



REPUBLIC OF KENYA
IN THE HIGH OF KENYA
AT ELDORET
CIVIL SUIT NO. 201 OF 1997

NANDI KIPSAINA MURSOI.....PLAINTIFF

VERSUS

EZEKIEL KIPLAGAT KIPEL.....1ST DEFENDANT

DAVID MBUTHIA MACHARIA.....2ND DEFENDANT

LINUS NJAGI GATIMU.....3RD DEFENDANT

ISAAC JULIUS SANG.....4TH DEFENDANT

ROMANUS ANGOLET.....5TH DEFENDANT

SAMWEL NJUGUNA KANGETHE.....6TH DEFENDANT

GILBERT MASACHI EGESA.....7TH DEFENDANT

JOSPHAT EVASA ENZUGA.....8TH DEFENDANT

JUDGMENT

1. The plaintiff, *Nandi Kipsaina Mursoi*, is old and illiterate. He claims that his son in law, *Ezekiel Kiplagat Kipele* (the 1st defendant), took advantage of his situation to defraud him of his land. The plaintiff was the registered owner of *Eldoret Municipality/Block 21 (King'ong'o) 10*. It was agricultural land measuring about 30 acres (hereafter *the suit land*). He decided to subdivide it into a number of commercial or residential plots. A total of 103 plots were created out of the subdivision scheme.

2. The 1st defendant and his wife (the plaintiff's daughter) were living on the suit land. The plaintiff authorized the 1st defendant to embark on the survey and subdivision of the suit land. The plaintiff's case is that he (plaintiff) only sold part of the land to two purchasers through *Birech & Company Advocates*; and, that the 1st defendant fraudulently transferred *some* plots to himself and to the other persons including the seven defendants.

3. The plaintiff was categorical that he never sold any portion of the land to his son in law or the defendants. In particular, he claims that he never applied for consent from the Land Control Board (LCB)

to transfer the disputed plots. The plaintiff testified that the 1st defendant duped him to make thumb print impressions on several documents. He only discovered the fraud when Julius Sang (the 4th defendant) started constructing on the property. The plaintiff then placed *cautions* on the disputed titles.

4. By a plaint dated 20th May 1997, the plaintiff prays for a *declaration* that the registration of seventeen plots being Eldoret Municipality/Block 21 (King'ong'o) 915, 916, 919, 920, 921, 922, 923, 924, 942, 943, 944, 945, 946, 947, 948, 960 and 961 in favour of the defendants was *fraudulent* and *null*. The *particulars of fraud* are pleaded at paragraph 3 (a) to (g) of the plaint. They include: registering the transfers without the plaintiff's consent; concealing the nature of the instruments; misleading the plaintiff to execute blank transfer forms; and, obtaining consent of the LCB by fraud. The plaintiff thus prays that the transfers be *cancelled*; and, that the register be *rectified*. He also craves damages, costs and interest.

5. By a joint statement of defence dated 3rd June 1997, the defendants deny the claim *in toto*. At paragraph 7 of the defence, it is pleaded that the plaintiff "*transferred [the disputed plots] personally to the 1st defendant who in turn transferred to the rest of the defendants*". The defendants state that they paid the consideration; and, that their titles are indefeasible. In a synopsis, their case is that all conditions precedent and antecedent to the transfers were followed to the letter.

6. The 1st defendant is registered as the proprietor of *eight* of the disputed properties: Eldoret Municipality/Block (King'ong'o) 915, 919, 920, 921, 922, 923, 960 and 961. The 2nd defendant owns plots 916 and 924; the 3rd defendant plots 944 and 945; the 4th defendant plot 946; the 5th and 6th defendants plot 947; the 7th defendant plot 943; and, lastly, the 8th defendant who holds plot number 942. Eldoret Municipality/Block (Kingong'o) 948 is also the subject of this suit. It is registered in the name of *Willy Kyole Mutiso* (DW3). He is *not* named as a *defendant*.

7. The plaintiff called seven witnesses. Like I have stated, the plaintiff recognized only *two* legitimate transfers to *Lossianus Aluku*; and, *Peter Oenga*. He testified that he thumb printed the transfer documents using tractor's grease. He said that he had instructed the 1st Defendant to carry out the two transactions. On cross examination, he conceded that he had authorized the subdivision of the parent land. He could not tell how many plots were created from the subdivision scheme.

8. PW2 was Julius Saina. He is a son of the plaintiff. He testified that his father only attended the Land Control Board (LCB) meeting in respect of transfers to *Lossianus Aluku* and *Peter Oenga*. He said the plaintiff did not transfer the land to Samuel Njuguna and Gilbert Egesa (the 6th and 7th defendants). He said the plaintiff was old and ailing; and, that he could not make all the trips to the LCB. The plaintiff filled the forms and left the matter to the 1st defendant. Approval for subdivision was granted under *Minute No. 553/95* on 13th July 1995 for 103 plots. He conceded that it was the 1st defendant who obtained the services of a surveyor, *Omondi Opuodho & Company*. The surveyor's fees were Kshs 30,300 (Exhibit 31). He said the fees were not fully paid.

9. PW2 alleged that the 1st defendant acted fraudulently. Following complaints by the plaintiff, the 1st defendant and his wife were arrested. He said that some title deeds; and, about 79 blank transfer forms were found in his custody. He said that the 1st defendant could not give a satisfactory explanation. He and the 4th defendant were charged in the *Chief Magistrates Court Criminal Case 3740 of 1996*. He said the Republic filed an appeal in *Misc. Criminal Application No. 10 of 2000*. He said it was still pending.

10. PW2 admitted that there was a sale agreement on 22nd February 1994 between David Macharia and Ezekiel Kipler (the 1st and 2nd defendants) where 1/8 of an acre was sold for Kshs 60,000. Upon further cross examination, he said that the plaintiff consented to the subdivision of the land. However, all the resultant 103 titles should have borne his name. He stated that the plaintiff signed a mutation form in his presence. It was brought to him by the surveyor. PW2 was emphatic that the plaintiff did not authorize the 1st defendant to execute any transfer on his behalf.

