



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC No. 5 OF 2016

WILSON KIPKORIR YEGON.....PLAINTIFF

VERSUS

CHRISTOPHER KIPLANGAT RONO.....DEFENDANT

JUDGEMENT

1. Vide a Complaint dated the 3rd February 2016, the Plaintiff herein sought for the orders that a permanent injunction restraining the Defendant by themselves, agents, servants, employees or otherwise from trespassing onto, grazing thereon, ploughing, destroying a fence erected thereon and/or interfering with the Plaintiff's proprietary interest in LR No. Kericho/Itembe/735. The Plaintiff also sought for cost, interest of the suit, and any other relief that the court may deem fit and just to grant.

2. In response, the Defendant herein filed his statement of defence and counterclaim on the 17th May 2016, wherein he denied the allegations contained in the Plaintiff's Complaint stating that the suit property was indeed part of his land parcels No Kericho/Itembe/923 and 924. That the registration of the Plaintiff as proprietor of land parcel LR No. Kericho/Itembe/735 was fraudulent. The Defendant in his counterclaim sought that the registration to the said suit land be declared null and void and be canceled, and further that the Plaintiff be ordered to move out of No Kericho/Itembe/923 and 924 and in default an eviction order to issue.

3. Subsequently after both parties had complied with the provisions of Order 11 of the Civil Procedure Rules, the matter was set down for hearing.

The Plaintiff's case

4. The Plaintiff, Wilson Kipkorir Yego who testified as PW1 gave his evidence to the effect that he came from Kapkatet and worked for Kenya Commercial Bank in Nairobi. That he had filed suit against the Defendant after the Defendant's Advocate had written to him alleging that he had encroached on the Defendant's parcel of land No. Kericho/Itembe/923. That the allegation was strange to him because he had been in occupation of his own parcel of land which is Kericho/Itembe/735 as per the title herein produced as Pf exh 1 and a certificate of official search dated 4th January 2016 also produced as Pf exh 2, and a letter from the Land Registrar Bomet dated 6th January 2016 which he produced as Pf exh 3.

5. The Plaintiff testified that he had first bought the suit land measuring 0.1 acres for Kshs. 31,500/= in 1996 from the Defendant wherein at the time the title had been in Christopher's father's name. That initially they did not enter into a written agreement and later he had bought more land which added up to 0.75 acres, for a total of Kshs. 240,726/= wherein he had made payments in installments in both cash and kind.

6. That he had first paid Kshs. 31,500/= to Paul Rono, who was the Defendant's brother, in the year between 1997 and 1998. He then built a canteen for Defendant worth Kshs. 41,940/=, 2 toilets and 2 bathrooms for Kshs. 31,620/= and a 2 bedroomed house worth Kshs. 54,276/= on an understanding between him and the Defendant. He paid the balance in cash.

7. That after building the houses, they had entered into a written agreement which got burnt in his house alongside other documents. That he had taken possession of the land in October, 1996. He proceeded to produce a sketch of the agreement as Pf exh 4 and testified that he had obtained a title for the suit property in May, 1998 after going to the Land Control Board. That later, he had engaged the services of a surveyor to confirm the size of his land.

8. His evidence was that he had stayed on the suit land from the year 1996 up to the 17th December 2015 when the Defendant's wife chased away his worker. That he had tried to resolve the matter amicably in vain.

9. That he had received a letter from the Assistant Chief Itembe Sub-location requesting them to attend a meeting to resolve the dispute. He

produced the letter as Pf exh 5 and proceeded to testify that before they could attend the meeting, he had received a letter demand from the Defendant's advocates dated 1st January 2016 herein produced as Pf exh 6 wherein he had reported the matter to the pastor but the Defendant refused to attend a scheduled meeting.

10. That on the 26th December 2015, the Defendant chased his tenants from his house wherein he had asked the village elder to warn him (Plaintiff) not to go to the suit land. That the Defendant also hired goons to send away all his tenants who were 17 in number, at the time. That in addition to the shops he had built on the suit land, he had also connected electricity and water, and also planted trees which had since been destroyed. That he was now unable to access his land and the shops are vacant.

