



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Environmental & Land Case 693 of 2012**

**SILAS BARTONJO KIPTALA.....PLAINTIFF**

**VERSUS**

**JAMES KIPKEMBOI MUREI.....DEFENDANT**

**JUDGEMENT**

***(Suit by plaintiff seeking orders of permanent injunction and eviction of defendant from suit land; suit land registered in name of plaintiff; plaintiff having bought suit land from the 3rd party; defendant claiming that 3rd party had earlier sold the suit land to him and seeks order to enforce the contract between himself and the 3rd party; Suit land being agricultural land; no application for consent of land control board made by the defendant; 3rd party offering the defendant refund before filing of 3rd party notice; whether contract between defendant and the 3rd party is enforceable; whether plaintiff's claim against defendant succeeds; plaintiff's suit against defendant succeeds; suit against 3rd party dismissed with costs)***

This matter was commenced by a plaint filed on the 15 March 2011 and which was amended on 20 May 2011 before any of the parties had filed appearance or defence. In the amended plaint, the plaintiff has sought the following orders :-

- i) An injunction to prevent the defendant from encroaching trespassing into land reference Tulwet/ Kesses Block 5 (Cheptiret) /96.
- ii) An eviction order to remove the defendant from and or the structures he has put on land reference Tulwet/Kesses Block 5 (Cheptiret)/96.
- iii) Costs of the suit.

In his amended plaint the plaintiff pleaded that he is the registered owner of the land reference Tulwet/Kesses Block 5 (Cheptiret)/96 (the suit land) measuring approximately 0.6 hectares. It is pleaded that in February 2011, the plaintiff went into the land to plough and prepare the same in readiness for planting only to find the land ploughed by the defendant. It is averred that the defendant was asked to stop ploughing and planting crops on the suit land but to no avail. The plaintiff has also pleaded that the defendant in April 2011 put up a temporary structure on the suit land. It is asserted that the plaintiff as the registered owner of the land is entitled to exclusive enjoyment of the suit land and that the defendant has no legally enforceable claim on the land. It is for this reason that the plaintiff has sought the orders prayed in the plaint.

Upon being served, the defendant entered appearance and filed a statement of defence. In his defence, the defendant pleaded that the plaintiff acquired the suit land unprocedurally and fraudulently in

collusion with one Liansi Sijile. He has averred that he bought a piece of land measuring 1.5 acres being a portion of the land parcel known as Tulwet/Kesses Block 5 (Cheptiret)/26 which land comprised of 5 acres from the said Liansi Sijile at a consideration of Kshs.78,000/=. He has pleaded that he has been living on the said parcel of land since the date of purchase in the year 1999 and has done developments therein. He has further pleaded that he continued quiet possession until 18 February 2011 when a surveyor came and started sub-dividing the land into two portions. It is then that he learnt that the plaintiff had colluded with the vendor and sold the said portion to the plaintiff whereas he (the defendant) was the rightful owner. He has pleaded various particulars of fraud on the part of the plaintiff and the said Liansi Sijile which include buying and selling the defendant's land when they knew or ought to have known that the defendant was the legal and valid owner; buying and selling the defendant's suit land on the basis of forged and fraudulent documents; purporting secretly and fraudulently to allocate the suit land to the plaintiff without following the right procedure; and fraudulently and dishonestly transferring the defendant's suit land in favour of the plaintiff. In his defence the defendant prayed that the title issued to the plaintiff be revoked and the suit be dismissed with costs.

The defendant later made an application to enjoin Liansi Sijile as a third party to these proceedings which application was allowed. In the third party notice, the defendant claimed indemnity and/or contribution against Liansi Sijile. His reasons are that on 31 March 1999 he sold to the defendant a piece of land measuring 1.5 acres out of the land parcel **Tulwet/ Kesses Block5 (Cheptiret) /26** at a consideration of Kshs.98,000/= which the defendant paid in full. He has further pleaded that without justification the third party refused to transfer the suit land to the defendant's name despite various reminders. He has averred that the third party colluded with the plaintiff by selling the defendant's portion of land to the plaintiff after subdividing the same. He has pleaded particulars of fraud against the third party which are more or less similar to those that he pleaded in his defence. He has in the third party notice claimed specific performance of the contract of sale made on 31/3/1999. He has also pleaded that the third party be made liable for costs of the suit and for the third party to indemnify him in the event that judgment is passed in favour of the plaintiff against the defendant.

The third party upon being served entered appearance and filed his third party defence. In his third party defence, the third party asserted that the sub-division and transfer of the land parcels Tulwet/Kesses Block 5 (Cheptiret) /26 and Tulwet/ Kesses Block 5 (Cheptiret) /96 were legal procedural and proper. He has further asserted that the land parcel Tulwet/Kesses Block 5 (Cheptiret) /96 has already been transferred to the plaintiff and is no longer available for transfer to the defendant. He has denied that the transfer to the plaintiff was fraudulent. He has however admitted receiving the sum of Kshs. 98,000/= from the defendant as consideration for purchase of the land reference Tulwet/Kesses Block 5 (Cheptiret)/ 26 but asserted that the sale was nullified by operation of law by virtue of the Land Control Act. He has pleaded that the defendant's only remedy in law is for a refund of Kshs.98,000/= which refund was made to the defendant but the defendant rejected the same. The third party has further contended that it is contrary to the Land Control Act for the defendant to seek enforcement of the contract entered into between the third party and the defendant. He has pleaded that he is not under a duty to justify his refusal/failure to seek consent of the Land Control Board to the agreement which has since become null and void. He has also pleaded that the claim of the defendant against the third party is time barred under the Limitation of Actions Act and that the time within which the defendant ought to have claimed the suit land lapsed on 31/3/2011. He has pleaded that he is not liable to pay any damages except the refund of the sum of Kshs. 98,000/=. He has asserted that the defendant is not entitled to any indemnity from the 3rd party and that the third party proceedings ought to be dismissed and/or struck out with costs.

Pleadings having been closed, this matter proceeded before me on 20/2/2013 and 21/2/2013. The plaintiff testified that in the year 2010 a friend informed him that there was a piece of land available for sale out of the land registered as Tulwet/Kesses Block 5 (Cheptiret)/26. This land was owned by Liansi Sijile, the third party herein. The total acreage of this parcel of land was 5 acres and he purchased 1.5 acres. The other 3.5 acres was purchased by another person. The land was hence sub-divided into two portions. The portion measuring 1.5 acres was registered as Tulwet/Kesses Block 5 (Cheptiret)/96 and the other portion measuring 3.5 acres was registered as Tulwet/Kesses Block 5 (Cheptiret)/97. The land parcel Tulwet/Kesses Block 5 (Cheptiret)/96 was transferred to the plaintiff and is now registered in his name. The plaintiff produced the official search as Exhibit No.1 and the Certificate of Title as Exhibit

No.4 to demonstrate that he is now the registered owner of the suit land. After he got the Certificate of Title, he went to develop the land in February 2011. It is then that the defendant alleged that the land was his. He then sought legal assistance and his lawyers wrote a letter of demand to the defendant. The defendant was not willing to move out but instead ploughed the land, planted trees and constructed a structure. He stated that he never found the defendant on the land in 2010 and denied the plaintiff's alleged possession of the land since 1999. He has denied forging any documents and has stated that the transfer of the suit land into his name was proper. He stated that he talked to Mr. Sijile about the defendant's claims and Mr. Sijile informed him that he had finalized with the defendant by offering him a refund of the purchase price.

In cross-examination, the plaintiff asserted that he did not know of any dispute before he purchased the land. He first came to know of the dispute when a response came to the demand letter that he wrote to the defendant. He stated that when he bought the land the same was under the name of Mr. Sijile, the third party.

In his evidence in defence, the defendant asserted that the suit land was his. He testified that he bought the land on 31/3/1999 from Mr. Sijile. He bought the land at a consideration of Kshs.98,000/= for 1.5 acres. There was a written agreement made which agreement the defendant produced as Defence Exhibit No.1. He stated that after he bought the land, he started farming it and fenced it. However, he did not settle in peace because the sons of the third party started causing him problems by uprooting his crops and demanding that he leaves the land. The defendant referred the issue to the Chief of the area (Cheptiret Location) in 2003. He testified that before the Chief, Mr. Sijile confirmed that he had sold the land to the defendant but Mr. Sijile's sons still continued to disturb his possession. The matter was then referred to the District Officer (D.O). The defendant testified that Mr. Sijile confirmed before the D.O that he had sold the land to the defendant and that on his part (Sijile) he had no problem but that it was his sons who were not happy that their father sold the land to the defendant. The D.O in his wisdom told the sons to buy the land from the defendant if they wanted it and he wrote his decision in a letter that was produced by the defendant as Defence Exhibit No.2. The sons of Mr. Sijile never paid the money and the defendant stated that thereafter he remained in peaceful occupation. The defendant asserted that Mr. Sijile sold to him the land but admitted that they never appeared before the land control board. He admitted that no application for consent of the land control board was ever prepared and neither was any formal transfer instrument prepared.