11. PW2 referred to receipts for payment to surveyors by the 1st defendant. He admitted there were other undisputed sales to purchasers other than *Lossianus Aluku* and *Peter Oenga*. He claimed that some of the transactions did not pass through the Land Control Board (LCB). PW2 attended the LCB meetings and translated the proceedings for the plaintiff. He said the plaintiff gave consent for plot numbers 988 to 995 (application numbers 62 to 69).

12. The witness said there were no minutes authorising transfers to the 1st defendant. He noted that some of the documents were signed by the plaintiff while others were signed by the 1st defendant. He conceded that the plaintiff approved the transfer of 2 acres of land to the 1st defendant. The elders later ruled that the 1st defendant be added the old farm house where he resides. PW2 testified that none of the defendants purchased land from plaintiff. They all purchased their plots from the 1st defendant. He claimed the transactions were fraudulent. He in particular blamed the 1st defendant and Julius Sang (the 4th defendant). PW2 denied having tried to influence the trial magistrate in the criminal case facing the 1st and 4th defendants.

13. PW3 was the plaintiff's wife. She had scanty evidence on the dispute. She and her husband never lived on the King'ong'o land. They resided in Mosoriot. She said the 1st defendant had resided in King'ong'o from the year 1977. She said the 1st defendant was then working at Raiply Limited. She denied that the plaintiff had authorized the 1st defendant to sell the suit land.

14. PW4 was Anthony Tergech. He was an Acting Chief. Prior to that, he was a police officer stationed in Eldoret. He investigated the fraud relating to the land. When he searched the 1st defendant's house, he recovered LCB application forms. The titles to the disputed plots were in the custody of Trans-National Bank. He formed the opinion that the 1st defendant had forged the forms or thumb printed them. He handed over the matter to Inspector *Baya Bor*. Upon cross examination, he was not certain whether the complaint was made by the plaintiff or PW2. He said he testified in the criminal matter before the lower court. He was unaware of the judgment.

15. PW5 was Samuel Nderitu Ndirangu. He was the Land Registrar, Uasin Gishu District. He gave a detailed background on the disputed land. Regarding Eldoret Municipality/Block 21 (King'ong'o) 915, he said it measures 0.044 hectares. It was first registered in the name of the plaintiff. It was transferred on 13th February 1996 to the 1st defendant and a title issued on the same day. He said the plaintiff lodged a caution as a beneficial owner. The date is not indicated. He produced the green card as exhibit PE 25.

16. He said that Eldoret Municipality/Block 21 (King'ong'o) 916 measures 0.060 hectares. It was originally registered on 31st October 1995 in the name of the plaintiff. There is a transfer on 13th February 1996 to the 1st defendant. On 21st June 1996 it was transferred to David Mbutia Macharia and a title as issued on the same day. On 7th May 1996, the plaintiff lodged a caution claiming an interest as a beneficial owner. The details are in the green card marked as exhibit PE 26.

17. PW5 produced the card for Municipality/Block 21 (King'ong'o) 918 (Exhibit 27). The plot measures 0.068 hectares. On 31st October 1995, the plaintiff was registered as the proprietor and a title was issued on 24th January 1996. That was the last entry on the green card.

18. Regarding Municipality/Block 21 (King'ong'o) 920 the witness said it measures 0.142 hectares. The first entry is dated 31st October 1995 in favour of the plaintiff as proprietor. On 13th February 1996 it was transferred to the 1st defendant and a title issued. On 7th May 1996, the plaintiff lodged a caution. The witness produced the green card as exhibit PE 28.

19. The witness also produced the green card for Municipality/Block 21 (King'ong'o) 921 (Exhibit 29). The plot measures 0.093 hectares. The first proprietor was the plaintiff who was registered on 31st October 1995. On 13th February 1996 it was transferred to the 1st defendant and a new title issued on the

same day. On 7th May 1996, the plaintiff lodged a caution.

20. Regarding Municipality/Block 21 (King'ong'o) 922 the witness said it measures 0.114 hectares. The plaintiff was registered as proprietor on 31st October 1995. It was transferred to the 1st defendant on 13th February 1996 and a title was issued the same day. The plaintiff lodged a caution on 7th May 1996. The witness produced the green card as exhibit PE 30.

21. The witness testified that Municipality/Block 21 (King'ong'o) 923 measures 0.151 hectares. On 31st October 1995 the plaintiff was registered as proprietor. On 13th January 1996 it was transferred to the 1st defendant. There is a caution entered by the plaintiff on 7th May 1996. The green card was produced as exhibit PE 31.

22. Municipality/Block 21 (King'ong'o) 942 on the other hand measures 0.111 hectares. On 31st October 1995 the plaintiff was registered as proprietor. On 11th April 1996, it was transferred to *Josephat Evasa Enzuga* (the 8th defendant) and the title issued the same day. On 10th April 2002, the plaintiff lodged a caution claiming a beneficial interest (exhibit PE 32).

23. Municipality/Block 21 (King'ong'o) 943 measures 0.088 hectares. On 31st October 1995 the plaintiff was registered as proprietor. On 22nd April 1996, it was transferred to the 1st defendant and the title issued the same day. It was transferred to *Gilbert Masachi Egesa* (the 7th defendant) on 16th May 1996 and title issued the same day. On 10th April 2002, the plaintiff lodged a caution claiming a beneficial interest (Exhibit PE 33).

24. The witness said that Municipality/Block 21 (King'ong'o) 944 measures 0.100 hectares. The first proprietor was the plaintiff who was registered on 31st October 1995. On 13th February 1996 it was transferred to the 1st defendant. On 19th March 1996, the 1st defendant transferred it to *Linus Njagi Gatimu* (the 3rd defendant). On 10th April 2002, the plaintiff lodged a caution claiming a beneficial interest (Exhibit PE 34).

25. Regarding plot Municipality/Block 21 (King'ong'o) 945, the witness testified that it measured 0.100 hectares. On 31st October 1995, the plaintiff was registered as proprietor. On 13th February 1996 it was transferred to the 1st defendant. He in turn transferred it to *Linus Njagi Gatimu* (the 3rd defendant) on 19th March 1996. The plaintiff lodged a caution on 10th April 2002 claiming a beneficial interest (exhibit PE 35).

27. PW5 also produced the green card for Municipality/Block 21 (King'ong'o) 946 (Exhibit 36). The plot measures 0.109 hectares. On 31st October 1995 it was registered in the name of the plaintiff. On 25th January 1996 it was transferred to the 1st defendant. On 26th January 1996 the latter transferred it to *Isaac Julius Sang* (the 4th defendant) and a new title processed the same day. On 10th April 2002, the plaintiff lodged a caution against the title.

27. The witness produced the green card for Municipality/Block 21 (King'ong'o) 947 (Exhibit 37). It measures 0.109 hectares. The plaintiff was registered as proprietor on 31st October 1995. On 31st January 1996 it was transferred to *Romanus Angolet Ekasiba* and *Samuel Njuguna Kangethe*, (5th and 6th defendants). On 10th April 2002, the plaintiff lodged a caution against the title claiming ownership.

28. PW5 also produced the green card for Municipality/Block 21 (King'ong'o) 948 (Exhibit 38). The plaintiff was registered as proprietor on 31st October 1995. On 13th February 1996 it was transferred to the 1st defendant. A title was issued on the same day. On 19th April 1996 the 1st defendant transferred the plot to *Willy Kyole Mutiso* (DW3). A fresh title was issued the same day. On 7th May 1996, the plaintiff lodged a caution claiming a beneficial interest.

29. Regarding Municipality/Block 21 (King'ong'o) 960, the witness produced a green card (Exhibit 39). It measures 0.044 hectares. On 31st October 1995, the plaintiff was registered as the owner. On 13th February 1996 it was transferred to the 1st defendant. On 7th May 1996, the plaintiff lodged a caution claiming a beneficial interest.

30. Lastly, the witness produced the green card for Municipality/Block 21 (King'ong'o) 961 (Exhibit 40). It measures 0.043 hectares and was first registered in the name of the plaintiff on 31st October 1995. On 29th February 1996, it was transferred to the 1st defendant. The plaintiff has lodged a caution claiming beneficial interest.

31. The witness did not produce the transfer forms for all those transactions. He said the notice he received was too short. On cross examination, he said he did not have evidence that any pre-requisite to the transfers were not met.

32. PW6 was John Kirwa. The court (Gacheche J) declined to receive his evidence in view of his relationship with the 6th and 7th defendants. The court was of the view that if he testified on behalf of the plaintiff, he would breach advocate-client confidentiality.

33. PW7 was Andrea Kotut. The relevant evidence was that he purchased some company shares pertaining to the parent land. He was doing so on behalf of the plaintiff. The land was 30 acres. A company house had been erected on it. The plaintiff was given the option to purchase the house. In default, the vendor reserved the right to pull it down and cart away the materials.

34. PW8 was Mary Busienei. The material part of her evidence was as follows. On 19th May 1997 the 1st defendant broke the door to the house on the suit land. A complaint was made to the police and became the genesis of a criminal case in the lower court. She said the 1st defendant was convicted. She was however not privy to the dealings between the plaintiff and the 1st defendant over the disputed plots. That marked the close of the plaintiff's case.

35. As I stated, the claim is contested. The first defence witness was the 4th defendant, Isaac Julius Sang (DW1). He is the registered owner of Eldoret Municipality/Block 21 (King'ong'o) 946. He produced a certified copy of the title (Exhibit DE 1). He said the original title was charged to *Housing Finance Company*. He said that he purchased the plot on 10th December 1995 from the 1st defendant. He produced the sale agreement (Exhibit DE 2). Upon cross examination, he said that he and the 1st defendant attended the Land Control Board for approval of the transaction. In sum, the 4th defendant was saying that the transaction was clean.

36. DW2 was Gilbert Egesa. He is the 7th defendant. He did not know the plaintiff. He testified that he bought Eldoret Municipality Block 21 (King'ong'o) 943 directly from the 1st defendant. He bought the plot on 29th March 1996 for Kshs 100,000. He paid the amount in full. He produced copies of the title and sale agreement (Exhibit DE 3). On cross examination, he said he paid the purchase price in installments. He was introduced to the 1st defendant by Isaac Sang (the 4th defendant). He said he attended a sitting of the LCB and obtained consent to transfer.

37. DW3 was Willy Kyole Mutiso. He also did not know the plaintiff. He bought Eldoret Municipality/Block 21 (King'ong'o) 948 from the 1st defendant in 1996. He was introduced to the vendor by Isaac Sang (the 4th defendant). He produced the title deed and sale agreement (Exhibits DE 5 and 6). The consideration was Kshs 100,000. He testified that he and the 1st defendant went to the Land Control Board for the necessary consent. On cross examination, he denied that he attended the LCB with *Christopher Wabwire*. He said the purchase price was paid through his advocates in cash.

38. DW4 was Ezekiel Kiplel. He is the 1st defendant. He testified that the plaintiff was his father in law. He married the plaintiff's daughter in 1972. Since that date, he has lived on Eldoret

Municipality/King'ong'o/10 which was later subdivided into 103 plots. That was in 1995. He said the subdivision was initiated by the plaintiff. His brother in law, Joshua (PW2), and the plaintiff sought his help to pay for the subdivision. He hired the services of *Omondi Opuodho & Company or Arch Surveys*. He paid them Kshs 326,700 between 1992 and 1995. He produced eleven receipts for diverse dates between 1st November 1991 and 24th July 1995 (Exhibits DE 1). All the receipts, except one, were in the name of the 1st defendant. He conceded he had no power of attorney from the plaintiff.

39. The 1st defendant testified that he was to be compensated with 15 or 16 plots measuring 1/8 and ¼ acres. He said that on 9th November 1995 the plaintiff and PW2 accompanied him to the Land Control Board. He obtained the necessary consents for the 15 plots. He sold some of the plots to the defendants including Gatimu, Ekesa, Esuka, Mutiso, Sang and Kangethe. Owing to a court injunction, only Sang has built on the property.

40. The 1st defendant said there was a written agreement with the plaintiff relating to the amount of survey fees of Kshs 326,700. The 1st defendant did not have the original copy. The agreement was marked as *DMFI 1*. He said he could not trace it. To be fair to the 1st defendant, he tried to produce the agreement during his cross examination. It was not procedural. I will revisit the matter of the agreement later.

41. The 1st defendant testified that a dispute erupted between him, his father in law and PW2. The two alleged he had forged the transfer instruments. He and Julius Sang (the 4th defendant) were charged in the *Chief Magistrates Court Criminal Case 3740 of 1996*. He said they were acquitted under section 210 of the Criminal Procedure Code. He produced a copy of the proceedings. The parties attempted arbitration before the District Commissioner. He suggested that the matter be resolved by the family. On 3rd July 1996 a meeting was convened by elders at his home. The elders resolved that he be given 2 acres; and, the residential house.

42. The 1st defendant clarified that the two bedroomed residential house is on plot 923. He claimed it was sold to him by the company, *King'ong'o Farm*. He said the company had 24 officials or members including Kipsaina (the plaintiff). The consideration was Kshs 25,000. He said the agreement was made in the presence of the 24 members at the chief's office; and, he made the payment there. He then attended the LCB with the plaintiff and obtained consent to transfer. The 1st defendant however did not produce the consent or minutes of the LCB.

43. Upon cross examination, he said consideration for the plots was the survey fees paid on behalf of the plaintiff. In addition, he had taken care of the parent land. He said he has sold all except 8 plots. He denied having been convicted over the dispute over the suit land. He admitted he was fined in 1997 in an unrelated matter over a complaint by a neighbour. He was emphatic that there was no fraud in the transaction. He said he was not pursuing costs of the suit.

44. DW5 was Phillip Barno. He is a former chief. His material evidence was that he chaired the meeting of elders at the 1st defendant's house on 3rd July 1996. Fourty elders attended. 15 of them signed the ruling. He produced the minutes of the meeting. The elders resolved that the 1st defendant be given 2 acres; and, the residential house. DW5 conceded that the elders were not gazetted. On cross examination, he also admitted that the District Officer was not in attendance. DW5 came to learn later of the criminal case against the 1st defendant. He denied that he solicited money from Joshua (PW2).

45. DW6 was David Mbutia. He works for the Ministry of Lands. Between 1994 and 2000 he worked in Eldoret as the secretary to the Land Control Board (LCB). He produced minutes of 13th July 1985. Minute 553/95 shows the plaintiff applied to subdivide the suit land into 103 plots. Consent was granted. He said that on 9th November 1995 he applied to transfer some of the plots; and, that LCB consent was granted. Upon cross examination, he said that at no one time did the 1st defendant come alone to the Land Control Board. He was always accompanied by the plaintiff. He said the plaintiff would thumb-print the

applications for consent. The witness could not tell how many plots were in dispute.

46. DW6 had also purchased plot number 916 in 1996 from the 1st defendant. A title was issued to him. The 1st defendant is still using the land. He said that plot number 924 was sold by the plaintiff to Francis Mwangi in April 2004; and, that it has never been transferred to him.

47. The last witness for the defence was Dorothy Leting (DW7). She is the County Lands Registrar, Uasin Gishu County. She referred to the records. The consent for subdivision was granted on 13th July 1995 for 103 plots. *Change of user* from agricultural into residential and commercial plots was also approved. On 9th November 1995, vide minutes 981/95-1003/95, consent was granted to transfer various parcels to various persons. Transfers were then effected. She produced a bundle of documents containing the consents, transfers and applications to the Land Control Board (Exhibit D E 8). In her opinion, all necessary documents to transfer the plots were executed.

48. Upon cross examination, she said that the transfer for plot number 915 was attested by the Registrar. The transferee was the 1st defendant. Only the Registrar could ascertain the signature. She could not tell the holder of ID NO 7276435/70. She however disagreed with the suggestion that the plaintiff did not execute the transfer. She conceded that the application for consent does not indicate the name of the transferor; but there is a thumb print impression. The date of application was different from the date of sitting of the Board. She said that all the applications for consent were for the transfers dated 13th July 1995 and 9th November 1995.

49. Regarding plot number 947, she said the application was dated 25th January 1996. On plot 948, the application is dated 9th February 1996. The purchaser executed it on the latter date; the owner on 10th February 1996. With respect to plot number 924 in favour of David M. Macharia (DW6), the transferee did *not* sign. It was also not attested. It was not registered. The witness said there are two thumb print impressions for plots 946 and 948. She did not know why the owner placed two thumb print impressions. Regarding plots 919 and 922, she said the signatures were attested by one *Wainaina*. The ID NO 7276235/70 appears on all the other plots. The witness did not know the location of the disputed land or who resides there. That marked the close of the defendants' case.

50. The plaintiff has filed submissions dated 28th November 2016 with authorities annexed. The defendants' submissions were filed on 11th April 2016 together with a list of authorities. On 7th March 2017, the learned counsel for all the parties addressed the court on their submissions. I am indebted to all the learned counsel for their diligence; their assistance; and, courtesy to the court. If I do not make direct reference to all the cited cases, it is *not* for their *lack* of relevance.

51. I have considered the rival arguments. I have also paid heed to the evidence, the records and materials, the pleadings, and lists of authorities.

52. From the pleadings and the evidence, the issues for determination can be condensed into nine-

i. Whether the plaintiff authorized the 1st defendant to subdivide the land into 103 plots;

ii. Whether the plaintiff authorized the 1st defendant to sell the resultant plots;

iii. Whether the 1st defendant paid Kshs 326,700 or such other sum towards the survey or subdivision fees;

iv. Whether the plaintiff agreed to give or sell 15 or 16 plots to the 1st defendant in consideration of the survey fees;

v. Whether valid consent to transfer the plots was obtained from the Land Control Board;

- vi. Whether the transfer of the disputed plots to the defendants was fraudulent and void;
- vii. Whether the transfers should be cancelled and titles restored to the plaintiff;
- viii. Whether the plaintiff is entitled to the reliefs in the plaint; and,
- ix. Who should bear the costs of this suit?

53. I would add the general question of *jurisdiction*. I stated at the beginning that this is a claim for recovery of titles. Under article 162 (2) of the Constitution of Kenya 2010, it is a matter squarely within the sphere of the Environment and Land Court. Jurisdiction is everything. Without it, the court must lay down its tools. *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1. But that would be to simplify the matter too much. This suit predates the Constitution: it was presented to court on 20th May 1997 at the High Court. The evidence by the plaintiff and his seven witnesses was taken by my predecessors, Gacheche J; and, Ibrahim J (as he then was). The first three defence witnesses were heard by Azangalala J (as he then was). I took the evidence of the *last four* defence witnesses.

54. Under the Land Court Act, all land matters *partly* heard by the High Court were to proceed before the High Court. On 18th February 2013, the matter had been placed for directions before the Land Court. The learned judge (Munyao J) referred to the Land Act; and, noting that the matter was partly heard by the High Court, returned the file to this court. I thus find the court has jurisdiction to determine the suit. None of the parties has contested the jurisdiction of the court.

55. From the evidence of the plaintiff; his son PW2; and, PW7, I entertain no doubt that the plaintiff purchased the property known as Eldoret Municipality/Block 21 (King'ong'o) 10. The land was 30 acres. A company house had been erected on it. The plaintiff was given the option to purchase the house. In default, the vendor reserved the right to pull it down and cart away the materials. The house is now on what is plot number Eldoret Municipality/Block 21 (King'ong'o) 923.

56. The 1st defendant claimed the *house* was sold to him by the company, *King'ong'o Farm*. He said the company had 24 officials or members including Kipsaina (the plaintiff). The consideration was for Kshs 25,000. While I do not doubt the 1st defendant, he could only have purchased the house or materials and *not* the land on which it was erected. The entire 30 acre piece of land was owned by the plaintiff. Eldoret Municipality/Block 21 (King'ong'o) 923 did *not* exist at that point. It was a by-product of the subdivision. In short, he could only have *purchased* the portion of land from the plaintiff; or, being the *son in law*, received it as a *gift*. The plaintiff *denies* having sold or given the portion to the 1st defendant.

57. On 3rd July 1996 a meeting was convened by elders at the 1st defendant's home. The elders resolved that the 1st defendant be given 2 acres; and, the residential house. There are legal challenges to the decision of the elders. Phillip Barno (DW5) who chaired the meeting conceded that the elders were not *gazetted*. On cross examination, he also admitted that the District Officer was not in attendance. The panel was clearly *not* a Land Disputes Tribunal as known under the provisions of the Land Disputes Tribunal Act (now repealed). In any case, they would not have had jurisdiction under section 3 of the repealed Act to deal with a registered title. Their decision was clearly without legal foundation and is *not* binding on this court.

58. Did consideration pass from the 1st defendant to the plaintiff for the land on which the two bedroomed house sits? Was the sum of Kshs 326,700 paid between 1992 and 1995 by the 1st defendant for survey work sufficient consideration? Paraphrased, did the 1st defendant subsequently obtain good title to Eldoret Municipality/Block 21 (King'ong'o) 923 (including the house)? The answers to all those questions are conjoined with the dispute over all the other plots. I will revisit the matter shortly.

59. The evidence of Samuel Nderitu (PW5) is relevant to the questions I have posed. At the material time, he was the Land Registrar, Uasin Gishu District. He gave a detailed background on the disputed land.

Eldoret Municipality/Block 21 (King'ong'o) 923 measures 0.151 hectares. On 31st October 1995 the *plaintiff* was registered as proprietor. On 13th January 1996 it was transferred to the 1st *defendant*. There is a caution entered by the plaintiff on 7th May 1996. The green card was produced as exhibit PE 31.

60. The starting point is this. From the evidence of the plaintiff; PW2 and, the plaintiff decided to subdivide his land into a number of commercial or residential plots. Consent for subdivision was obtained from the Land Control Board. He executed a mutation form in the presence of PW2. 103 new plots were created out of the subdivision scheme.

61. It is not also contested that he authorized the 1st defendant to deal with the survey and subdivision. The 1st defendant who obtained the services of a surveyor, *Omondi Opuodho* or *Arch Surveyors*. I am also satisfied that the 1st defendant paid them Kshs 326,700 between 1992 and 1995. He had eleven receipts for diverse dates between 1st November 1991 and 24th July 1995 (Exhibits DE 1). Six of the receipts were in the name of the 1st defendant. One receipt dated 13th May 1993 was in the name of the suit property.

62. The answers to issues numbers i) and iii) that I framed above are both in the affirmative: First, that *the plaintiff authorized the 1st defendant to subdivide the land into 103 plots* and, secondly, that *1st defendant paid the cost of survey or subdivision of Kshs 326,700 between 1992 and 1995*.

63. The plaintiff was an old man. His son in law was living in King'ong'o. The plaintiff and his wife were living in Mosoriot. Beyond the payment of survey and subdivision fees, I accept that the 1st defendant put in time in the process. There had to be *quid pro quo*. I accept his evidence that consideration was to be a *number* of plots. But it *cannot* reasonably be 15 or 16 plots. That would answer issue number iv) that I framed above.

64. Why do I say so? First, the claim is contested by the plaintiff. Secondly, the 1st defendant did not prove or produce a written agreement to that effect. Thirdly, the plaintiff has placed cautions on the disputed plots. Fourthly, the cost of the plots (depending on their size) ranged from Kshs 60,000 to Kshs 100,000. For example, PW2 admitted that there was a sale agreement on 22nd February 1994 between David Macharia and the 1st defendant. It was for 1/8 of an acre at the price of Kshs 60,000. Gilbert Egesa (DW2) purchased plot Eldoret Municipality Block 21 (King'ong'o) 943 from the 1st defendant for Kshs 100,000 on 29th March 1996. DW3, Willy Kyole Mutiso, bought Eldoret Municipality/Block 21 (King'ong'o) 948 from the 1st defendant for Kshs 100,000. It would thus be *unconscionable* for the 1st defendant to receive 15 or 16 plots for consideration of his time; or, for the Kshs 326,700 he paid for survey or subdivision.

65. Although the plaintiff instructed the 1st defendant to deal with the survey and subdivision, there is *no* concrete evidence that the plaintiff *authorized* him to *sell* the plots in dispute. For starters, no documentary evidence was produced to that effect. Secondly, the 1st defendant did not have a *power of attorney* to do so.

66. Furthermore, it is evident that the plots were *first* registered in the name of the plaintiff. They were then transferred to the 1st defendant. The latter transaction is a legal minefield. Being a contract for disposition of an interest in land, it required to be in *writing*. See the mandatory provisions of section 3 (3) of the Law of Contract Act.

67. True, there is an *agreement of sale* for 3¾ acres to the 1st defendant by the plaintiff dated 25th August 1992 (DMFI 6). It was to be hived out of the parent land. The consideration was to be Kshs 300,000. The agreement was not formally produced as an exhibit. The point is that there is no sale agreement for the disputed plots from the plaintiff to the 1st defendant. The plots were registered and had titles. Disposition to the 1st defendant without a written agreement violated section 3 (3) of the Law of Contract Act.

68. My final answer to issue number ii) that I framed above is in the *negative*: there is *no* concrete evidence that the plaintiff authorized the 1st defendant to *sell* the plots in dispute.

69. Like I have said, the 1st defendant claims 15 or 16 plots in exchange for the Kshs consideration 326,700 paid for subdivision and survey expenses. I have already held that it is *unconscionable*. It is not also lost on me that the plaintiff denies ever reaching such an agreement. It was incumbent on the 1st defendant to prove his allegations. But the *plaintiff's* son, PW2, freely conceded in cross examination that the plaintiff *approved* the transfer of 2 acres of land to the 1st defendant. It partially supports the findings of the elders. I held at paragraph 57 of this judgment that the *informal* decision of the elders is *not* binding on this court.

70. That said, the plaintiff cannot have his cake and eat it. He did *not* meet the subdivision fees. I find merit in the spirit of the agreement dated 25th August 1992 (DMFI 6). The sum of Kshs 326,700 would have entitled the 1st defendant to only four quarter acre plots. I say so because Eldoret Municipality/Block (King'ong'o) 948 measuring 0.088 hectares was sold by the 1st defendant to Gilbert Egesa (7th defendant) for Kshs 100,000. That was on 29th March 1996.

71. Our Constitution speaks strongly about *substantial justice*. To be fair, I will allow the 1st defendant to keep *Eldoret Municipality/Block (King'ong'o) 923* on which the *two bedroomed* residential house is erected. I found earlier that it was not contested that he paid *King'ong'o Farm* for the *house or materials* but *not* the land it sits on. The plot measures 0.151 hectares (2.844 acres or thereabouts). Considering my findings at paragraph 70 above, I am being more than generous. That will however be conditional upon the 1st defendant paying damages for fraud that I will address shortly.

72. There are then the allegations of *fraud*. The standard of proof for fraud is *higher* than a balance of probability; it approaches, but is below, proof beyond reasonable doubt. See *Koinange v Koinange* Nairobi, High Court case 66 of 1984 [1986] eKLR, *Ratilal Patel v Lalji Makanji* [1957] EAR 314 at 317, *Umila Mahindra Shah v Barclays Bank International Ltd* [1979] KLR 67, *Joseph Alur Otieno v Alice Wanjiku Kariuki and another*, Nairobi, High Court Commercial Case 241 of 2011 [2014] eKLR, *Mary Mengich v David Rugut*, Eldoret, High Court ELC Case 132 of 2012 [2013] eKLR, *Jennifer Nyambura Kamau v Humphrey Nandi*, Court of appeal, Nyeri, Civil Appeal 342 of 2010 [2013] eKLR.

73. I am alive that *no* handwriting expert was called to show that the *thumb print impressions* on the application for Land Control Board consent; or, the transfers were *not* those of the plaintiff. But that would be to miss the point. The plaintiff's case is that he was *duped* into making thumb print impressions on many blank forms. He could *not* read or write. I have studied the proceedings in *Chief Magistrates Court Criminal Case 3740 of 1996* (Defence exhibit 2). The 1st and 4th defendants were charged with forgery of the transfer forms for the disputed plots. While *acquitting* the 1st and 4th defendants of the charge, the learned trial magistrate observed-

“According to PW4 Julius Muthaiga a finger prints expert who examined the documents, the thumb prints on the documents were found to be those of Kipsaina Mursoi who is the complainant in this case. The report of the finger prints expert is exhibit 48 in this case. The complainant had testified that the 1st accused had made him to put his thumb print on very many documents until he got tired. This shows that the complainant may have signed the transfer forms by thumb printing without knowing what he was signing due to the fact that he is illiterate. The accused may have falsely misrepresented the forms to the complainant making him belief (sic) he was transferring to the two people to whom he had sold...”

74. The parent land was agricultural land. Transactions on the land were *controlled* by the Land Control Act. The Act provides clear procedures. For instance, the vendor must present an application to the Board. He must attend to the hearing with relevant family members. No sale or transfer of agricultural land is valid without the written consent of the Board. The transaction would be void. See *Karuri v Gitura* [1981] KLR 247, *Kariuki v Kariuki* [1983] KLR 225.

75. I have considered the decision cited by *Mr. Nyachiro*, learned counsel for the defendants, in *Nduati v Gitiha Farm*, Nakuru, Civil Appeal 134 of 1985 [1987] eKLR. The learned judge held that the decision of the board made under section 8 of the Land Control Act is *not* to be questioned by any court of law. But the court is entitled to *examine* the procedures leading to that consent. If the consent is obtained by fraud, it *cannot* stand as a final and conclusive decision. In the instant case, the transfers from the 1st defendant to the co-defendants are on the face of them regular. However, the 1st defendant obtained the original consent to transfer from the plaintiff irregularly or by misrepresentation. That in turn taints the subsequent transfers to the co-defendants.

76. The 1st defendant claimed that the plaintiff attended all the Land Control Board (LCB) meetings. He said that on 9th November 1995 the plaintiff and PW2 accompanied him to the Land Control Board when consent was granted for his (1st defendant's) 15 plots. The plaintiff and his son (PW2) vehemently denied it. They acknowledge only *two* transactions to *Lossianus Aluku* and *Peter Oenga*. But PW2 conceded in cross examination that there were *other* sales. PW5, Nderitu, who was the Land Registrar, did *not* have evidence that any pre-requisites to the transfers were *not* met.

77. It is important to keep in mind that the plaintiff was *illiterate*. He testified that he thumb printed the transfer documents using tractor's grease. His son (PW2) attended the LCB meetings and translated the proceedings to the plaintiff. He said the plaintiff gave consent for plot numbers 988 to 995 (application numbers 62 to 69). He said there were *no* minutes authorising transfers to the 1st defendant. The 1st defendant did not adequately *rebut* that evidence.

78. I am fortified there by the evidence of PW4, Anthony Tergech. He was an Acting Chief. Prior to that, he was a police officer stationed in Eldoret. He investigated the fraud relating to the land. When he searched the 1st defendant's house, he recovered blank LCB application forms. The plaintiff testified that the 1st defendant duped him to make thumb print impressions on several documents. He only discovered the fraud when Julius Sang (the 4th defendant) started constructing on the property. PW2 said the plaintiff was old and ailing; and, that he could not make all the trips to the LCB. The plaintiff filled the forms and left the matter to the 1st defendant. There is then the passage I referred to at paragraph 73 of this judgment on the ruling of the lower court in *Chief Magistrates Court Criminal Case 3740 of 1996* (Defence exhibit 2).

79. The plaintiff placed a caveat or restriction on the disputed titles. The current county Registrar, Dorothy Letting (DW7), said that all the applications for consent were for the transfers dated 13th July 1995 and 9th November 1995. She however admitted to flaws highlighted at paragraphs 48 and 49 of this judgment. Some of those irregularities are glaring: With respect to plot number 924 in favour of David M. Macharia (DW6), the transferee did *not* sign. It was also not attested. It was not registered. There are *two* thumb print impressions for plots 946 and 948. In the majority of the transfer forms, the thumb print of the plaintiff was attested to by the Registrar. It implies the plaintiff was present. Since the Registrar did *not* know the plaintiff, the plaintiff was identified by a mysterious person known as *Stephen M. K. Wainaina* ID NO 7276235/70. The plaintiff disowns him.

80. I remain alive that the 1st defendant has *not* been convicted of *fraud* relating to registration of the titles. But this is a civil matter. Like I stated, the standard of proof for fraud *approaches*, but is *below*, proof beyond reasonable doubt. From my analysis of the evidence above, the plaintiff has established fraud to the required standard. I am *not* satisfied that the plaintiff signified his consent to transfer of the disputed plots to the 1st defendant. The transfer in turn contravened the mandatory procedures in the Land Control Act. That in turn taints the subsequent transfers to the 2nd to 8th defendants.

81. My answer to issue number v) framed earlier is *negative*: There was *no* valid consent to transfer the plots from the Land Control Board. My answer partial answer to issue number vi) is in the *affirmative*: the transfer of the disputed plots to the 1st and 4th defendants was *fraudulent* and *void*.

82. The next question is the appropriate remedy for the plaintiff. Section 26 and 80 of the Land

Registration Act No. 3 of 2012 give the court power, on certain conditions, to cancel or rectify the entries in a title. There is a *rebuttable presumption* that a certificate of title is *conclusive* evidence of proprietorship; and, indefeasible. Section 26 provides-

“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.....”

83. I cannot think of a better illustration of a title illegally or unprocedurally obtained than that by the 1st or 4th defendants. But there is *no* doubt that the 2nd, 3rd, 5th, 6th, 7th and 8th defendants; and, Willy Kyole Mutiso (DW3) were *innocent purchasers* from the 1st defendant. But the 1st defendant’s title was tainted by fraud. He could not pass a good title to the co-defendants. Should the titles to the co-defendants and DW3 be cancelled? The answer is found in section 80 of the Land Registration Act. It provides-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake

“The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

84. The wording of the proviso to section 80 of the Land Registration Act is in *clear* and *simple* language. The 4th defendant knowingly or *substantially contributed* to the malpractices by the 1st defendant. The 4th defendant was *complicit* in the fraud. There was sufficient and strong circumstantial evidence linking him to the fraud. See *Suleiman Bin Abdulla v Azzan Bin Zahir & another* [1958] E.A 553. He was working closely with the 1st defendant. For example, he is the one who introduced Gilbert Egesa (the 7th defendant) and Willy Mutiso (DW3) to the 1st defendant. The 1st and 4th defendant were charged for forgery of the transfers in the *Chief Magistrates Court Criminal Case 3740 of 1996*. They were *acquitted* under section 210 of the Criminal Procedure Code. The Republic appealed in *Misc. Criminal Application No. 10 of 2000*. I would thus *not* hesitate to cancel the 4th defendant’s title. If well advised, he has other remedies.

85. Regarding the charge in favour of *Housing Finance Bank*, the 4th defendant had no *clean title*. It follows as a corollary that he had no right to charge the land. The mere fact that the title is encumbered is *not* a bar to *cancellation* of the title. To hold otherwise would be to encourage fraudulent transfers of land. See *Alice Chemutai Too v Nickson Korir & 2 others*, Eldoret, High Court, ELC 51 of 2014 [2015] eKLR.

86. On the other hand, I am *not* satisfied that the 2nd, 3rd, 5th, 6th, 7th and 8th defendants were parties to the *fraud*. Like I stated earlier, they were *innocent purchasers* from the 1st defendant. There is no evidence that they *“had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”* They fall squarely within the proviso to section 80 of Land Registration Act. The same reasoning applies to the property known as Eldoret Municipality/Block (Kingongo) 948 registered in the name of *Willy Kyale Mutiso (DW3)*, but who was not named as a *defendant*.

87. My answer to issue number viii) is that the plaintiff is entitled to the *declarations* sought *but* only as against the 1st and 4th defendants. The irregular or fraudulent transfers to the 1st and 4th defendant must be cancelled; and, the property restored to the plaintiff. *Except* for the property Eldoret Municipality/Block (King'ong'o) 923.

88. The plaintiff did not lead strong evidence to assist the court to assess *general damages*. I have found that the titles to DW3; and, to the 2nd, 3rd, 5th, 6th, 7th and 8th defendants are *indefeasible*. They had paid the purchase price to the 1st defendant. For example, DW2 and DW3 paid Kshs 100,000 each. DW6 paid Kshs 60,000. There is a loss to the *plaintiff* of *eight* properties in favour of DW3; and, to the 2nd, 3rd, 5th, 6th, 7th and 8th defendants. Assessment of general damages for *fraud* is not a scientific exercise. The court has discretion. However, the damages should be assessed at the *time* the plaintiff *lost* the land. See *Kimani v Attorney General* [1969] E.A 502, *Thabiti Finance Company Limited (in Liquidation) & another v Augustine Abiero*, Court of Appeal, Nairobi, Civil Appeal 251 of 2001 [2004] eKLR. The average cost of the three plots to DW1, DW3 and DW6 was Kshs 86,000. The average purchase price of the *eight* plots lost is thus Kshs 688,000. I think that is a reasonable assessment of general damages for the fraud. I award the plaintiff that sum together with interest from the date of the decree.

89. I have said enough to demonstrate that the plaintiff has *partially* proved his case on a *balance of probabilities* but only as against the 1st and 4th defendants. In the result, I order as follows-

a. That the transfers of *seven* properties known as Eldoret Municipality/Block (King'ong'o) 915, 919, 920, 921, 922, 960 and 961 to the 1st defendant, *Ezekiel Kiplagat Kiplel*, are null and void; and, are hereby *cancelled*. The register shall be *rectified*; and, the titles restored to the plaintiff.

b. That the transfer of the property known as Eldoret Municipality/Block (King'ong'o) 946 to the 4th defendant, *Isaac Julius Sang*, is null and void; and, it is hereby *cancelled*. The register shall be *rectified*; and, the title restored to the plaintiff.

c. That the 1st defendant, *Ezekiel Kiplagat Kiplel*, in consideration of the sum of Kshs 326,700 paid as survey and subdivision fees, is entitled to the property known as Eldoret Municipality/Block (King'ong'o) 923 measuring 0.151 hectares (2.844 acres or thereabouts) including the *two bedroomed house* erected thereon.

d. That as a condition of retaining the title in order **c)** above, the 1st defendant shall pay to the plaintiff *general damages* for fraud assessed at Kshs 688,000 (as more particularized in paragraph 88 of this judgment) together with interest at court rates from the date of this decree until full payment.

e. The suit against the 2nd, 3rd, 5th, 6th, 7th and 8th defendants is *dismissed* with *no* orders as to costs. For the avoidance of doubt, their titles to the properties known as Eldoret Municipality/Block (King'ong'o) 916, 924, 942, 943, 944, 945 and 947 are *indefeasible*. The cautions or other restrictions registered by the plaintiff against those titles shall be removed forthwith.

f. The title to the property known as Eldoret Municipality/Block (King'ong'o) 948 which is also the subject of this suit; and, which is registered in the name of *Willy Kyole Mutiso* (DW3), but who was *not* named as a *defendant*, is also *indefeasible*. The cautions or other restrictions registered by the plaintiff against the title shall be removed forthwith.

90. That leaves the question of *costs* against the 1st and 4th defendants. Costs normally follow the event and are at the discretion of the court. The 1st defendant indicated that he would *not* pursue costs against his *father in law*. The 4th defendant was operating closely with the 1st defendant in the impeached transactions. In the interests of justice; and, cognizant of the predicament that has now befallen the 1st and 4th defendants, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 27th day of April 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Cheptarus for the plaintiff instructed by *Rotuk & Company Advocates* assisted by *Joseph C. K. Cheptarus & Company Advocates*.

Mr. Nyachiro for the defendants instructed by *Nyachiro Nyagaka & Company Advocates*.

Mr. Ouma, Court Clerk.