11. His request to the court was to allow him to continue with his business on the suit land. That his fence had been destroyed and he had been deprived of income from the temporary shops he had built. That the structures were wasting away as they have been invaded by termites since nobody was staying in them. He also sought for an injunction to restrain the Defendant from grazing his livestock, farming or in any way interfering with his land and for costs of this case.

12. In cross examination, the Plaintiff confirmed that he had been in occupation of the suit land since the year 1996. That he had bought the land from the Defendant and his brother Paul wherein Paul had received the cash for 0.1 acres while the Defendant had been paid in kind as he had put up temporary houses for him and also paid him some cash. That in total he had bought 0.75 acres.

13. That the idea of building houses for the Defendant had come from his father but there had been no acknowledgement of the cash by the Defendant or his brother. That the sketch agreement had been prepared and signed by the Defendant because he had lost the agreement in 1998 when his house got burnt. He acknowledged that the sketch had not been signed either by Paul or the Defendant's father and further that he did not mention in his plaint that he had been chased from his land. That although he could not remember the original number from which his title had been derived, yet he had attended the meeting at the Land Control Board in 1998.

14. He was referred to a letter dated the 18th April 2016 wherein he confirmed that the same was from the Deputy County Commissioner, Bomet who had stated that there had been no minutes of the Land Control Board. He also confirmed that the Defendant's father (Sinoi Arap Ruto) had died in February, 1998. That he had picked his title in May, 1998 and that according to the map Pf MFI 9, his parcel of land had not been indicated.

15. The second witness Paul Nyige who testified as PW2 informed the court that he comes from Bomet County and was a business man. That he had recorded his statement on the 11th July 2016 which he wished to adopt as his evidence. On cross examination the witness informed the court that he knew that the Plaintiff had bought land from the Defendant although he did not know its acreage. He confirmed that he was the one who had taken the Plaintiff to the Defendant to negotiate for the purchase of land although he did not know what they had agreed on.

16. Upon being re-examined, he informed the court that he was aware from what the Defendant's father had told him that the Plaintiff had finally bought the suit land and had constructed some temporary houses thereon. He also stated that there were occupants (tenants) in the houses that the Plaintiff built.

17. The third witness Phillip Kipkoech Rotich who testified as PW3 also adopted his statement as his evidence and upon cross examination he confirmed that the Plaintiff had engaged him to construct some temporary wooden houses, one shop and a toilet on the suit land. That further, he had been told by PW2 (Paul Nyige) that the Plaintiff had bought land from the Defendant. He however denied having been present when the agreement for sale of land was made

18. On being re-examined, he confirmed that the Plaintiff that he had also built a house for the Defendant on the Plaintiff's instruction and that the same was occupied by the Defendant.

19. The fourth witness Samwel Langat testified as PW4 to the effect that he was the District Surveyor Bomet. That he had been stationed in Bomet for the last 10 years. That he had come with the records relating to land parcel no. Kericho/Itembe/712 which showed that the parcel of land belongs to one Sino Arap Ruto and had been sub-divided in May 1998 giving rise to Nos. 734,735 and 736.

20. That parcel of land No. 735 measured 0.3 hectares and was registered in the name of Wislon Yegon Kipkorir. That he had come across a mutation form but did not see the Land Control Board consent which was usually kept by the Land Registrar because the sub-division was supposed to be applied for by the Land Registrar. That the mutation form had been signed by the land owner Sino Arap Ruto.

21. On cross examination the witness confirmed that the mutation form had been signed on 23rd April 1998. That it had been approved on 29th May 1998 and have been presented and paid for on the 28th May 1998 wherein title had been issued after the 29th May 98.

22. His evidence was that procedurally they retained one copy of the mutation form, the 2nd copy was given to the Land Register while the 3rd copy was sent to the Map Amendment office. He produced the mutation for parcel No. 712 as Pf exh 7 and 8.

23. The witness proceeded to testify that he had the record for parcel No. 774 although some documents for parcel No. 734 were missing. He was stood down to come and produce the mutation forms in respect of parcel no. Kericho/Itembe/734.

24. On the 16th July 2018, pursuant to submissions by Counsel for the Plaintiff, the court directed the District Surveyor & Land Registrar to visit land parcels No. 735, 923, 712, 723 and 924 to establish whether parcel No. 735 existed. Further directions were that both parties were to be present during the visit and that the surveyor was to file the report within 30 days.

