



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 116 of 2007

HELLEN CHEPKURUI SIGEI.....PLAINTIFF

VERSUS

JULIANA CHEPKOROS.....DEFENDANT

JUDGMENT

1. The plaintiff brought this suit on 12th November, 2007 against the defendant seeking the following reliefs;-

- i. A declaration that the plaintiff is the registered proprietor of the parcels of land known as L.R.NOs. Trans-Mara/Kimintet“D”/1353 and 1354 (hereinafter referred to where appropriate only as “the suit properties”).**
- ii. A permanent injunction restraining the defendant by herself or through her agents, servants and/or anyone claiming under the defendant from trespassing onto, interfering with and/or in any manner whatsoever dealing with the suit properties.**
- iii. An order of eviction against the defendant.**
- iv. General damages for trespass.**
- v. Costs.**

2. The plaintiff’s case against the defendant as set out in the plaint dated 12th November, 2007 is that, at all material times the plaintiff was and is still the registered proprietor of the suit properties which are situated within Trans-Mara District in the Republic of Kenya. The plaintiff claims that between September and October, 2007, the defendant trespassed into a substantial portion of the suit properties where she commenced the construction of temporary structures and cultivation. The plaintiff has averred that the defendant’s conduct aforesaid is unlawful and has prevented the plaintiff from cultivating that portion of the suit properties in occupation of the defendant. The plaintiff claims that the defendant’s conduct aforesaid amounts to an interference with the plaintiff’s right to exclusive possession and occupation of the suit properties. The plaintiff claims that a demand had been made upon the defendant to vacate the suit properties and stop further trespass but the defendant has declined to comply thereby rendering the filing of this suit inevitable. The defendant filed her statement of defense to the plaintiff’s claim on 11th January, 2008 in which she denied the plaintiffs claim in its entirety. The defendant has averred in her statement of defense that she is not occupying the suit properties as claimed by the plaintiff. She has contended in her defense that she is occupying a parcel of land known as Plot No. Transmara/Kimintet/1429(hereinafter referred to where appropriate only as “Plot No.1429”) which she claims is a subdivision of land parcel No. Transmara/Kimintet/923. The defendant claims that her

occupation of Plot No.1429 aforesaid followed the decision of the Minister in, Kimintet “D” Adjudication Section, Appeal No. 62 of 2004 over the said parcel of land known as Transmara/Kimintet “D”/923 (hereinafter referred to where appropriate only as “Plot No.923”). She claims that in the said appeal, it was ordered that Plot No.923 aforesaid be subdivided into two(2) following which subdivision she got one of the subdivided parcels namely Plot No.1429 while the plaintiff retained the other parcel known as Plot No. Transmara/Kimintet/1428 (hereinafter referred to where appropriate only as Plot No.1428). The defendant has prayed for the Plaintiff’s suit to be dismissed with costs.

3. In his reply to the defendant’s statement of defense, the plaintiff has denied the existence of Plot No.923, Plot No. 1428 and Plot No. 1429 . The plaintiff has averred that the parcel of land known as Plot No.923 which was the subject of Kimintet “D” Adjudication section, Appeal No. 62 of 2004, is separate and distinct from the suit properties which are registered under the Registered Land Act (Cap. 300) Laws of Kenya (now repealed) in the name of the plaintiff.

4. After the said reply to defense, the parties agreed on a total of 13 issues for determination by the court. I will refer to these issues later in this judgment. When this suit came up for hearing before **Hon. A. Makhandia, J.** on 4th May, 2011, the parties entered into a consent on the following terms;-

i. The District land Registrar and surveyor, Trans-Mara District, respectively, do visit LR.NOs. TRANS-MARA/KIMINTET “D”/1353, 1354, 1428 & 1429 and ascertain the existence of the said parcels of land and

their respective ground location.

ii. The District land Registrar and Surveyor, Trans-Mara District, to confirm whether LR.NOs. TRANS-MARA/KIMINTET ‘D’/1353, 1354 & 1429, do share any common boundary.

iii. The District Land Registrar and surveyor, Trans-Mara District, to confirm whether the portion occupied by the Defendant falls on LR.NOs. TRANS-MARA-KIMINTET ‘D’/1429 or 1353 and 1354.

iv. The costs of the District Land Registrar and Surveyor, Trans-Mara District to be shared equally between the plaintiff and the Defendant.

v. The Report by the District Land Registrar and Surveyor, Trans-Mara District to be filed on or before the 8th day of July, 2011, when the case shall be mentioned.

Pursuant to the order that was issued by the court following the said consent, the District Surveyor, and the District Land Registrar, Trans-Mara District prepared and submitted their report to court on 7th September, 2011 on the issues that were

referred to them for investigation and confirmation. After the submission of this report, the plaintiff listed this suit for hearing on 14th November, 2012 when it was heard before me. The plaintiff gave evidence in support of her case while the defendant elected not to give evidence or call any witness. In her evidence in chief, the plaintiff stated that she is the registered proprietor of the suit properties which she inherited from her late husband one **JOSEPH CHERUIYOT SIGEI**. She produced copies of title deeds and certificates of official search to prove her ownership of the suit properties. She told the court that she inherited the suit properties as one parcel then known as Plot No. 923, which was then registered in the name of her said deceased husband. After having the said parcel of land registered in her name, she subdivided it in the year 2005 into two portions namely Plot No. Transmara/Kimintet “D” 1353 and 1354, the suit properties herein. The Plaintiff told the court that, the defendant who is her neighbor entered into one of the said parcels of land namely Plot No. Trans Mara/Kimintet “D” 1353 which measures approximately 1.87 hectares and occupied a substantial portion of it which she is using for cultivation. She told the court that if the defendant had not been using her parcel of land aforesaid, she

would have been the one cultivating maize on it. The plaintiff testified further that she is not aware of Plot No. 1429 which the defendant claims to be occupying and how she came to own it since there was no restriction on plot No. 923 when she inherited it from her deceased husband. The plaintiff prayed for the eviction of the defendant from the suit properties, loss of user and the costs of the suit.

5. The plaintiff produced in evidence in addition to the title deeds for the suit properties (which were produced as plaintiff's exhibits 1 and 2) and certificates of official search for the same (which were produced as plaintiff's exhibits 3 and 4), a report that was prepared by the District Surveyor and District Land Registrar, Trans Mara District dated 26th August, 2011 pursuant to the order of the court that I referred to herein earlier. This report together with the annexures thereto were produced in evidence by consent of both parties and marked as Plaintiff's exhibit 5. The relevant part of this report is reproduced herein below for ease of reference;-

“Pursuant to High Court order dated 4th may, 2011 and subsequent summon dated 8th July, 2011, it has been noted that;

The Registrar and the District Surveyor visit the land parcels as ordered.

All the parties were present and represented by their relatives. The Registrar deduced the following;

That Parcel No. TRM/Kimintet ‘D’/923 was initially owned by one Joseph Cheuriyot Sigei. It had an appeal to the Minister though not indicated on the Land Register. The case was heard and determined such that the land was to be sub-divided into two equal portions one for Joseph Cheruiyot and another for Juliana Chepkoros.

That the said parcel was transferred to one Hellen Chepkurui Sigei who was a wife to the proprietor. The appeal to Minister case was in the processes of being determined.

That Hellen Chepkirui Sigei sub-divided the said

parcel into two portions which resulted into new parcel numbers, after the order from appeal to Minister was delivered for the parcel to be sub-divided into two equal portions.

<u>NEW NO.</u>	<u>AREA</u>
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TRM/KIMINTET ‘D’/1353	1.87HA
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TRM/KIMINTET ‘D’/1354	10.17HA
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(Copy of mutation is attached)

That through various correspondences from the director of land Adjudication and settlement the officer, the District Surveyor was directed to implement the Ministers decision on the appeal case No. 62 of 2004 TRM/Kimintet ‘D’/923, Julian Chepkoros VS Joseph Sigei which was done on 27/08/2007.

That parcel 923 was again subdivided into two equal portions i.e.

<u>Parcel No.</u>	<u>Area</u>
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TRM/Kimintet ‘D’/1428	5.8Ha.
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TRM/Kimintet ‘D’/1429	5.8Ha.
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(Attached is a copy of mutation)

That during the implementation of the appeal to the Minister by the District land surveyor, it was discovered that parcel No. TRM/Kimintet 'D'/923 have been subdivided into 1353 & 1354 and hence titles deeds have been issued to One Hellen Chepkurui Sigei.

It is the observation by the District Land Registrar and District Land Surveyor that all these parcels lay within parcel No. TRM/Kimintet 'D'/923 only that parcel No. TRM/Kimintet 'D'/1428 and 1429 are as a result of subdivision of 923 by the District surveyor into equal portion as a result of direction to implement the Minister's appeal which are not registered because of previous subdivision of parcel No. TRM/Kimintet 'D'/923"

6. On being cross-examined by the defendant's advocate, the plaintiff told the court that she obtained a grant of letters of administration that authorized her to administer and inherit the estate of her deceased husband which included the suit properties. The plaintiff told the court further that she was not aware that her deceased husband had a dispute with the defendant over plot No. 923 and that any case was pending at the time she applied for a grant of letters of administration of the estate of her deceased husband. The plaintiff told the court that she came to know of the dispute that existed between the deceased and the defendant that was being handled by the District Commissioner in the year 2004. She could however not remember whether the dispute was over plot no. 923 or not. She could also not remember the outcome of that case. When the advocate for the defendant read to her a portion of the proceedings which contained the award of the District Commissioner to the effect that the appeal was allowed in part and that the disputed land namely Plot No. 923 was to be divided equally between her deceased husband and the defendant herein, her response was that she did not agree with what was read to her. The plaintiff told the Court further that the defendant entered the suit property in the year, 2007 on the strength of the decision of the District Commissioner aforesaid and that she did not appeal against that decision.

7. In re-examination by her advocate, the plaintiff admitted that she participated in the proceedings that took place before the District commissioner but she could not remember the particulars of the parcel of land that was the subject of the said proceedings. She maintained that she was not aware of the parcel of land that the District Commissioner had ordered to be subdivided. She denied any knowledge of the land parcel numbers 1428 and 129 and maintained that as far as she was concerned, the defendant was occupying her parcel of land.

8. The defendant closed her case without calling evidence and the parties agreed to put in written submissions. The plaintiff filed her written submissions on 23rd November, 2012 while the defendant filed her written submissions in reply on 3rd December, 2012. I have considered both submissions and I will refer to the same from time to time hereunder where necessary while considering the issues that have arisen for determination in this suit. As I had mentioned at the beginning of this judgment, the parties herein framed and agreed on a total of twelve (12) issues for determination in this suit. It is interesting to note however that in their written submissions, the Plaintiff's advocates once again framed new issues (now reduced to five (5) which they went ahead and submitted on.

The defendant's advocates on their part made submissions without reference to either the issues that they had agreed upon with the advocates for the Plaintiff or the new issues that

the Plaintiff's advocates had framed in their submission. On my part and for the purposes of this judgment, I will go with the issues that were framed and agreed upon by the parties. The statement of agreed issues signed by the advocates for the parties herein dated 11th June, 2008 was filed in court on 20th June, 2008. These are the issues that I would now seek to answer one after the other. For ease of reference, I reproduce the same herein below:-

1. Whether or not the Plaintiff is registered as the proprietor of L.R. NOs. TRANSMARA/KIMINTET 'D'/1353 & 1354, respectively?

2. If so, whether the registration of the plaintiff as such, was pursuant to first registration?

3. Whether or not L.R NOs. TRANSMARA/KIMINTET 'D'/1353 & 1354, respectively, arose from

and/or hitherto formed part of KIMINTET 'D' ADJUDICATION SECTION, PLOT NO. 923?

4. Whether or not the Defendant resides on and/or cultivates portions of LR. NOs. TRANSMARA/KIMINTET 'D'/1353 & 1354?

5. If the answer to 4 above is in the affirmative, when the Defendant commenced such residence and/or cultivation?

6. Whether or not the Defendant has lawful cause and/or reason to cultivate the suit land?

7. Whether or not there exist LR NOs. TRANSMARA/KIMINTET/1428 & 1429, respectively in the register of Land situate, within Kimintet Registration Section?

8. If the answer to 7 above is in the affirmative, in whose names are the said parcels of lands registered?

9. Whether or not LR NOs. TRANSMARA/KIMINTET/1428 & 1429, formed part of what was hitherto parcel Number KIMINTET D/923?

10. Whether the defendant occupies LR NOs. TRANSMARA/KIMINTET/1429.

11. Whether the defendant is a trespasser?

12. Whether the plaintiff is entitled to the Orders sought

13. Who should bear the costs of this suit?

9. Issue No.1

The plaintiff testified that she is the registered proprietor of the suit properties. She produced in evidence copies of the title deeds for the suit properties and certificates of official search which confirm that she is duly registered as the proprietor of the suit properties. The plaintiff's evidence in this regard was not challenged either in cross-examination or by contrary evidence from the defendant. I am therefore satisfied that the plaintiff is the registered proprietor of the parcels of land known as Transmara/Kimintet "D"/1354 and Transmara/Kimintet "D"/1354, the suit properties herein. On this issue, I am in agreement with the Plaintiff's submission.

10. Issues No.2 and 3

According to the report dated 26th August, 2011 that was submitted to court by the District Surveyor and the District Land Registrar, Trans Mara District the contents of which is reproduced hereinabove and which report was produced in evidence by consent of the parties as plaintiff's exhibit 5, the suit properties, namely Transmara/Kimintet "D"/1353 and Transmara/Kimintet "D"/1354 are sub-divisions of the parcel of land previously known as Transmara/Kimintet "D"/923 ("Plot No.923"). Plot No. 923 was owned initially by one **Joseph Cheruiyot Sigei**, the plaintiff's deceased's husband. According to the plaintiff's own testimony, she inherited Plot No. 923 from her deceased husband who died in the year, 2000. In the year, 2005, she transferred the said plot into her name after which she sub-divided it into two portions which sub-division gave rise to the two parcels of land that now forms the suit properties herein. Due to the foregoing, the suit properties arose from the original parcel of land known as Plot No. 923 which was owned by the plaintiff's deceased husband. Since the Plaintiff's deceased's husband, **Joseph Cheruiyot Sigei** was the one in whose name Plot No.923 was demarcated and recorded during the adjudication process and ultimately registered according to the report of the District Land Surveyor and District Land Registrar aforesaid, the said **Joseph Cheruiyot Sigei** was the first registered owner of the same. The plaintiff who inherited the said plot from the deceased and caused it to be sub-divided into two cannot be said to have been the first registered owner of either Plot No. 923 or the two (2)

subdivisions which are the suit properties herein. The Plaintiff cannot also derive the status of a first registered owner by virtue of her inheritance of Plot No.923 from a first registered owner or by the subsequent subdivision of the said plot and having herself appearing in the register of the subdivided plots as the first owner. Copies of the Land Registers for Plot Nos. 923, Plot No. 1353 and Plot No. 1354 annexed to the Report of the District surveyor and District Land Registrar referred to herein above (hereinafter referred to only as “**the Plaintiff’s exhibit 5**”) as “A6”, “A7” and “A8” leaves no doubt that Plot No. 923 was first registered in the name of the plaintiff’s deceased husband on 7th January, 2004. This plot was transferred to the plaintiff on 21st June, 2005 and the title was closed on 17th November, 2005 when the said property was sub-divided into plot No. 1353 and 1354 which were both registered in the name of the plaintiff on the same date. My understanding of the term “**first registration**” as used in section 143 of the Registered Land Act, Cap 300 (now repealed) is that, it connotes that registration that was effected pursuant to the provisions of section 11(2) and (2A) of the Registered Land Act, Cap. 300 laws of Kenya (now repealed) after the adjudication process under the Land Adjudication Act, Cap.284, Laws of Kenya. I do not think that a person who acquires a property that was previously registered in the name of another person who then sub-divides such property can be referred to as “the first” registered owner of the sub-divided plots. I believe that it is for the purposes of dispelling this wrong notion that the land registries have developed a practice over the years of indicating in the registers and title deeds for the titles that result from sub-divisions, the parcel number of the original plot. I do not know why it is not indicated in the title deeds that were produced in court by the plaintiff for plot No. 1353 and Plot No.1354 that they are sub-divisions of Plot No. 923 a fact which is expressly set out in the registers for the two (2) properties. Due to the foregoing, it is my finding that the registration of the plaintiff as the proprietor of the suit properties was not a first registration and that the suit properties arose from Plot No.923.

11. Issue No.4.

The plaintiff is seeking the eviction of the defendant from the suit properties namely plot Nos. 1353 and 1354. This claim presupposes that the defendant is in occupation of the suit properties otherwise the issue of eviction will not arise. In her evidence, the plaintiff testified that the plaintiff is occupying a portion of Plot No.1353 and that the defendant took possession of the same in the year 2007. From the proceedings and ruling in the Appeal case No. 62 of 2004, referred to herein above which is part of Plaintiff’s exhibit 5, it was found as a fact that the defendant herein was occupying a portion of the then Plot No. 923. In the said ruling, it was directed that Plot No. 923 be sub-divided into two so that the defendant can retain the portion where she is said to have constructed some houses while the plaintiff’s husband was to retain the other portion which they were cultivating. According to Plaintiff’s exhibit No.5, the plaintiff subdivided Plot No. 923 into Plot No. 1353 and 1354. From the plaintiff’s testimony, the defendant is occupying Plot No. 1353. It is not clear from the evidence adduced in court whether Plot No. 1353 which the plaintiff claims is occupied by the defendant is the portion of Plot No.923 where she had put up structures according to the proceedings I have referred to herein above. According to the said exhibit 5, whereas the plaintiff subdivided Plot No. 923 into Plot No. 1353 and 1354, the defendant with the assistance of the District surveyor Trans Mara caused Plot No. 923 to be sub-divided into Plot No. 1428 and 1429 and the defendant according to her defense claims to be occupying Plot No. 1429. While the plaintiff’s sub-division was registered, the defendant’s subdivision according to exhibit 5 was not registered due to prior sub-division of Plot No.923 by the plaintiff as aforesaid. It follows therefore that the only parcels of land arising from the sub-division of plot No.923 which are registered are Plot No. 1353 and 1354. Since there is no evidence to contradict the plaintiff’s evidence that the defendant is occupying and carrying out cultivation on Plot No. 1353, it is my finding that the said plot is being occupied by the defendant. I would wish to add for completeness of the determination of this issue that, from the mutations attached to exhibit 5, Plot No. 1353 is situated on the portion of Plot No. 923 which would have been comprised in Plot No. 1429 if the defendant’s sub-division had been registered. I am in agreement with the submission of the Plaintiff’s advocates that the parcel of land which the defendant is referring to as Plot No.1429 comprises of Plot No.1353.

12. Issue No.5.

According to the evidence adduced by the plaintiff, the defendant entered Plot No. 1353 in September,

2007 and commenced cultivation thereon. She testified in this regard in her evidence in chief and in cross-examination. In the absence of any evidence to controvert the plaintiff's evidence on this point, I find that the defendant entered Plot No. 1353 in the year 2007 and commenced cultivation thereon. I am aware however that there is evidence on record which I have already referred to hereinabove to the effect that the defendant was occupying a portion of the original Plot No. 923 as at 10th June, 2004 when the District Commissioner Trans Mara determined the Adjudication Appeal No. 62 of 2004 and ordered the said plot to be sub-divided into two so that the defendant can remain with the portion that was under her occupation while the plaintiff would remain with the other portion that she was then cultivating. My finding herein that the defendant entered Plot No. 1353 in the year 2007 does not mean therefore that the defendant was not in occupation of the original parcel No. 923 on which there is evidence that she had put up structures.

13. Issue No. 6.

According to the plaintiff's exhibit 5, Plot No. 1353 which the defendant is occupying is a sub-division of Plot No. 923. As I have already stated hereinabove, Plot No. 923 was initially registered in the name of the plaintiff's deceased's husband **Joseph Cheruiyot Sigei**. During the adjudication process, the defendant had raised an objection to the recording and demarcation of Plot No. 923 in favor of the plaintiff's said deceased husband. The defendant's objection was dismissed with costs. Following the dismissal of her objection, the defendant appealed to the minister pursuant to the provisions of section 29 of the Land Adjudication Act, Cap. 284, Laws of Kenya. While that Appeal to the minister was pending, the Land Adjudication Officer, Kimintet "D" Adjudication Section seems to have proceeded under section 27 (3) of the Land Adjudication Act, Cap. 284 Laws of Kenya to forward the Adjudication Register to the Director of land Adjudication who in turn forwarded the same to the Chief Land Registrar to effect the necessary registration of the parcels of land concerned pursuant to the provisions of section 28 of the Land Adjudication Act, Cap. 284 laws of Kenya and Section 11 (2) and (2A) of the Registered Land Act, Cap. 300 Laws of Kenya (now repealed). It is instructive to note that, the Director of Land Adjudication while forwarding the Adjudication Register to the Chief Land Registrar under section 27 of the adjudication Act aforesaid, was also supposed to forward a list of all the appeals that had been preferred to the Minister arising from the objections that had been determined in the adjudication section concerned and the Chief Land Registrar was duty bound pursuant to the proviso to Section 28 of the Land Adjudication Act, Cap 284 Laws of Kenya to enter a restriction against the register of all such parcels of land which were affected by an appeal which restriction was to endure until the appeal was determined. Upon the determination of the Appeal, the Chief Land Registrar was supposed to alter the register in accordance with that determination. According to the plaintiff's exhibit 5, while Plot No. 923 was being registered in the name of the plaintiff's husband by the Land Registrar, Trans Mara District upon receipt of the Adjudication Register as aforesaid, the fact that there was an appeal pending by the defendant was not indicated in the register and as such no restriction was entered against the title of Plot No. 923. This omission by the Land Registrar allowed the plaintiff who is the legal administrator of the estate of her deceased husband, **Joseph Cheruiyot Sigei** to transfer Plot No. 923 from the name of her deceased husband to her name. She thereafter subdivided the said plot into two namely Plot No. 1353 and 1354. This action was taken by the Plaintiff after the said Appeal had been determined in favor of the defendant but before the register of Plot No.923 could be amended as I have indicated herein above to factor in the outcome of the said Appeal as I mentioned herein earlier. I am of the view that by operation of law namely, section 28 of the Adjudication Act, Cap. 284 laws of Kenya, a person who is registered as a proprietor of land pursuant to an adjudication process which is subject to an appeal to the Minister under Section 29 of the said Act, holds the title to such property subject to the outcome of the appeal whether the pendency of such appeal is indicated in the Register and a restriction is entered against the title or not. In my view the need to indicate the existence of such appeal in the register and to enter a restriction against the title is to act as a notice to third parties who may wish to deal with the land that the land is encumbered. I do not think that the person registered as a proprietor of such parcel of land or his legal representative can defeat the outcome of the appeal to the Minister by simply sub-dividing the land. According to plaintiff's exhibit 5, the defendant's appeal to the minister was determined on 10th June, 2004 and was allowed in part. As I have already stated hereinabove, the Minister (who was represented by the District Commissioner, Trans Mara District) directed that Plot No. 923 be sub-divided into two (2) so that the defendant could retain the portion on which her houses were situated while the

plaintiff herein was to keep the portion that she was cultivating. According to the proceedings of the said appeal, the District commissioner and his team who heard the appeal made a site visit before they delivered their verdict which they have stated was based on evidence adduced and the observations made at the site. It was their finding that both the plaintiff herein and the defendant were in possession of Plot No. 923 with the defendants having put some structures thereon while the plaintiff was cultivating the same. Following the determination of the said appeal, the Director of Land Adjudication and settlement directed the District Surveyor, and the District Land Adjudication and Settlement Officer, Trans Mara District to implement the order of the Minister aforesaid so as to give effect to the provisions of Section 28 of the Land Adjudication Act, Cap. 284, Laws of Kenya. Pursuant to this directive, the District Surveyor, Trans Mara District proceeded to sub-divide Plot No. 923 into two (2) equal parts, namely Transmara/Kimintet "D"/1428 ("Plot No. 1428") and Transmara/Kimintet "D" 1429 (Plot No. 1429"). According to the Plaintiff's exhibit 5, this exercise was carried out on 27th August, 2007 but this sub-division that was carried out by the District Surveyor Trans Mara District pursuant to the order of the Minister could not be registered because it was discovered that the plaintiff herein had already carried out a sub-division on Plot No. 923 in the year 2005 soon after the decision of the Minister aforesaid which subdivision resulted in the closure of the register for Plot No. 923 and the opening of new registers for the sub-divisions namely, Plot No. 1353 and 1354. According to the evidence adduced in court by the plaintiff which I have already analyzed above, the defendant entered into and started cultivating Plot No. 1353 in the month of September, 2007. This seems to coincide with the time when the District Surveyor Trans Mara District sub-divided Plot No. 923 for the second time. It is no wonder that the defendant is claiming to be occupying Plot No. 1429 pursuant to the order made on her appeal and not Plot No. 1353. As I have already held hereinabove, the defendant is occupying Plot No. 1353 and not Plot No. 1429 as she alleges, as Plot No. 1429 was not registered. In the circumstances of this case, I am of the view that whether the defendant is occupying Plot No. 1353 as I have held hereinabove or Plot No. 1429 which is only a plot on paper, such occupation is sanctioned by a lawful order made by the Minister pursuant to an appeal that was lodged by the defendant in accordance with the provisions of the Land Adjudication Act, Cap 284, laws of Kenya. As I have already stated hereinabove, the Registration of Plot No. 923 in the name of the plaintiff's deceased husband was subject to the outcome of the appeal that had been lodged by the defendant and the outcome of such appeal could not be defeated by the sub-division of the said parcel of land. The decision in the defendant's appeal No. 62 of 2004 is therefore binding upon the plaintiff who participated personally in the said appeal. The defendant's occupation of Plot No. 1353 or portion of the parcel of land formerly known as Plot No. 923 for that matter pursuant to the order made in the said appeal cannot therefore be termed unlawful. It is therefore my finding that the defendant has lawful cause to occupy and cultivate Plot. 1353.

I don't agree with the Plaintiff's submission that the defendant should have mounted a counter-claim to assert her right over Plot.No.1353 instead of taking the law into her own hands. As I had mentioned earlier, the defendant has been in occupation of the parcel of land formerly known as Plot No.923. There is no evidence that the defendant vacated the said parcel of land and only came back to claim it forcefully after the determination of her Appeal. I don't see therefore the basis of the Plaintiff's claim that the defendant has taken the law into her own hands. The defendant's occupation of the suit properties is pursuant to a lawful order that was made in the Adjudication Appeal Case No.62 of 2004 in her favor which order was not appealed. In my view, if there is anyone who has taken the law into her own hands, it is the Plaintiff by her reluctance or refusal to have the order of the Minister perfected choosing instead to seek the aid of this court to evict the defendant from the suit properties contrary to the decision in the said appeal. In the circumstances, the holding in the Court of Appeal case of **Aikman-Vs-Muchoki (1984)KLR 353** relied on by the Plaintiff does not apply in this case.

14. Issue No. 7 & 8.

As I have already stated hereinabove, the sub-division of Plot

No. 923 into Plot Nos. 1428 and 1429 was not registered for reasons that I have already given. Plot Nos. 1428 and 1429 do not therefore exist in the register of land situated within Kimintet Registration, Section.

15. Issue No. 9

As I have already mentioned above, Plot Nos. 1428 and 1429 are sub-divisions of Plot No.923 which came about when the District surveyor, Trans Mara District attempted to sub-divide Plot No. 923 so as to comply with the order of the Minister. The two parcels though not registered are comprised in what was formerly Plot No. 923. This fact is clearly brought out in Plaintiff's exhibit 5.

16. Issue No. 10

Plot No. 1429 is not registered from the evidence on record but the parcel of land which is situated on the portion of the former plot No. 923 which the defendant calls Plot No. 1429 is Plot No. 1353. The defendant is therefore occupying Plot No. 1353 and not Plot No. 1429 which does not exist in the land register as I have already observed.

17. Issue No. 11

I have already found herein above that the defendant has a lawful cause to occupy Plot No. 1353. The defendant cannot therefore be a trespasser on the said Plot or on the suit properties for that matter.

18. Issue No. 12.

For the reasons that I have given in my determination of the preceding issues, my answer to this issue is in the negative. If I am wrong in my determination of the foregoing issues, I am of the view that the Plaintiff is not entitled to the reliefs sought therein for another reason that I have not dealt with above. Although this issue was not raised by the parties, it goes to the foundation of fair administration of justice and as such, the same cannot be ignored by the court when it arises from the evidence adduced before the court. It is not a matter that the court is bringing up in aid of the defendant but as a matter of public policy. It is a well settled doctrine of law that, a party cannot found an action on his own wrong. This doctrine is well captured in the latin phrase *Exturpi Causa non oritur actio*. In my view this is one such case. The plaintiff herein is the widow and legal administrator of the estate of **Joseph Cheruiyot Sigei**. The defendant had raised an objection to the recording and demarcation of Plot No. 923 in favor of the deceased. The defendant lost the objection. In exercise her right of appeal which is conferred by law, the defendant appealed the dismissal of her objection to the Minister under Section 29 of the Land Adjudication Act, Cap. 284, Laws of Kenya. Contrary to her evidence in chief, there is no doubt whatsoever from the proceedings of the Appeal Case No. 62 of 2004, that the plaintiff was aware of the existence of that appeal. At the hearing of the said Appeal, the plaintiff represented her husband who was deceased by then. The plaintiff who participated in the proceedings of the Appeal must also be taken to have had knowledge of the outcome of the said appeal as she proceeded immediately thereafter to transfer Plot No. 923 into her personal name before she subdivided it to ensure that it was completely out of reach of the defendant. This fact was denied by the plaintiff in cross-examination. However, having observed the demeanor of the Plaintiff in Court while she was giving evidence, I am unable to believe the plaintiff. The Plaintiff even claimed strangely that she did not know that it was the parcel of land No. 923 that was the subject of the said Appeal. Despite her knowledge of the existence of the Appeal against the recording and demarcation of Plot No. 923 in favor of her deceased husband during the adjudication process, the plaintiff proceeded to transfer Plot No. 923 to her name and if that was not enough, went ahead to sub-divide the said plot into two (2) thereby doing away completely with the register of Plot No. 923. As a result of this sub-division, the order made in favor of the defendant on appeal aforesaid could not be perfected. The plaintiff had clearly stolen a march against her. As I had observed earlier in this judgment, it is required as a matter of law that where there is a pending appeal against the determination of an objection during the adjudication process the parcel of land the subject of such appeal must be preserved until the appeal is heard and determined and at the determination of the appeal, the register of the said parcel of land must be amended to reflect the outcome of the appeal. The plaintiff herein with the full knowledge of the existence of the appeal by the defendant and the outcome thereof, dealt with the land in such a manner that it became difficult to enforce the order that was made in favor of the defendant in the appeal. With the full knowledge that the appeal was in favor of the defendant and that the order made therein entitled the defendant to occupy a portion of what was Plot No. 923 before the same was sub-divided by the plaintiff contrary to the law, the plaintiff has now approached this court which is both a court of law and equity to assist her in evicting the defendant from the parcel of land that was awarded to

her on appeal and which she has been unable to register in her name due to the Plaintiffs unlawful conduct. Can this court give such assistance? My answer is no. The Plaintiff's cause of action arises from clear breach or transgression of the express provisions of the Land Adjudication Act, Cap.284 Laws of Kenya in which transgressions the Plaintiff fully participated. It is a cardinal principle of public policy that no court will lend its aid to a man or woman who founds his or her cause of action upon an immoral or an illegal act. This court cannot be used as a tool to perpetuate illegality or injustice. The upshot of all the foregoing is that the plaintiff is not entitled to the reliefs sought. Although the plaintiff is the registered proprietor of Plot No. 1353 and Plot No. 1354, the Plaintiff's rights over these two (2) parcels of land are subject under the provisions of the Land Adjudication Act, Cap.284 Laws of Kenya to the rights that accrued to the defendant in the Appeal Case No. 62 of 2004. Contrary to the submission by the Plaintiff's advocates, the rights accorded to the Plaintiff as the registered proprietor of the suit properties under sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012 are not absolute and indefeasible. I decline therefore to declare the Plaintiff as the absolute proprietor of the suit properties. I decline also to grant the equitable remedy of injunction sought together with an order for the eviction of the defendant. The prayer for general damages is also refused. The plaintiff is not entitled to such damages in view of my finding that the defendant is not a trespasser and due to the fact that the plaintiff did not prove the same. The court was not told by the plaintiff as to how she arrived at the sum of Kshs.800,000.00 claimed under this head of claims. No evidence was placed before the Court on the basis of which it could assess the general damages claimed. I am in agreement with the defendant's advocates' submission that the Plaintiff's suit should be dismissed. The same is hereby dismissed with costs to the defendant.

Dated, signed and delivered at Kisii this 8th day of February, 2013

**S. OKONG'O,
JUDGE**

In the presence of:

Mr. Oguttu for the plaintiff
Mr. Minda for the defendant
Mobisa Court Clerk.

**S. OKONG'O,
JUDGE.**