In cross-examination by counsel for the plaintiff, he admitted that he does not have title to the suit land and that the same is registered in the name of the plaintiff. He stated that the other portion of 3.5 acres (now registered as land parcel No.97) was bought by one Kibiwott Yego Kibunja and that now the third party has sold the whole of the 5 acres that was originally comprised in Land parcel No.26. He stated that he was not aware when the suit land was sold to the plaintiff and admitted that he did not have anything to show that the procedure followed by the plaintiff in acquiring the land was irregular. He asserted that he has never been refunded his purchase money. He was however shown a cheque for kshs.98,000/= and a forwarding letter. He stated that he refused to accept a refund of the money because he was entitled to interest and the cost of the development that he made.

Cross-examined by counsel for the 3rd party, the defendant admitted that he never lived peacefully on the land owing to interference by the sons of the 3rd party. This was until the D.O resolved the matter in 2004 when he gave the 3rd party's sons the option of buying out the defendant which they did not. Thereafter he lived in relative peace until 2011 when the plaintiff came to claim the land. He admitted that a banker's cheque for kshs.98,000/= was drawn on 2 August 2011 before he filed the third party proceedings in October 2011. He admitted that when he filed the 3rd party proceedings 12 years had lapsed from the date of the initial agreement which was dated 31 March 1999. He asserted that he has now sued the third party because he wants the land back and so that he (the 3rd party) can pay the costs of this suit. He stated that he refused the refund of Kshs. 98,000/= because it was not inclusive of interest and other costs that he had expended on the land.

In addition to his testimony, the defendant called two other witnesses. DW-2 , Musa Kipsang Tanui, a village elder, testified that he was present when the agreement of 31/3/1999 was made. He was

aware that the defendant purchased 1.5 acres out of the 5 acres that the third party owned. The consideration was Kshs. 98,000/=.He was also aware that one of the sons of the third party had asserted that he would not vacate the land and the matter was referred to the Chief and later the D.O. He confirmed that the D.O asked the sons of Mr. Sijile to refund the defendant the purchase price if they wanted the land but no refund was forthcoming and thereafter the defendant lived quietly.

DW-3, Philip Leting Yego stated that he was the Chief of Cheptiret Location. He testified that he is aware of the 1999 agreement between the defendant and the third party. He also confirmed the dispute between the sons of Mr. Sijile and the defendant which was resolved by the D.O.

The third party on his part confirmed that he sold land to the defendant. He thereafter moved to Turbo and purchased a land measuring 2 1/2 acres where he resides. After he sold the land his sons were unhappy and attempted to evict the defendant. He confirmed that the dispute was referred to the D.O who resolved it. In 2011, he prepared a banker's cheque of kshs.98,000/= to refund the defendant the purchase price. He produced the banker's cheque as Third party's Defence Exhibit No. 1. The money was rejected. He stated that there was no reason why the defendant sued him through the third party notice as he had already offered a refund. Cross-examined by counsel for the defendant, the witness admitted that he sold land to both the plaintiff and the defendant.

The hearing of the matter having been closed, I invited the parties to make submissions on the case. The plaintiff and defendant filed written submissions but the third party did not file any and did not appear to make any oral submissions.

In his submissions, the plaintiff's counsel asserted that the plaintiff is entitled to the reliefs sought in the amended plaint. He submitted that the defendant has no valid claim over the land as no consent of the land control board was obtained within 6 months of 31/3/1999 which was the date of the agreement. He further submitted that the defendant had not been in occupation for more than 12 years before the suit was filed. He averred that the defendant's only remedy under the Land Control Act was for a refund of the money paid for the controlled transaction if it is not time barred. He submitted that refund was made but the defendant rejected the same. He stated that no fraud or irregularity of procedure was established by the defendant. He asserted that the second sale by the third party to the defendant was not fraudulent as the previous transaction had been voided by the Land Control Act. He relied on the cases of ***Kariuki v Kariuki (1983) KLR 225***, ***Simiyu vs Watambamala (1985) KLR 852***, ***Githu v Katibi (1990) KLR 634***, ***Wamukota v Donati (1987) KLR 280*** and ***Wambua v Wathome & Another (1968) EA 40***.

The defendant's counsel in his submissions reviewed the evidence on record and asserted that the defendant by planting trees and putting up a temporary house demonstrated an attachment to the land which cannot be compensated in terms of money. He averred that the defendant is entitled to be paid the current value of the land and the costs of developments therein or in the alternative that the defendant be compelled to give him another portion of land equivalent to what he had sold to the defendant. He submitted that the third party owns 2 1/2 acres of land at Turbo which he can still allocate and give the defendant so that the defendant can continue living his normal life. He also alleged fraud by stating that the plaintiff and the third party appointed the same counsel to prepare the pleadings and referred me to the signatures in the plaintiff's amended plaint and the third party memorandum of appearance. He also submitted that the plaintiff and third party have not come to court with clean hands. He further submitted that the act of the third party in selling the land to the plaintiff was an act in bad faith and therefore the third party should bear the costs of this suit. He contended that the 3rd party ought not only to refund the purchase price of kshs. 98,000/= but also costs and the current market value of the said land or in the alternative give the defendant land measuring 0.6 hectares. He sought guidance from the case of ***Emily Jepkemboi Kogo v Patrick Korir Eldoret HCCC No.195 of 2007***. He has also relied on the case of ***Giella v Cassman Brown (1973) EA 348*** and contended that the balance of convenience is in favour of the defendant continuing to occupy the land. He closed his submissions by stating that the court should not encourage malicious vendors who sell land to innocent buyers and later sell the same to other persons and claim refuge under the provisions of Section 6 of The Land Control Act.

I have considered the pleadings, the evidence and the submissions of the parties. It is apparent

from the evidence that the third party, Liansi Sijile, initially owned the land parcel Tulwet/Kesses Block 5 (Cheptiret)/26 (Land parcel No.26) which measured 5 acres. It is not in contention that on 31 March 1999 he entered into a sale agreement with the defendant to sell to the defendant 1.5 acres out of the land parcel No. 26. It is also not in contention that the subject land is agricultural land. The Land Control Act under Section 6 mandates that for certain transactions to be valid, the consent of the Land Control Board must be granted. The provisions of Section 6 of the Land Control Act, CAP 302 Laws of Kenya state as follows:-

6. (1) *Each of the following transactions -*

- (a) *the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*
- (b) *the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;*
- (c) *the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.*

It will be seen that one of the transactions that requires consent of the land control board is a sale of agricultural land. Section 6 provides that if consent of the land control board is not granted for a transaction that requires such consent, then such transaction is going to be void for all purposes.

It therefore follows that the agreement of 31/3/1999 between the defendant and the third party has been rendered void by operation of law. The question that follows is what happens to a purchaser such as the defendant ? The answer is found in Section 7. Which provides as follows :-

*If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.*

Section 22 cited in Section 7 provides that it is an offence for a person to pay or receive money or be in possession of land pursuant to a transaction that has been voided for want of consent.

The remedy provided by the Land Control Act is therefore only limited to a refund which is recoverable as a debt.

In his submissions, Mr. Mainga, learned counsel for the defendant argued that the transaction between the plaintiff and third party should be declared a fraud and be set aside. Fraud was indeed pleaded by the defendant in his defence and third party notice. It cannot be said that the transaction between the plaintiff and third party was fraudulent. The court of appeal had occasion to deal with a more or less similar submission in the case of **Kariuki v Kariuki** and this is what the court stated :-

*"When a transaction is clearly stated by the express terms of an Act of Parliament to be void for all purposes for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked. "*

A similar position was taken in the case of **Wamukota v Donati** where the court (Gachuhi JA) stated as follows at p 287.

*"There is no apparent evidence of fraud on the part of the appellant. If the appellant and the*

*owner colluded to deprive the respondent of what, at one time, appeared to be a dealing in land which he wished to buy and the appellant and the owner acted within the law in their dealing, there is nothing the court can do for the respondent."*

What the above decisions assert is that there cannot be an allegation of fraud if a person complies with the provisions of the law, although morally, his conduct may be considered deplorable. It is the same situation in this case. The defendant cannot allege fraud where the plaintiff and third party followed the provisions of the law that enabled the plaintiff to now become the registered owner of the suit land. The defendant could probably sustain an action for adverse possession if his possession had been quiet, open and exclusive for a period of 12 years. Without even going to whether or not his possession was quiet, open and exclusive, it is clear that he fell short of the 12 years by a few days. His agreement and entry into possession was on 31/3/1999 whereas the plaint herein was filed on 14 March 2011 and amended on 19 March 2011. It was a close call but yet too far for the defendant for his possession fell short by a few days to 12 years interruption certainly having occurred by the filing of this suit.

The only remedy that the statute provides is a refund of the consideration which is recoverable as a debt. The submissions of counsel for the defendant that the third party should be ordered to give the defendant equivalent land, or compensation equivalent to the current market value of the property or costs of the developments therein are not submissions supported by law. Counsel has sought refuge in the case of ***Emily Jepkemboi Kogo v Patrick Korir Eldoret HCCC No. 195 of 2007***. In the said case, the plaintiff filed suit to evict the defendant from a portion of his land. The defendant had bought the said portion but consent of the land control board was never granted. The court held that in absence of consent the defendant had no right to occupy the suit land and granted the order of eviction. However, the court ordered the plaintiff to refund the defendant the purchase price and the costs of the developments which the defendant had made on the land. With the utmost respect, I am unable to agree with this decision. The statute is clear that the only remedy is a refund of the consideration and no more. The award of cost of developments would be an equivalent of an award of damages which the statute does not allow. In the case of ***Kariuki v Kariuki***, the High Court Judge sitting on first appeal awarded damages in a case where the transaction was vitiated for want of consent. On appeal, the court of appeal stated as follows on this point at p227 :-

*"No general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent. The only remedy open to a party to a transaction which has become void under the Act is that he can recover any money or consideration paid in the course of the transaction under Section 7 of the Act... had the Act so intended, it would have so provided."*

This position was affirmed in the case of ***Wamukota v Donati***. In the said case, the vendor as land owner sold land to the respondent. No consent of the land control board was given but the respondent moved into possession and made substantial developments. The vendor then sold the land to the appellant with the transaction being approved by the land control board and transfer effected to the appellant. The court of appeal emphasized that the only remedy was a refund of the purchase price. It stated as follows at p288:-

*"The law provides that in the absence of the Land Board consent that agreement became null and void for all purposes on expiry of 3 months (the then stipulated period) from the date of the agreement...Section 7 of the Land Control Act (CAP 302) provided for the refund of the purchase price. No consideration for the development is provided for in the Act."*

There is no other remedy for the third party except a refund of the purchase price. There is even no consideration of a balance of convenience and I think the submission of counsel on this point and his reliance on the case of ***Giella vs Cassman Brown*** was misplaced. The issue of balance of convenience is only applicable in interlocutory applications for injunctions and not in determining the main suit. I think counsel misapprehended the case of ***Giella v Cassman Brown*** as the matter before me is the main suit and not an interlocutory application. Before I took this minor diversion, I was talking about the remedy available to the defendant. The evidence on record shows that the third party on 2/8/2011 drew a cheque for Kshs.98,000/= in refund of the purchase price which cheque was forwarded to the defendant on the

same day. This cheque was rejected by the defendant through the letter dated 8/8/2011 and the same was returned to the third party. The defendant filed an application to enjoin the third party on the 19 October 2011 after the refund was offered. The third party proceedings were therefore unnecessary given that the only available remedy was a refund which had already been offered to the defendant.

I emphasize that the only remedy is a refund of the consideration which is recoverable as a debt. It follows therefore that such recovery must be made within the limitation period for the recovery of a debt. This period is 6 years in accordance with section 4 (1) (a) of the Limitation of Actions Act, CAP 22, Laws of Kenya. The third party in his defence has contended that any claim for a refund is now barred by limitation of time and cannot be recovered. The third party's argument is that the claim accrued from 31/3/1999 and ought to have been made within 6 years which was not done.

This is a plausible argument that would have succeeded if the third party had not offered the payment on 2/8/2011. The act of making the payment in my view revived the period of limitation. This extension is captured in Section 23 (3) of the Limitation of Actions Act which provides that :-

*(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:*

In essence time started running afresh once the third party offered the refund to the defendant on 2/8/2011. It therefore means that the defendant can recover the debt since it is not barred by limitation.

The problem in our instance is that the defendant has not in his pleadings sought any refund of the purchase price. He did not have a counterclaim in his statement of defence but only sought prayers to have the title of the plaintiff revoked. In his third party notice, the defendant prayed for orders of specific performance of the contract of 31/3/1999, costs of the suit, and indemnity in case judgement is passed in favour of the plaintiff against him. He never asked for a refund of the purchase price either as a main or alternative prayer. Similarly in his evidence, the defendant asserted that all he wants is the land. This theme was also adopted by counsel in his submissions. I would have had no hesitation in awarding the plaintiff the purchase price if he had made an alternative prayer asking for the same or had shown an inclination that in the worst case scenario he would be ready to take the purchase price. I am in the circumstances not sure whether the defendant would appreciate an order for the refund of the purchase price. He still has an avenue to recover the same in separate proceedings if he wants to and I will have to let him make his choice after he weighs his options. I take refuge in this decision vide the authority of ***Simiyu v Watambamala*** (1985) KLR 852. In the said case, the trial court vitiated a transaction which was entered into without consent of the land control board being obtained. On appeal the court had this to state on the failure by the trial judge to order a refund of the purchase price :-

*"It is complained that he (the judge) ought to have ordered the refund of the purchase money under Section 7 of the Land Control Act. It is obvious that the learned judge could do no such thing on the summons before him. The appellants should have sought redress in other proceedings, and whether damages, or a refund under section 7 as a debt, or any other remedy, is open to them now after the time that has lapsed since 1971, I leave the others to decide."*

In the same vein, I leave it to the defendant to decide whether he wishes to pursue his claim for refund. If he opts to do so, such claim will be determined on its own merits at the appropriate forum. The less I say about it now the better.

I am aware that I have not said much about the plaintiff's claim against the defendant. It is not that I have forgotten it. Let me now attend to it.

The plaintiff has asked that an order of injunction be issued to stop the defendant from trespassing into the suit land and for an order of eviction. The evidence on record shows that the plaintiff is the registered owner of the suit land. As registered owner, he is entitled to enjoy all rights of proprietorship.

Under Section 26 of the Land Registration Act, this court is mandated to take the Certificate of Title as prima facie evidence of proprietorship. The plaintiff's title can only be cancelled on the grounds of fraud or misrepresentation to which the plaintiff must be proved to be a party or if the plaintiff had acquired his title illegally, unprocedurally or through a corrupt scheme. No evidence has been led that the plaintiff acquired the title fraudulently or by misrepresentation. Neither is there any evidence that the plaintiff acquired his title illegally, unprocedurally or through a corrupt scheme. The title of the plaintiff must therefore stand. He is perfectly entitled to enjoy all rights of proprietorship including the right to exclusive possession of the suit land. The defendant has no legal right to be on the suit land. I do not hesitate to allow the order of injunction sought by the plaintiff and the order of eviction.

I have dealt conclusively with the plaintiff's case against the defendant and the defendant's case against the third party. The plaintiff must succeed in his case against the defendant with costs. The defendant's case against the third party also fails. I am unable to order the third party to indemnify the defendant for the costs. That leaves the issue of the costs of the third party proceedings. I would have been inclined to order the third party to pay costs if there was evidence that he had failed to refund the defendant the purchase price. However, the evidence is clear that the third party offered the defendant the purchase price before instituting the third party proceedings. I have a lot of sympathy for the defendant but unfortunately the law is not on his side. It should have been apparent to the defendant that the third party proceedings were completely unnecessary. In the premises the third party proceedings are dismissed with costs.

In summary I make the following final orders :-

1. A permanent injunction is hereby issued against the defendant restraining him and/or his servants/agents from entering, being upon, utilizing, or in any other way interfering with the land parcel Tulwet/Kesses Block 5 (Cheptiret)/96.
2. The defendant to vacate the land parcel Tulwet/Kesses Block 5 (Cheptiret)/96 within 7 days from the date hereof and in default the defendant be evicted from the suit land.
3. The plaintiff shall have the costs of the suit as against the defendant.
4. The third party proceedings are hereby dismissed with costs.

It is so ordered and decreed.

**DATED AND DELIVERED AT ELDORET THIS 15<sup>th</sup> DAY OF APRIL 2013**

**JUSTICE MUNYAO SILA**

**JUDGE ENVIRONMENT AND LAND COURT**

**Delivered in the presence of:**

**Mr. E.M. Momanyi Advocate of M/s Anassi Momanyi & Co Advocates for the plaintiff.**

**Mr. V.N. Oribo Advocate Holding Brief for Mr. Omwenga of M/s Omwenga & Co Advocates for the defendant.**

**No Appearance on the part of M/s Nyachiro Nyagaka & Co Advocates for the 3rd Party.**