is concerned with the importance and the comfort such a home generates but once a party feels that the property is suitable for purposes of a security, it means the party has destroyed, defaced and/or degraded the sanctity and rituality of the said matrimonial home.

Of late there has been a tendency to enroll the courts into the preposterous viewpoint of what is commonly referred to as matrimonial home. The rite of marriage and the place where the marriage is celebrated usually has no relation to a contractual obligation which has matured. The issue whether a party attaches special sentimental value is not an issue meant for consideration in the grant of an injunction. My position is that where the property is the sole family home, it may attract considerable and significant sympathy from the court but short of that, nothing else attaches. In this case it is the persons who joined in the marriage who felt, the property was suitable merchandise for sale by making it a security for an overdraft. In my view the word matrimonial home is not a rule of conduct and/or general truth. It is obvious that matrimonial home can change depending on the circumstances. I am alive to the fact that the alleged matrimonial home may be memorable, it may be memorial and it may contain the family memoirs of the 2<sup>nd</sup> Plaintiff. I think it is time for the parties to have a local memorandum of understanding not to take the matrimonial property to the den of the lion. And once parties decide to deface that sanctified place by making it a security for a loan/overdraft, then that legal position cannot be relegated to a position lower than the material and sentimental position of



the family unit. In this case, it is the family that made the decision to convert its property into saleable commodity, with all the risks accruing therefrom.”

139. Indeed the suit property was sold in a public auction in the year 2001 wherein one Nancy Cherono Muge bid for and bought it. On the 6<sup>th</sup> April, 2005 the land had been transferred by the chargee to one Nancy Cherono Muge where a discharge had been executed through the said transfer. The 1<sup>st</sup> Defendant having been registered to as proprietor of the said parcel of land through a sale by a public auction, the suit land herein, I find ceased being Matrimonial property and was now an independent property registered to the said Nancy Cherono Muge. The evidence on record was to the effect the transfer of the suit property from Barclays bank Kenya limited being the chargee herein had been seamless.
140. There having been evidence from the Land registrar Bomet who had testified as Dw5, that the title had been acquired by Nancy Cherono Muge legally and lawfully, her proprietorship was hence protected by law and specifically under the provisions of Section 25 and 26 of the [Land Registration Act](#) wherein she now had exclusive rights to deal with the property as she pleased to the exclusion of all the others.
141. Indeed it is on record that the said Nancy Cherono Muge had acted as an agent to the 1<sup>st</sup> Defendant who at the time the suit land was auctioned, had legally separated from the Plaintiff via proceedings in Sotik Magistrate’s court case No. 8 of 2000.
142. Further evidence was that Nancy Cherono Muge having been registered as proprietor of the suit land, had transferred the same to the 1<sup>st</sup> Defendant herein on the 29<sup>th</sup> May, wherein a title deed had been issued the same day. I hold and find that the 1<sup>st</sup> Defendant’s registration to the said parcel of land was not in trust for the Plaintiff or the children sired by the two of them and she did not need a spousal consent to dispose of the suit land thus the same was acquired independently.
143. Indeed upon perusal of the Plaintiff’s Complaint, there were no particulars of trust, customs or applicable customary law had been pleaded apart from the submissions herein submitted, which submissions it is trite, is not evidence. It will be noted that trusts are among the overriding interests provided for in Section 28 of the [Land Registration Act](#), and for which a proprietor holds land subject to, as provided in Section 25 of the [Land Registration Act](#). A trust is essentially a situation in which one person holds property on behalf of, or for the benefit of another. Trusts are of different types and can be created in a variety of ways (See for example Hansbury & Maudsley, Modern Equity, 10 Edition, Chapter 4) Trust, including customary trust is a question of fact which ought to be proved by evidence as provided for by Section 107, 108 and 109 of the [Evidence Act](#). The Plaintiff did not demonstrate that the suit property was encumbered by any trust.
144. Indeed the evidence on record was that the 1<sup>st</sup> Defendant had, subsequently, through a sale agreement dated 11<sup>th</sup> June 2018, between her and the 2<sup>nd</sup> Defendant, sold and transferred the suit parcel of land to the 2<sup>nd</sup> Defendant who had been registered as its proprietor and a title deed issued on 17<sup>th</sup> November, 2022, through regularization. The transfer and registration to the 2<sup>nd</sup> Defendant, according to the Land Registrar was legal, lawful and supported by documentary evidence.
145. Although the Plaintiff had alleged fraud in this transfer to the effect that the title held by the 2<sup>nd</sup> Defendant was acquired illegally, and fraudulently and therefore it was a null and void and ought to be cancelled, yet the onus was on him to prove those allegations. Fraud is a serious matter which must



be proved to the required standard. In *R.G Patel vs Lalji Makanji* 1957 E.A 314, the Court of Appeal 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”.

146. Indeed Section 107(1) of the *Evidence Act*, is clear to the effect that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which (s)he asserts, must prove that those facts exist.

147. In the case of *Arthi Highway Developers Ltd vs West End Buthery Ltd & Others* C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R), the Court of Appeal cited the following passage from *Bullen & Leake* precedents pleadings 13<sup>th</sup> edition at Page 427:

“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of ..... It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved ..... General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

148. I find this piece of evidence missing and/or not discharged and therefore the said allegations will remain as such, mere allegations. From the evidence on record, if any fraud had been committed than, the according to the Land Registrar, the same would have fallen on the doorstep of the Plaintiff because transfer of the suit property to the Plaintiff had been made on the 9<sup>th</sup> February, 2017 whilst the same was still registered to Nancy Cheronno Muge and wherein the 1<sup>st</sup> Defendant had placed a caution claiming beneficiary interest. That a title deed had even been subsequently issued without any documentation.

149. Evidence of the custodian of records who was also an expert witness, DW5, confirmed that the transfer of the suit property from the Chargee to Nancy Muge and finally the 2<sup>nd</sup> Defendant had been backed with documentary evidence and that the 2<sup>nd</sup> Defendant was the current the legal proprietor of the suit property. I agree.

150. The rights of a proprietor are set out in Section 26 of the *Land Registration Act*, which provides as follows:-

“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. “

151. From the above provision of the law, it is clear that the 2<sup>nd</sup> Defendant having finally been registered as the proprietor of the suit land, he became the absolute and indefeasible owner of the said property.



His registration/title could only be challenged as provided by Section 26(1) (a) & (b) of the [Land Registration Act](#) 2012. In the instance case, none of the two scenarios have been pleaded and or proved. Indeed the evidence on record was to the effect that the sale and transfer of the suit parcels of land to the 2<sup>nd</sup> Defendant had been conducted legally. This had been buttressed by the production of the sale agreement, consent, certified copies of green card and the Title deed. I find that the titles held by the 2<sup>nd</sup> Defendant to land parcel No. Kericho/Chemagel/488 had been obtained legally and the 2<sup>nd</sup> Defendant is a bonafide purchaser for value.

152. In the end, but I find that the Plaintiff's case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has not been proved on a balance of probabilities and the same is herein dismissed with costs.



**DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS  
16<sup>TH</sup> DAY OF NOVEMBER 2023**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

***KERICHO ELC 67/2018 JUDGEMENT Page 11 of 11***