25. The surveyor's report was filed on 21st October 2019 wherein the court ordered that a copy of the same be furnished to the parties upon payment of the requisite fees.

26. The matter then proceeded for hearing on the 25th June 2019 wherein PW4 was recalled for cross examination and he proceeded to testify that Land parcel No. Kericho/Itembe/735 existed on the ground and that he had included it in the sketch map attached to the report. That the boundaries in the mutation differed slightly with what was on the ground. That upon their visit, they had found many people wherein they had been shown the parcel by the Plaintiff wherein the Defendant had informed them that said land parcel No. 735 did not exist and what was on the ground was parcel No. 924. That in his sketch, he had depicted a portion of the RIM and that Parcel No.735 did not exist on the RIM.

27. His further evidence was that in the RIM, parcel No. 924 crossed over to where parcel No. 735 was. That land parcel No. 712 was subdivided into 3 parcels namely 734, 735 and 736 and that parcels No. 734-736 did not exist on the RIM because the mutation forms were not forwarded to them by the Land Registrar for amendment. That at page 4 of the mutation forms, the same showed that the forms had been forwarded.

28. He proceeded to testify that after the mutation was done, the surveyor would do the numbering and after the surveyor approves the numbers, they would forward the same to the Land Registrar who would then open new green cards for the new numbers. After this process, the Land Registrar was supposed to return the signed mutation forms for them to forward to the provincial surveyor for amendment of the RIM.

29. That this was the ideal situation. That in practice however, the Land Registrar did not forward the forms back to them and that he did not know if the mutation was forwarded to the provincial surveyor. He confirmed once again that parcels No. 734-736 were not in the Registry Index Map.

30. That from his report, part of parcel No. 924 ought to be parcel No. 735. Parcel No. 712 no longer existed because it was sub-divided. Land parcel No. 734 also did not exist because it gave rise to parcel No. 773 and other numbers but that he did not have any document to show this. He also confirmed that he did not establish the acreage of land parcel No. 735 or 924 but that parcel No. 735 was smaller on the ground than on paper (mutation form.)

31. In re-examination, the surveyor reiterated that the summons he had received from court required him to establish whether parcel No. 735 existed. That he had recommended that the mutation for parcel No. 712 be amended on the RIM and further that parcel No. 735 be amended to conform to the ground situation in terms of acreage. That the said recommendations would not interfere with parcel No. 924 because No. 924 encroached on parcel No. 735.

32. The next witness PW5 one Bernard Kipngetich Rotich pursuant to adopting his witness statement as his evidence was cross examined wherein he responded that he was a certified Mason with an identity card issued by the National Construction Authority. That he had built a timber house for the Plaintiff which was divided into 8 shops. That the construction had taken place on 20th November 2015. He confirmed that he had not been present when the Plaintiff had bought land but that he had informed him of the purchase and that he was the caretaker who had been collecting rent from the Plaintiff's tenants from the month of January 2015 to October 2015. The Plaintiff thus closed its case

Defence case

33. The defense case was opened by the Defendant Christopher Kiplangat Terer alias Christopher Kiplangat Rono who testified as DW1 to the effect that he knew the Plaintiff as they resided on the same parcel of land L.R No. Kericho/Itembe/924 to which he had its title. He produced a copy of the search as Df exh 1 and went on to testify that he also owned L.R No. Kericho/Itembe/923 to which he produced the search certificate as Df exh 2. His evidence was that he had inherited the two parcels of land from his mother and that the said parcels of land were a sub-division of L.R No. Kericho/Itembe/773. He referred to Pf exh 8 as the copy of the mutation showing the sub-division.

34. He proceeded to testify that in the year 2015, the Plaintiff had encroached on his land parcel No. 924 on allegations that he had purchased it from the Defendant's late father. That he had showed him a title which had read L.R No. Kericho/Itembe/735 and which title had been issued on 26th May 1998. That up to that point he had not been aware that the Plaintiff owned the land and therefore he sought advice from his advocate and later went to the lands office to conduct a search where he discovered that indeed parcel No. 735 was registered in the Plaintiff's name. That he had then asked for documents to show how the Plaintiff got the land where he had been shown a document, a letter of consent for subdivision of Kericho/Itembe/712. He produced the said letter of consent as Df exh 3. That he was also shown the mutation form (Pf exh 7) dated the 28th May 1998 which showed the subdivision for land parcel No. 713(sic) which resulted into parcels No. 734, 735, and 736. The Defendant continued to testify that the mutation form had been forwarded for registration on 29th May 1998.

35. He also testified that there had been no transfer form showing transfer of the parcel to Plaintiff. That there was no application to transfer from the Land Control Board. That he had seen a consent given by Land Control Board to transfer the land to Plaintiff. That the letter of consent dated the 9th December 1997 was addressed to Sino Arap Ruto, he produced the same as Df exh 4. He confirmed that Sino Arap Ruto was his late father who had passed away in February, 1998 as per the copy of his death certificate which he produced as Def exh 5.

36. His evidence was that the RIM which he produced as Df exh 6 did not show the position of parcel No. 735 but only the position of land parcels No. 923 and No. 924. That he never got to see forms or other relevant documents for transfer of parcel No. 735 to Plaintiff. He also produced a letter dated the 18th April 2016 showing that there had been no minutes showing the transfer of parcel No. 735 to Plaintiff. He produced the said letter as Df exh 7 and sought for the dismissal of the Plaintiff's suit and for his counter claim to be allowed.

37. When the Defendant was cross examined, he confirmed that parcel of land No. 773 belonged to his mother and that parcel No. 712 did not belong to his late father. That the Plaintiff had not made developments on parcel No. 735 but on parcel No. 924 which he was referring to

as parcel No. 735. That the construction he has put therein are not complete and that he had not been there when the Plaintiff was putting up the construction. He confirmed to having filed suit No 2 of 2016 in Court when he got to know of the construction.

38. He also confirmed that Df exh 3 was dated 9th December 1997 by which time his father had not passed away. He also confirmed that parcel No. 735 was in the name of the Plaintiff and that he had obtained the titles to his own land in the year 2015. That his father did not own land parcel No. 712. He also confirmed that although he could not remember when his mother passed on, yet she had died before the Plaintiff entered on his parcel of land.

39. That he was positive that land parcel No. 773 did not exist and that although the same was depicted on the map, yet he could not tell how it came to be shown on the map. That he did not know about parcel No. 712 or when the sub-divisions arose from it. That he had never seen the Plaintiff on the land when he was growing up and that when he had noticed the problem, he had gone to court. He also confirmed that he had not reported the matter to the police and neither was he out to frustrate the Plaintiff, but was adamant that the transfer documents of the Plaintiff's land were not complete.

40. On being re- examined, he had reiterated that he was not aware of parcel No. 712 owned by his late father. That he had been residing on parcel No. 924 way back in 1974 even as his late mother gave it to him. He also reiterated that Df exh 3 was a certified true copy of the original which he had been given as it then was. That he had not seen land parcel No. 735 on the map but that he had confirmed that parcel No. 924 was on the map which he had been issued with at the Lands office.

41. That the Plaintiff moved to land parcel No. 924 in the year 2015 and that his parcels of land No. 924 and 923 were a subdivision of land parcel No. 773 which had given rise to parcels No. 921, 922, 923, 924, 925, 926 and 927. His evidence was that his father did not own parcel No. 712 but plot No. 110.

42. The second defence witness Richard Maritim who testified as DW2 informed the court that he came from Bomet County, Itembe Location and that he knew both Christopher Kiplangat Rono and Wilson Kipkorir. He sought for his witness statement to be adopted and proceeded to testify that land parcels No. 923 and 924 belonged to Christopher Kiplangat Rono. That the said parcels of land were family land which had been given as a gift to Christopher.

43. The defence closed their case and parties were directed to file their written submissions.

Plaintiff's submissions

44. The Plaintiff summarized the evidence adduced by both parties before stating down their issues for determination as follows;

- i. Whether the Defendant is seized with the requisite locus standi to defend and institute a counterclaim.
- ii. Whether the Defendant's counter claim is statutory time barred.
- iii. Whether the Plaintiff is entitled to the orders sought herein.

45. On the first issue for determination, the Plaintiff submitted that the suit land was a resultant parcel of the subdivision of LR No. Kericho/Itembe/712 which was registered in the name of Sino Arap Ruto who is said to have died in 1998. The Defendant who claimed to be the son of the deceased was neither the deceased's legal representative nor did he have the requisite Letters of Administration to the estate of the deceased to enable him raise a claim over the suit land. There are no proceedings that have been undertaken in respect of the estate of the deceased and there is therefore no nexus between him and the deceased property. That he was a stranger to the estate of the deceased and thus lacked the locus standi to defend and/or institute the counter claim in respect of the suit land. The Plaintiff relied on the case of **Hawo Shanko vs Muhamed Uta Shanko [2018] eKLR** in support of his submission. His further submission was that the law of succession only allowed a party to institute and maintain a suit on behalf of the estate of a deceased person only after they had obtained the relevant letters of administration.

46. On the second issue of determination in relation to the limitation of actions, the Plaintiff submitted that the agreement for the sale of the land was entered into on the 22nd April 1997 between the Plaintiff and the deceased. The letters of consent to transfer the suit land were issued on 9th December 1997 wherein the Plaintiff was registered as the owner of the suit land on 26th May 1998 and he took possession, developed the land wherein he has been in occupation.

47. That the Defendant illegally obtained title to LR No. Kericho/Itembe/923 and 924 in the year 2015 and unlawfully trespassed onto the suit land after destroying a fence that had been erected therein, started ploughing the land and let loose his cattle to graze on the same. That the period between 1998 and 2015 was over 17 years and if the Defendant had any claim over the suit land, he ought to have raised the same within the prescribed time as was stipulated under Section 7 of the Limitation of Actions Act. His claim therefore was statutory barred and the court has no jurisdiction to handle the same.

48. On the third issue as to whether the Plaintiff's suit was merited it was this submission that he had acquired title to the suit land legally wherein he had been in occupation for over 17 years and had made substantive improvements. That although the Defendant had raised allegations of fraud in his defence pertaining the Plaintiff's registration of the suit land, yet there had been evidence adduced by the District Land Surveyor confirming that indeed whereas the Registry Index Map (RIM) had not been amended to reflect what was on the ground yet the suit land existed on the ground. That it had been a subdivision of LR No. Kericho/Itembe/712 into three portions being 734, 735 and 736. That the portion pointed out by the Plaintiff corresponded with parcel number 735 which was depicted on the mutation form of Kericho/Itembe/712. The allegation of fraud therefore could not be sustained. The Plaintiff further submitted that given the seriousness of the allegations, the onus was on the Defendant to provide evidence to the court of the alleged fraud which evidence ought to have met the

standard of proof, as was understood by the Court of Appeal in the case of **Central Bank of Kenya Limited vs. Trust Bank Limited & 4 Others [1996]**.

49. The Plaintiff submitted that his case had been proved to the required standard in law. That the Defendant was undeserving of the orders sought in the counterclaim and therefore the court should find in his favour. **Defendant's submissions**

50. The Defendant submitted that he was contesting the Plaintiff's claim of purchase of land parcel LR No. Kericho/Itembe/735 from the late Sino Arap Ruto. He framed his issues for determination as follows;

- i. Whether the Defendant's claim against the Plaintiff is statute barred.
- ii. Whether the Defendant lacks the locus standi to bring the claim against the Plaintiff.
- iii. Whether the counter claim is merited
- iv. Whether the Defendant is a trespasser
- v. Whether the Plaintiff is entitled to prayers sought
- vi. Who pays the costs

51. On the first issue for determination the Defendant submitted that the counterclaim as brought was not a claim for the estate of Sino Arap Ruto but that the Plaintiffs land parcel did not exist on the ground and the Plaintiff was only holding title in paper which had been acquired fraudulently. That the counterclaim did not seek any prayer on behalf of the deceased's estate and as such the claim that he lacked the locus to bring the counter claim should fail.

52. It was the Defendant's submission on the second issue for determination that under Section 4(2) of the Limitation of Actions Act a claim founded on tort had to be brought within three years from the date upon which the cause of action arose. That the suit was instituted in 2016 where the Plaintiff asserted his proprietary interests. That it had been when the Defendant was filing his response that while conducting due diligence at the lands office, that he had learnt of the fraud wherein documents in support of the fraud had been availed to him in 2016 which was the same year.

53. That on the 17th May 2016 the Defendant filed an amended defence to plead fraud which was a period of less than one month after realization of the fraud and therefore the time when the cause of action arose. The claim that the counterclaim is statute barred should also fail.

54. The Defendant submitted that the counterclaim was merited to the effect that although the Plaintiff on the counterclaim stated that the Defendant's title was acquired fraudulently, yet land parcel LR No. Kericho/Itembe/735 emanated from land parcel LR No. Kericho/Itembe/712 as evidenced by the mutation form produced as exhibit 4. The Plaintiff's title was issued on 26th May 1998. Mutation to the land parcel that gave rise to the Plaintiff's land was done on 28th May 1998 which was two days after the issuance of the title. That further at the time of the said mutation, the alleged owner of land parcel LR No. Kericho/Itembe/712 was already deceased as per exhibit 5. The fraud was summed up by the letter from the office of the County Commissioner confirming the nonexistence of the minutes confirming the transfer of the land parcel LR No. Kericho/Itembe/735 to the Plaintiff.

55. Further submissions were that through the production of the Registry Index Map as defence exhibit 6, the defence had shown that the Plaintiff's parcel did not exist on the ground. That the surveyor had also confirmed that the acreage of the land showed by the Plaintiff on his ground was different from that in the title. That information the evidence adduced by the Defendant was that the Plaintiffs document of title was nothing but a boardroom document functioned with an aim of using it to grab land from the Defendant. That apart from that, there had been no iota of evidence of the Plaintiff's purchase of the Defendant's parcel of land.

56. On the issue of whether he was a trespasser, the Defendant's submission was that he was the registered proprietor of land parcels LR No. Kericho/Itembe/923 and 924 both having been gifted to him by his parents and land upon which his parents were interned. That he had been in occupation of the suit land since his childhood. That his registration as proprietor was therefore protected under Sections 24 and 26 of the Land Registration Act as the same had neither been questioned on impeached. That being in occupation of his own land, it could not be said that he was a trespasser to the Plaintiff's property.

57. The Defendant submitted that the Plaintiff's evidence was laden with inconsistencies which vitiated his alleged trespass against the Defendant. That although the Plaintiff had sought for permanent injunctive orders against him, yet he had not discharged the parameters settled in the celebrated case of **Giella vs. Cassman Brown [1973]** sic). The title held by the Plaintiff to suit land LR No. Kericho/Itembe/735 being questionable as per the evidence adduced in court that the said land constituted the Defendants suit lands LR No. Kericho/Itembe/923 and 924. That there had been no prima facie case established and therefore the court could not issue injunctive orders in favour of the Plaintiff as the same would amount to evicting the Defendant from his parcels of land because the Plaintiff did not distinguish his parcel of land from the Defendant's parcels of land.

58. On the last issue for determination, the Defendant submitted that costs normally followed an event as provided for under Section 27 of the Civil Procedure Act unless there were exceptional circumstances to depart from the established legal principles. That since there were no exceptional circumstances in the present case, he sought that the Plaintiff's Plaint be dismissed and the counter claim be allowed with costs.

Determination

59. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. From the summation of the matter in question, the Plaintiff's suit is based on an allegation that he had encroached on the Defendant's parcel of land No. Kericho/Itembe/923. That these allegation was strange to him because he had been in occupation of his own parcel of land from the year 1996 which land, LR No. Kericho/Itembe/735 measured 0.3 hectares. That he had been registered as its proprietor on 26th May 1998. That he had first bought the suit land measuring 0.1 acres for Kshs. 31,500/= in 1996 from the Defendant wherein at the time the title was still in Christopher's father's name. That initially they did not enter into a written agreement and later he had bought more land, which added up to 0.75 acres for a total of Kshs. 240,726/= wherein he had made payments in installments in both cash and kind. That he had first paid Kshs. 31,500/= to Paul Rono, who was Christopher's brother, between 1997 and 1998. He then built a canteen for Christopher worth Kshs. 41,940/=, 2 toilets and 2 bathrooms for Kshs. 31,620/= and a 2 bedrooomed house worth Kshs. 54,276/= on an understanding between him and Christopher. He had paid the balance in cash. That he had put up shops and rental rooms on the suit land and also connected electricity and water, planted trees which had since been destroyed after the Defendant chased his tenants from the land in December 2015. The Plaintiff therefore sought that there be an order of permanent injunction restraining the Defendant from interfering with his proprietary interest in L.R No. Kericho/Itembe/735.

60. The Defendant's case on the other and is that the Plaintiff took occupation of parcel of his (Defendant's) land L.R No. Kericho/Itembe/924, land which he referred to as parcel No. 735, in the year 2015. That he had lived on land L.R No. Kericho/Itembe/924 which was a subdivision of land parcel No. 773 since 1974 and that the said parcel of land had been registered to his mother. That upon the subdivision of No. 773, it had given rise to parcels No. 921, 922, 923, 924, 925, 926 and 927 wherein he had inherited parcels L.R No. Kericho/Itembe/923 and L.R No. Kericho/Itembe/924 from his mother. He was registered as its proprietor on the 14th October 2015.

61. The Defendant's case was that although the Plaintiff's claim was over land parcel L.R No. Kericho/Itembe/735 on allegations that he had purchased it from the Defendant's late father, yet parcel No. 773 did not exist on the ground although it reflected on the Registry index map and further that his father was not registered to land parcel L.R No. Kericho/Itembe/712 from which land parcel No. L.R No. Kericho/Itembe/735 is said to have arisen upon its subdivision. The plaintiff's registration therefore as the proprietor of L.R No. Kericho/Itembe/735 was fraudulent. The Defendant in his counterclaim thereon sought that the registration of the Plaintiff as the proprietor of parcel L.R No. Kericho/Itembe/735 be declared null and void, the same be canceled and the Plaintiff be ordered to move out of land parcel L.R No. Kericho/Itembe/923 and L.R No. Kericho/Itembe/924 and in default an eviction order to issue.

62. Indeed from the narration above what comes out for determination is the following ;

- i. Whether the Plaintiff's registration as proprietor of the suit land was lawful or obtained through fraud.
- ii. Whether the Plaintiff is entitled to the orders sought in his Plaint
- iii. Whether the Defendant is entitled to the orders sought in the counter claim
- iv. Who is entitled to pay the costs of the suit

63. On the first issue for determination as to whether the Plaintiff's title was lawful or obtained through fraud, the onus was on the Defendant to prove these 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".

64. In the case of **Arthi Highway Developers Ltd vs West End Butchery Ltd & Others [2015] eKLR**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13th 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".

65. I have no doubt in my mind that the Defendant herein has distinctly pleaded the facts on which fraud is alleged against the Plaintiff. The next step however was for him to prove those allegations to the required standard. I will therefore interrogate all those allegations of fraud, as submitted by the Defendant.

66. The Plaintiff's suit is that he was the proprietor of land parcel No. Kericho/Itembe/735 measuring 0.3 hectares having had purchased the same from the Defendant and his brother Paul, wherein Paul had received cash for 0.1 acres while the Defendant had been paid in kind, land which he had been in occupation from the year 1996.

67. The Defendant's case on the other hand is that although the Plaintiff claims to have purchased the suit land from his father, which land was a subdivision of LR No. Kericho/Itembe/712, yet his father was not the proprietor of the said original suit land No.712. That the Plaintiff had superimposed parcel No Kericho/Itembe/735 which does not exist on the ground, on his (Defendant's) land parcels No. Kericho/Itembe/923 and 924. The Defendants assertion was that there were no forms or other relevant documents that supported the transfer of parcel No. 735 to Plaintiff and neither had there been minutes showing the transfer of parcel No. 735 to Plaintiff.

68. The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, held as follows:

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

69. Section 80 (1) of the Land Registration Act provides that:-

"Subject to sub Section (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."

70. From the above provisions it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

71. I have considered the original document that gave rise to the Plaintiffs' claim to ownership of land parcel No. Kericho/Itembe/735 which is the sale agreement herein produced as Pf exh 4. I note that the same shows that the sale agreement made on the 22nd April 1997 was between the Plaintiff and one Mr. Sino Arap Ruto (Defendant's father) for the sale of a portion of 0.1 (acreage not known). Details of the description of the property for sale, the sale premium, and the conditions thereto as well as signatures of both parties and their witnesses is not included. I find that this does not conform to the requirements of a contract as per the provisions of **Section 3(3)** of the **Contract Act** which provides as follows;

3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

72. That notwithstanding, the evidence of the District land Surveyor Bomet who testified as PW 4 was to the effect that land parcel No. Kericho/Itembe/712 belonged to one Mr. Sino Arap Ruto and was sub-divided in May 1998 giving rise to Nos. 734, 735 and 736. That parcel of land No. 735 measured 0.3 hectares and was registered in the name of Wislon Yegon Kipkorir. That the mutation form herein produced as Pf exh 7 and 8 had been signed by the land owner Sino Arap Ruto on 23rd April 1998 wherein it had been approved on 29th May 1998, presented and paid for on the 28th May 1998 wherein title had been issued after the 29th May 98.

73. Df exh 5 was explicit to the effect that Mr. Sino Arap Ruto who was the proprietor of parcel of land number No. Kericho/Itembe/712 had passed away on the 9th February 1998.

74. On the 16th July 2018, the court directed the District Surveyor & Land Registrar to visit land parcels No. 135, (sic) 923, 712, 723 and 924 to establish whether parcel No. 735 existed. A surveyor's report dated the 27th September 2018 was filed on 21st October 2019. I note that the ground findings were to the effect that;

i. On the RIM, Parcel No. 735 was missing but parcel number 924 existed.

ii. That parcels No. 734, 735 and 736 were subdivisions of parcel No. 712.

iii. That part of the position occupied by parcel No. 924 on the RIM was parcel No. 735 on the ground.

iv. That since the RIM as per the mutation of parcel No. 712 was not amended, it gave an erroneous impression that parcels No. 734, 735 and 736 did not exist.

v. That the portion pointed out to them by the Plaintiff corresponded with parcel No. 735 which was depicted on the mutation form for parcel No. 712.

75. The surveyor's recommendation had been that the mutation of parcel No. 712 should be amended on the Registry Index Map (RIM) subject to the court's direction so as to conform to the situation shown on the ground.

76. I have also considered the copy of a letter dated 18th April 2016 herein produced as defence exh 7 from the Deputy County Commissioner Bomet Sub county confirming that indeed there had been no minutes conferring the transfer of land No. Kericho/Itembe/735 to the Plaintiff.

77. Indeed it is clear that the deceased, Sino Arap Ruto, passed away on the 9th February 1998, there were no succession proceedings ever been filed in respect of the estate of Sino Arap Ruto the deceased, meaning that the estate of the deceased has not been distributed, by the time his land parcel No. Kericho/Itembe/712 was sub-divided in May 1998 giving rise to Nos. 734, 735 and 736 through a mutation form

which was signed allegedly by the deceased, long after his death on 23rd April 1998.

78. It will therefore not be necessary to belabor the point that title to No. Kericho/Itembe/735 was improperly acquired. Section 45 of the Law of Succession Act provides as follows:-

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this Section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

79. In the case of **Bahola Mkalindi vs. Michael Seth Kaseme & 2 others [2012] eKLR** the court held that;

‘The Law of Succession Act, Cap. 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.

80. **Section 55** of the Law of Succession Act stipulates that:-

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by Section 71.”

81. Having considered the evidence before me as well as the exhibits herein produced, it clearly emerges that **Section 55** of the **Law of Succession Act was not complied with before the deceased Sino Arap Ruto’s properties were transferred**. I therefore find that the said registration was a nullity as the estate of deceased could only have been dealt with under the law of succession Act after his death and not otherwise. I therefore find that the Plaintiff’s title to No. Kericho/Itembe/735 was acquired *illegally, un-procedurally or through a corrupt scheme* fraud, as pleaded by the Defendant and the same is herein liable for impeachment.

82. I further find that the Defendant has not laid any claim to the deceased’s property and having said so, I find in favour of the Defendants counter-claim and order that there be cancellation of the registration of the Plaintiff as proprietor of land parcel LR No. Kericho/Itembe/735 within 30 days as the same is null and void

83. The Plaintiff shall forthwith move out of No Kericho/Itembe/923 and 924 within the next 30 days and in default an eviction shall issue.

84. The Plaintiff’s suit is dismissed with costs to the Defendant.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 24TH DAY OF FEBRUARY 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE