



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC APPEAL NO. E001 OF 2020

JOSEPH KIPROTICH BOR.....APPELLANT

VERSUS

TABUTANY CHEPKOECH CHEBUSIT.....RESPONDENT

Being an Appeal against the Judgment of Hon L Kiniale Principle Magistrate

at Bomet Principle Magistrate's Court in ELC No. 7 of 2019.

Delivered on the 21st September 2019)

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard by Hon L Kiniale Principle Magistrate in the Magistrate's Court at Bomet in Environment and Land Case No. 7 of 2019 where the learned trial Magistrate, upon considering the evidence before her found that the Respondent herein was the legal registered proprietor of parcel of land No. Kericho/Kapkimolwa/1629. Subsequently the Appellant's title to the said parcel of land was canceled and an order of eviction issued.
2. The Appellant, being dissatisfied with the said Judgment, filed the present Appeal on the grounds raised in his Memorandum to wit;
 - i. That the learned trial Magistrate erred in law and in fact in disregarding the Appellant's evidence thus arriving at a wrong judgment.
 - ii. The learned trial Magistrate erred in law and in fact in cancelling the Defendants' title deed.
 - iii. The learned trial Magistrate erred in law and in fact in issuing a permanent injunction restraining the Appellant from selling, disposing off, and/or transferring the subject parcel of land.
 - iv. The learned trial Magistrate erred in law and in fact in failing to consider all the issues in controversy.
 - v. The learned trial Magistrate erred in law and in fact in awarding costs to the Respondent.
 - vi. The learned trial Magistrate erred in law and in fact in finding in favor of the Respondent contrary to the evidence on record.
3. The Appellant thus sought that the Appeal be allowed and the judgment of the honorable Principal Magistrate delivered on 21st September 2020 be varied, set aside and/or reviewed accordingly. The applicant also sought for both the costs of the Appeal and the subordinate court.
4. The Court issued its directions on 6th October 2021 to the effect that the Appeal be disposed of by way of written submissions wherein parties complied.
5. The Appellant's written submissions dated 21st October 2021 were to the effect that pursuant to the Respondent finding suit against him vide a plaint dated that 14th May 2018 and amended on the 13th July 2020, the matter was subsequently heard wherein the impugned judgment was delivered on 21st September 2019.
6. The Appellant gave a brief history of the matter in question to the effect that the Respondent was said to be the wife of the late Kipkirinyet

Arap Chebusit whom it was alleged to have bought land comprising Kericho/Kapkimolwa/9 in early 1970's from one Kipkoech Arap Chepkoech. No title had been issued. The Appellant's case on the other hand was to the effect that he had been in peaceful occupation of the said parcel of land since 1972 having purchased the same from the Respondent's husband. That despite knowledge of her presence, neither the Respondent nor her husband had ever raised any query.

7. The Appellant further submitted that subsequently without her knowledge, the Respondent, in collusion with the family members of the late Kipkoech Arap Chepkwoy, filed a Succession Cause No. 5 of 2017 before the Bomet High Court where the Respondent was listed as a beneficiary and the portion of land transferred to her. She then filed suit to claim ownership of the same and her prayers were granted by the court thus giving rise the present Appeal.

8. The Appellant raised their issues for determination as follows;

- i. Whether the trial court erred in not finding that the Respondents' suit was statutorily time barred thus occasioning a miscarriage of justice.
- ii. Whether the trial court erred in entering judgment in favor of the Respondent in total disregard of the evidence on record, which militated against.
- iii. What could have been the appropriate remedies in the circumstance of the case?

9. On the first issue for determination the Appellant herein submitted that it was not in dispute that he had been in occupation and use of the disputed land since 1972 to date. That the suit was filed on 24th May 2018 which was contrary to the provisions of Section 7 of the Limitation of Actions Act. That the law was clear to the effect that any action to recover land had to be filed within 12 years from the date on which the right of action accrued and if it first accrued to some other person through whom the claim was made, from the date the right accrued to that other person.

10. That since the Respondent had admitted in evidence during cross examination that the Appellant had been in occupation of the disputed land since 1972 wherein her husband who had been the original owner had no dispute, the right of action had accrued to the Respondent's husband 12 years from the date of transaction or his death. That the law of succession makes provision on what should be done in the event that the family of the original owner were not willing to institute succession proceedings in time. The family of the deceased ought to have been compelled to take out letters of administration. Reliance was placed in the case of **Nelson Machoka Keraro vs Land Registrar Kisii & 3 Others [2019] eKLR**.

11. The Appellant submitted that the trial court erred in law and fact when she disregarded the preliminary issue of limitation and went ahead to state that the said issue of limitation could not be raised as a preliminary point of with regard to technicalities. That the court had then proceeded to consider strenuous issues which ought not to have been considered. That the issue on limitation was not a procedural technicality but was a substantive issue which went to the jurisdiction of the court. The lack of consideration of the same therefore occasioned a miscarriage of justice.

12. On the second issue for determination as to whether the trial court erred in entering judgment in favor of the Respondent in total disregard of the evidence on record, the Appellant submitted that there had been no dispute that the Appellant had been on the suit land since the early 1970's when the land sale transaction had taken place. There was further evidence that the Respondent had never been in occupation of the suit land and that the proprietor of the same was her husband who knew of the Appellant's occupation and had no dispute therein. The evidence on record was to the effect that after the Respondent had fraudulently obtained title to the land by concealing relevant materials during the Succession Cause, she had then sought for the eviction of the Appellant from the suit land.

13. That the Appellant's testimony before the trial court had been corroborated by three witnesses, and further that the issue of land ownership had been raised earlier where it had been resolved in favour of the Appellant. That there had also been the production of the sale agreement which had confirmed that the Appellant had been occupation of the suit land for more than 46 years a fact which was not taken into account by the trial court. That the Appellant's occupation of land was an overriding interest recognized by the provisions of Section 28 of the Land Registration Act and therefore his existence on the land was a constructive notice of his interest in the same.

14. The Appellant submitted that had the trial court found in their favour, the appropriate remedies would have been for the cancellation of the title deed issued to the Respondent and issue a new title in favour of the Appellant. Further that the court should have also found that the Respondent's suit was statutory time barred and incompetent. That since this court had powers to order rectification, cancellation, or amendment of a register, if satisfied that the said registration was obtained, made or omitted by fraud or mistake, that this court to uphold the Appeal and grants the orders as afore stated.

Respondents' submissions

15. The Respondent's opening remarks to their submission was that "a thief acquired no right or interest which is transferable in stolen property, the transaction would be void ab initio and the property is traceable". See the case in **Jane Gatheca vs Priscilla Gitungu & Another(sic)**

16. The Respondent submitted that the present dispute related to a land dispute between the two parties, each in possession of a title deed, and laying claim to land parcel registered as Kericho/Kapkimolwa/1629

17. The Respondent's case being that the land in dispute which was initially registered as Kericho/Kapkimolwa/9 to the late Kipkoech Arap Chepkoech was sold to her late husband Kipkirinyet Arap Chebusit but that the vendor had died before transferring the same.

18. That a Succession Cause had been filed in the Bomet High Court where the confirmed Grant dated 14th December 2017 had bequeathed a share of the land of the late Kipkirinyet Arap Chebusit to the Respondent. There had been sub division of the original suit land wherein the Respondent had acquired title to land parcel No. Kericho/Kapkimolwa/1629 measuring 2.55 hectares and was issued the title deed on the 6th March 2018. That at no time was the land ever transferred to the Appellant herein.

19. That after having submitted evidence in court, the court had analyzed the dispute, considered the issues for determination as to who was the legal owner of the suit land where it had noted that the Respondent had obtained ownership through transmission. The court had further noted that the Appellant herein did not give cogent explanation as to how he had obtained title to property as there had been no court order to that effect. The court had then proceeded to pronounce itself to the effect that the Respondent's title was valid whereas the Appellant's title was to be cancelled as it was tainted with illegality.

20. The Respondent framed their issues for determination as follows;

- i. Who is the legal owner of No. Kericho/Kapkimolwa/1629
- ii. Whether the honorable court should affirm the order of permanent injunction issued against the Appellant in Bomet Principal Magistrate's court in No. 7 of 2019.
- iii. Whether the counter claim filed by the Appellant in Bomet Principal Magistrate's court in No. 7 of 2019 dated 13th July 2020 is properly on record and/or should be expunged from the record and or dismissed.
- iv. Whether the Respondent was entitled to costs in Bomet Principal Magistrate's court in No. 7 of 2019.
- v. Who should bear the costs of the Appeal.

21. On the first issue for determination, the Respondent relied on the provisions of section 26 of the Land Registration Act and on the decided case by the Court of Appeal in **Permanent Market Society & 11 Others vs Salima Enterprises & 2 Others** (sic) to submit that although title to land conferred ownership to someone, yet in a matter as this where there were two parties each holding title and claiming ownership to the same parcel of land in dispute, it had to be decided as to who held the valid title from the evidence adduced in court.

22. That in the absence of legal and relevant documents to show that the transfer had been done procedurally, it can only be discerned that the Appellant herein transferred the suit land to himself without any legal authority and through forged documents which had not been attested to nor signed by the proprietor. His title therefore deserved to be cancelled as it had been a subsequent title to the Respondent's title which had not been surrendered for cancellation. Further, that no notice of 90 days had been given to the Respondent as the proprietor of the suit land, by the Land Registrar of his/her intention to make any alterations to the respondent's title or revoke the same. (See Section 80 of the Land Registration Act.)

23. On the second issue for determination, the Respondent's submission was that having found that the Appellants' title had been obtained illegally and fraudulently when he transferred the suit lands to himself un-procedurally, the trial court was well within its mandate as provided for under Section 80 of the Land Registration Act, to cancel the respective title. Reference was made to the Court of Appeal decision in the case of **Evanson Wambugu Gachugi vs Simon Wainaina Gatwiki & 2 Others** (sic).

24. On the third issue as to whether the honorable Court should affirm the order of permanent injunction issued against the Appellant by the trial court, the Respondent's submission was to the effect that pursuant to the principles governing the grant or denial of injunctive orders as laid down in the celebrated case of **Giella vs. Cassman Brown [1973] EA .358**, the Respondent had satisfied the court as to the validity of her title to the effect that she was the absolute and indefeasible owner of the suit land and therefore had prima facie demonstrated that as a matter of right, the Appellant should be evicted from her land.

25. That the Appellant's counter claim in the trial court had offended the provisions of Order 7 rule 5 of the Civil Procedure Rules as no verifying affidavit had been filed in support of the averments made therein and therefore the same ought to be expunged and/or dismissed from the court record for being irregular and/or defective.

26. The Respondent submitted that they were entitled to costs in both in the trial court which costs had been settled fully by the Appellant. The Respondent sought for costs of the Appeal.

Determination.

27. I have considered the record, the judgment by the trial Magistrate, the written submissions by learned Counsel as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (*See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*). I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*).

28. According to the proceedings herein, the Plaintiff/Respondent herein instituted suit against the Appellant vide a plaint dated 14th May 2018 which was amended on the 13th July 2020, where she had sought for;-

- i. An order of permanent injunction restraining the Defendant by himself or his agents, servants or any other person acting on his behalf from selling/disposing or transferring all that property known as Kericho/Kapkimolwa/1629.
- ii. That an order of cancellation of the Defendant's title issued on 25th May 2018 for Kericho/Kapkimolwa/1629.
- iii. An order of eviction be issued against the Defendant for the parcel of land registered as Kericho/Kapkimolwa/1629.
- iv. Cost of this suit.
- v. Any other relief this honorable Court deems fit and just to grant.

29. The Appellant filed his statement of defence on the 24th July 2018 which defence was amended on the 10th July 2020 and contained a counterclaim wherein he generally denied all the allegations set forward by the Respondent in his Plaint stating that title to parcel number Kericho/Kapkimolwa/1629 was obtained illegally and the same ought to be cancelled. The Appellant had further prayed for the Respondent's suit to be dismissed with costs.

30. After the confirmation of the preliminaries, the matter proceeded for hearing before P. Achieng the Senior Principal Magistrate on the 30th September 2019 wherein the Plaintiff/Respondent and all her witnesses adopted their respective witness statement as their evidence. The Plaintiff/Respondent in her evidence as PW1 testified to the effect that she had participated in the Succession Cause No. 5 of 2017 which was in respect to the estate of Kipkoech Arap Chepkwony, wherein the family of the said Arap Chepkwony had been parties to the proceedings herein produced as Pf exh 3(a-c).

31. That at the close of the Succession Cause, she had been issued with a title deed which she produced as Pf exh 4. She also produced a search certificate as Pf exh 5. Her evidence was that pursuant to receipt of title, her advocate had issued notice to the Defendant/Appellant to vacate form the suit land.

32. During her cross examination, PW1 confirmed that she had not lived on the suit parcel of land and that the Defendant/Appellant had been in occupation from 1972 to date. That her husband and Chepkwony had no dispute over the parcel of land and that she had filed the suit because the Defendant/Appellant had refused to leave the land. She also stated that Chebusit did not sell the land to Arap Bor the Defendant/Appellant herein but that the land had been sold to her husband by Chepkwony although she had no sale agreement to produce in court. She also confirmed that when the chief of Kapkimolwa refused to give her a letter to enable her file the Succession Cause, she had obtained the said letter from the chief of Chepalungu. Her evidence was that she was not aware that the Defendant/Appellant also had a title deed to the said land.

33. The second witness Samwel Kipkemoi Koech who testified as PW2 testified that his late father had sold the suit land to the Plaintiff/Respondent's husband. That after the death of her husband, the Plaintiff had filed a Succession Cause. He also confirmed that a person by the name of Chebusit used to live on the land where he grazed his animals and carried out the business of buying and selling cows with the Respondent. That from the information he had received, the land had been bought by Chebusit.

34. In cross examination, the witness confirmed that Chebusit had died in 1975 whilst Chepkwony had died in 1987 but that it had been after the death of Chebusit that the Plaintiff had sought for the title from Chepkwony. He also confirmed that his father had no issue with the Defendant/Appellant's occupation on the suit land.

35. His evidence in re-examination was to the effect that they all knew that the Plaintiff was the owner of the land and that was why she had been included as a beneficiary to his father's estate during the Succession Cause where their father's estate had been distributed by the court.

36. PW3 one Stephen Arap Rotich, in his evidence had confirmed that there had been a meeting at the District Commissioner's office where the Plaintiff, the family of Koech and the Defendant had attended. He also confirmed that the chief of Kapkimolwa had refused to write for them a letter citing that he ought to have written it for the Defendant.

37. PW4, Thomas Kiboit Arap Langat also testified that he could recall Chebusit moving to Kures for treatment as he had been unwell. That prior to the demise of both Chebusit and Chepkwony, there had not been any dispute over the land and that he did not know the Plaintiff. He also confirmed to being present when Chebusit purchased the land from Chepkwony.

38. PW5 Kipkirui Arap Koech only adopted his witness statement before the Plaintiff closed its case.

39. The defense case which was led by the Defendant/Appellant who testified as DW1 after adopting his statement as his evidence, was to the effect that the Plaintiff herein was the wife to his friend Chebusit from whom he had bought the suit land. He produced his title as Df exh 1.

40. Upon being cross-examined, he produced the sale agreement as Df exh 2 and went on to testify that Chebusit had purchased the land from Chepkwony wherein after, Chebusit had sold the land to him, wherein he had taken possession of the same. That Chepkwony and his family acknowledged his ownership. That he was not aware of the Succession Cause as he was not part of the proceedings thereto. He also did not know how the Plaintiff had procured her title deed but that he had been given his own title deed to parcel number Kericho/Kapkimolwa/1629 by the Lands Board.

41. His evidence was that both title deeds held by him and the Plaintiff to parcel number Kericho/Kapkimolwa/1629 measuring 2.55 hectares had been issued in the same year wherein the Plaintiff got her title on 6th March 2018 and he got his on 25th May 2018 which was after

Chepkwony had passed away.

42. The Defendant/Appellant also conceded that whereas his statement showed that his land measured 9 acres his title deed on the other hand showed that the land measured 2.55 hectares an equivalent of 6.3 acres. His evidence was that the deceased's family had subdivided the land and given it to the Plaintiff without his involvement. He denied having connived with the local administration to defraud the Plaintiff of her land and further stated that it was not true that Chebusit had entrusted him to stay on the land and look after it as well as to herd his cattle.

43. The second defence witness Paul Kipkirui Langat the area chief of Kapkimolwa confirmed that the suit land was within his area of jurisdiction. That in the year 2000, the Plaintiff had gone to him to complain about the Defendant's trespass on the suit land wherein he had summoned the parties and referred them to a panel of Elders.

44. That from the history of the matter in question, the Plaintiff's husband and the Defendant had been great friends who conducted the business of buying and selling livestock together. His evidence was that Chebusit sold the suit parcel of land to the Defendant in 1972, who has since been in occupation. He also confirmed that during Chebusit's lifetime, there had been no dispute concerning the land and that according to him, from the many meetings he had held concerning the land, it was his opinion that the Defendant was its owner.

45. That he had advised parties to commence Succession Cause but his advice had been ignored and instead the Plaintiff's family obtained a letter from a chief in Narok with which they had used for file the Succession Cause. That it had been later that the Defendant had informed him of the receipt of a notice to vacate from the suit land.

46. In cross examination, the witness reiterated that in 1972 he was a witness to the transaction between Chebusit, Arap Chepkwony and Joseph Bor the Defendant and that it had been Chebusit who had bought the land from Arap Chepkwony.

47. When confronted with the two title deeds the witness testified that one title had been revoked by the Land Registrar and that he did not know the procedure under which the title had been issued pursuant to a Succession Cause. He also confirmed that the family of Arap Chepkwony had filed a Succession Cause although they did not involve all the beneficiaries and to some extent the purchasers of the estate. He was adamant that Arap Chepkwony did not sell any land to the Defendant. He also confirmed that although there had been an agreement between the Defendant and Chebusit yet there had been no certificate of transaction.

48. His evidence was that it was not possible for the courts to issue a title on one hand and for the Land Registrar to revoke it because the court had precedent on matters relating to land and not the land registrar.

49. DW3 Simoen Kipkoech Molel, a village elder from Kipleles adopted his witness statement as his evidence in chief wherein upon cross examination he testified that the suit land parcel Kericho/Kapkimolwa/1629 belonged to the Defendant who was currently in occupation. His evidence was that Kericho/Kapkimolwa/9 could not have been subdivided before a court in a Succession Cause and distributed to beneficiaries because it belonged to the Defendant. That Chebusit was his neighbor with whom they used to do business together at Mulot and that he owned land at a place known as Kores. When he was referred to the two title deeds herein produced as evidence, his response was that the issue needed to be sorted out at home.

50. DW4, Alexander Juma a relived Assistant Chief of Kapkimolwa sub location testified that all parties were known to him and that he was part of the team that sat with the clan elders to solve the land dispute concerning the suit land where they had reached a decision that the said land belonged to the Defendant.

51. On cross examination however he confirmed that the minutes of that meeting were not signed and that there had been many meetings between the two parties held. He also confirmed that the original owner of the suit land was Arap Chepkwony whose family had conducted a Succession Cause. That he was aware of the title being held by the Defendant and not the one held by the Plaintiff. The defence thus closed its case.

52. In order to make a determination on the above captioned issues, it is important to note that from the genesis of the matter in question, looking at the evidence adduced and the statements herein adopted as the witness' evidence in chief, that it is not in contention that parcel of land No. Kericho/Kapkimolwa/1629 measuring 2.55 hectares is a subdivision of parcel No. Kericho/Kapkimolwa/9 which was originally registered to Kipkoech .A. Chepkwony.

53. It is also not in dispute that around the year 1971, Kirinyet .A. Chebusit, who was the husband of the Respondent herein, bought 2.55 hectares of land from Kipkoech .A. Chepkwony to be excised from No. Kericho/Kapkimolwa/9.

54. It is further not in dispute that neither Kirinyet .A. Chebusit nor the Respondent herein took possession/occupation of the land they had purchased from Kipkoech .A. Chepkwony, but that the Appellant herein took occupation of the same in the year 1972.

55. The point of departure comes in this form; whereas the Appellant states that he bought 9 acres of land from Kirinyet .A. Chebusit for a consideration of ksh 3,600/= in 1972, which comprised in land parcel number No. Kericho/Kapkimolwa/9, the land was then subdivided giving rise to the suit land No. Kericho/Kapkimolwa/1629. That he subsequently acquired title on the 25th May 2018. The Respondent's assertion on the other hand was that after her husband Kirinyet .A. Chebusit had bought the land from Kipkoech .A. Chepkwony, he had left it under the care of the Appellant for purpose of keeping and grazing cattle for trade on transit to the cattle market since they were both cattle traders.

56. It is worth to note that these transactions were neither reduced into legal agreements nor were transfers of the said parcels of land effected. The title still remained in the name of its original owner, Kipkoech .A. Chepkwony up to his death and therefore no title was capable of being passed until legal representative(s) to the estate of Kipkoech .A. Chepkwony had been appointed by the court.

57. Kirinyet. A. Chebusit passed away in the year 1976 whereas Kipkoech. A. Chepwony passed away in 1987 and it is acknowledged that during their lifetime, there had been no query raised on the occupation by the Appellant on the suit land, where he still lives to date.

58. It is conceded that after the passing away of Kipkoech .A. Chepwony in the year 1987, his family filed a Succession Cause No. 5 of 2017 in Re Estate of Kipkoech Arap Chepkwony before the Bomet High Court where the Respondent was listed as a beneficiary. By a certificate of confirmation of grant issued on the 14th December 2017, a share of 2.55 hectares of the deceased's estate in No. Kericho/Kapkimolwa/9 was issued to Respondent herein. The suit land was subdivided wherein she was issued with title to No. Kericho/Kapkimolwa/1629 on the 6th March 2018. After being registered as the proprietor, she filed suit to claim ownership of the same and rightly so.

59. The Respondent having obtained title through transmission, and the Appellant herein having claimed that the said title had been obtained fraudulently by concealing relevant materials during the Succession Cause, the best avenue available to the Appellant was to have canvassed his dissatisfaction in the Probate Court as canvassing the same in this court would amount to this court sitting on Appeal on a decision of a court of equal status.

60. Having considered the pleadings, the evidence on record, the exhibits produced and the submissions filed, it is my view that the issue that arises for determination is whether the learned trial Magistrate upon considering the evidence before her erred by finding that the Respondent herein was the legal registered proprietor of parcel of land No. Kericho/Kapkimolwa/1629.

61. Indeed the Respondent having obtained her title through transmission and the Appellant herein having obtained his title through the "Land board", the present dispute herein relates to two competing titles to Kericho/Kapkimolwa/1629

62. In the case of **Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others**[2016] eKLR, Munyao J held as follows;

'A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

63. The evidence tabled by the Appellant although through no supporting documents, was that he had bought the suit parcel of land from the Respondent's husband Kipkirinyet Arap Chebusit in 1972 wherein he had been issued with the title deed on 25th May 2018 by the "Land Board".

64. The Respondent on the other hand gave cognate evidence to the effect that after the family of the late Kipkoech Arap Chepkwony filed a Succession Cause No. 5 of 2017 before the Bomet High Court, she had been listed as a beneficiary to his estate wherein vide the confirmation of grant dated 14th December 2017 she had been given a share of 2.55 hectares of the deceased's estate in No. Kericho/Kapkimolwa/9 in recognition of her late husband's interest in the estate. That there had been a sub division of the original suit land wherein she acquired title to land parcel No. Kericho/Kapkimolwa/1629 measuring 2.55 hectares and was issued the title on the 6th March 2018.

65. Needless to say that whereas the Respondent herein obtained her certificate of title on 6th March 2018, the Appellant was registered as proprietor of the suit properties on 25th May 2018. It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of **Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997**, where the court held that:

'Where there are two competing titles the one registered earlier is the one that takes priority'

66. The same position was held in the case of **Gitwany Investment ltd vs. Tajmal Ltd & 3 Others (2006) eKLR** where the Court held that:-

'...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail'

67. I find that the Respondent's title was the first in time and as equity teaches in its maxim that; **"when two equities are equal, the first in time prevails"**, then the Respondent's title deed was the first in time and should prevail the evidence called by the Respondent having been cognate and not displaced by the Appellant. No evidence was called to confirm how the 2nd title deed came into being and whether the title deed held by the Appellant was genuine or not. In fact of interest to note is that the Appellant's title had been registered after the death of the original proprietor of the suit land and without any probate proceedings conducted.

68. Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation, that was for a new title to be issued the older title has to be surrendered to the lands office for cancellation. No evidence was tendered by the Respondent that she had surrendered her title, which had been issued earlier than the Appellant's title, for cancellation.

69. Balancing the two competing titles, it is my view that the Respondent holds good title to the suit property. The title of the Appellant in my view, and in the absence of evidence to rebut the same, could only have been obtained either by the fraud, or by the mistake of the Land Registry, or both.

70. I note that these properties were registered under the repealed Registered Land Act which is now governed by The Land Act, 2012 and The Land Registration Act, 2012. Indeed the law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“the Certificate of Title issued by the Registrar upon registration, 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 the 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

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

71. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

72. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

73. 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.’

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

“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.”

75. 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.

76. That said and done I find and hold that the trial learned trial Magistrate did not error in finding in favor of the Respondent. The findings are herein upheld with the result that this Appeal lacks merit and is dismissed with cost as prayed.

Dated and delivered via Microsoft Teams at Kericho this 10th day of February 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE