



Langat v Chepkwony and another; Chepkwony (Suing as the Administrator of the Estate of Kaplachan Maritim) v Maritim and 2 others (Counter Claim) (Environment & Land Case 8 of 2012) [2022] KEELC 3379 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3379 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 8 OF 2012**

MC OUNDO, J

MAY 26, 2022

SYLVESTER KIPKIRUI LANGATPLAINTIFF

VERSUS

RAEL CHEPKWONY1ST DEFENDANT

JOHN KIPKEMBOI CHEPKWONY.....2ND DEFENDANT

COUNTER CLAIM

RAEL CHEPKWONY (SUING AS THE ADMINISTRATOR OF THE ESTATE OF KAPLACHAN MARITIM)PLAINTIFF

VERSUS

ELIZABETH CHEMUTAI MARITIM1ST DEFENDANT

JOSEPH KIPKEMOI RUTO.....2ND DEFENDANT

SYLVESTER KIPKIRUI LANGAT.....3RD DEFENDANT

JUDGMENT

1. This matter was filed vide a Plaint dated the 17th February 2012 by the Plaintiff who sought for orders of eviction against the Defendants from parcel of land known and described as Kericho/ Kabianga /3920 and for vesting orders in the Plaintiff. The Plaintiff further sought for a permanent injunction restraining the Defendants jointly and severally as well as any other person in occupation and use of the said suit land under the authority of the Defendants, from entering, processing, using or in any manner wasting and/or interfering with the Plaintiff's occupation, use and quiet possession of the said land. Further, the Plaintiff also sought for costs of the suit and interest thereon and any other or better relief that the court may deem just to grant.
2. In response to the Plaint, the Defendants filed their defence on the 9th March 2012, but amended it to include their counterclaim, on the 5th August 2014 stating that neither the Plaintiff nor one Joseph



Kipkemoi Ruto were the registered proprietors of the suit land and therefore the Plaintiff was not entitled to the orders sought. It was the Defendants' defence that the suit land herein was a result of intermeddling with the estate of Kaplachan Maritim (deceased) who was the registered proprietor of the original parcel of land registered as Kericho/Kabianga /98.

3. In their counterclaim, the 1st Defendant now the Plaintiff, as the administrator of the estate of Kaplachan Maritim, sued Elizabeth Chemutai Maritim, Joseph Kipkemoi Ruto and the Plaintiff as the 3rd Defendant, seeking that the Plaintiff's suit be dismissed and judgment be entered in her favour. That the subsequent subdivisions of the original suit land Kericho/Kabianga /98 into titles No. Kericho/Kabianga /2387, 2388, 2389 and 2442 be canceled. That the further, the subdivision of parcel number Kericho/Kabianga /2387 into parcels No Kericho/Kabianga /3920 and 3921 wherein parcel No. Kericho/Kabianga /3920 was transferred to the 2nd and 3rd Defendants in the counterclaim also be canceled and all these resultant parcels of land be restored back to original title No. Kericho/Kabianga /98. The Plaintiff in the counterclaim also sought for a permanent injunction against the Defendants therein, from interfering, trespassing, and/or remaining on the original parcel of land No. Kericho/Kabianga /98.
4. In the pendency of the suit, the 2nd Defendant in the main suit passed away wherein on the 24th February 2014, by consent counsel, agreed that there need not be substitution. The court thus directed that the case then proceeds against the 1st Defendant. The matter did not proceed immediately and on the 11th April 2017, the court was yet again informed that the 1st Defendant in the counterclaim had also passed away. Parties were then given time to try and reach an out of court settlement and when they failed to agree, the matter was set down for hearing.
5. On the 1st March 2018, the Plaintiff in the main suit, Sylvester Kipkurui Langat testified as PW1 to the effect that he had sued the Defendants herein in respect of land parcel No. Kericho/Kabianga/3920. That he had bought the said parcel from Joseph Kipkemoi Ruto in 2011 at a time when the same had been registered to Joseph Kipkemoi Ruto. That the land was subsequently transferred to him in December, 2011. He marked a title deed dated the 27th December 2011 as PfMFI 1 and went on to state that he had also conducted an official search in respect of the suit property on 7th December, 2011.
6. The witness proceeded to testify that he had a certified copy of the register (Green card) to No. Kericho/Kabianga/98 which showed on entry No. 1, that the title had been registered to one Kiplachan Maritim wherein on the 9th February 1971 a Certificate had been issued as per on entry No. 2. That vide entry No. 3 which was dated the 24th September 1990, a transfer had been made to Elizabeth Chemutai Maritim and a Title deed issued on 13th May 1992. That later the title had been closed upon subdivision of No. Kericho/Kabianga/98 giving rise to title Nos 2387, 2388, 2389 and 2442. He produced the copy of the green card as Pf exh 2.
7. PW1 further testified that he also had the copy of the Register for parcel No. Kericho/Kabianga/3920 which had been registered in the name of Elizabeth Chemutai Maritim on 18th December 2008. He produced the green card as Pf exh 3 and went on to state that entry No. 4 on the extract of the register showed that there had been a restriction registered on 5th January 2009 until the family dispute was resolved. That he did not know whether the family dispute was ever resolved.
8. The witness testified that he also had the proceedings of the Belgut Land Disputes Tribunal which had been between Raeli Maritim vs. Elizabeth Maritim, where a decision had been made thereto that parcel No. Kericho/Kabianga/2387 be divided into two for each party. The same was divided resulting into parcels No. Kericho/Kabianga/3920 and 3921. That wherein No. Kericho/Kabianga/3921 was to be transferred to Raeli Maritim, No. Kericho/Kabianga/3920 was to be transferred to Elizabeth who sold her share. He produced the said proceedings of the LDT as Pfexh 4.



9. He went on to testify that upon the purchase of parcel No. Kericho/Kabianga /3920, he had found Raeli Maritim and John Kipkemoi, a son to Raeli in occupation of the same wherein she had refused to vacate the land. That he had then issued her with a demand letter dated 19th January 2012, which he produced as Pf exh 5. That he had then sought the intervention of Elizabeth who was the “husband” of Raeli in a woman-to-woman marriage but Raeli had claimed that the land had not been distributed fairly.
10. It was his testimony that according to the decision of the Tribunal, Elizabeth had been given the green light to sell her portion of land as Raeli had been given land parcel No. Kericho/Kabianga /3921. That he had filed the case because the Defendants were still in occupation of his property and he wanted them evicted from thereon.
11. The witness confirmed that the land was registered in the name of Joseph Kipkemoi Ruto and denied being involved in any fraudulent dealings. That he had bought the land procedurally and lawfully and therefore there was no reason why the title should be cancelled as he had a right to stay on the suit property.
12. On cross examination, the witness confirmed that he came from Roret which was far from where the suit property was situate and that before he bought the suit property, he had not known the Defendant’s family. That he understood the procedure for buying land which involved identifying a parcel, conducting a search and after paying for the land one had to obtain consent of the Land Control Board after which the title would be transferred to one after payment of stamp duty. That before he had bought the suit property, he had bought other parcels of land.
13. He further confirmed that when he visited the suit property, he had found some two houses belonging to the Defendant thereon. Joseph Kipkemoi Ruto did not have a house on the suit property nor was he cultivating it. That although Joseph had told him that he had bought the land from Elizabeth Maritim, he had not however informed him (witness) why he had not taken possession of the land. That he had only told him that the Defendants were supposed to move to their own parcels of land. That the 1st Defendant had also informed him that she had heard that the land had been sold but she did not know to whom it had been sold to.
14. He conceded to not having called a surveyor to go and identify the land but that he had identified it through conducting an official search and through the map of the suit property. He further conceded to not having either the sale agreement in court nor documents proving that he had paid the stamp duty, but stated that the agreement had been prepared by Mr. Kipyegon to whom he had paid for his services.
15. His evidence was that although he had gone to the Land Control Board in the year 2011, he neither had the application for consent nor evidence of payment.
16. When referred to the to the minutes of the Belgut Land Disputes Tribunal (Pf exh 4) the witness confirmed that from the evidence of the complainant’s 2nd witness, the claim had been that that someone was claiming that he had bought land from Elizabeth Maritim. He went on to add that in the year 2009 Maritim’s family had been opposed to the sale of their land.
17. That according to the Defendant’s list of documents, Kaplachan Maritim had been registered as the owner of land parcel No. 98 in February, 1970 wherein he had died on 24th October 1984. That his letter of consent had been made on 2nd February 1989 and received on the 6th April 1989 after the board had sat, which had been 5 years after the death of Kaplachan Maritim. That according to the



- transfer form, Kaplachan Maritim had transferred the land to Elizabeth Maritim on 24th September 1990 pursuant to a sale wherein Elizabeth alleged to have paid Kshs. 20,000/- to her late husband.
18. The witness testified that Joseph Ruto had showed him a sale agreement, (which he did not have in court) and title deed wherein he had told him that he had bought the land at a cost of Kshs. 300,000/= per acre. That the said Joseph had not showed him the consent of the Land Control Board. That they had later gone to the Land Control Board in the year 2011. His evidence was that although he had sought the consent because the Defendants were in occupation, yet he had not mentioned to the Board that there were people on the land because Elizabeth had assured him that the Defendants would vacate the land. He confirmed that he had not sought for a refund of the purchase price from Joseph Ruto and further, that he had seen the restriction on the green card much later.
 19. Upon being re-examined the witness reiterated that he had bought the suit property from Joseph K. Ruto wherein he had been given the title deed by the Land Registrar upon following the right procedure in acquiring the title. That Elizabeth had been the registered the owner of the land in 1990 but had never been sued in respect of the said title. That he did not know when Kaplachan Maritim died.
 20. He further stated that the Limited Grant was obtained in June, 2015. That Kaplachan Maritim is said to have died in 2004 wherein a restriction owing to a family dispute had been placed on the land in January, 2009. That the Tribunal had subsequently sat and resolved the family dispute and therefore he was not aware of any other dispute over the land. That he did not know how Elizabeth had acquired the title to the suit land No. Kericho/Kabianga/3920, but that she had sold the same to Joseph K. Ruto who in turn had sold it to him for a consideration but could not remember how much he had paid for the land.
 21. The next witness PW2, Joseph Kipkemoi Ruto testified to the effect that he knew PW1 to whom he had sold to a parcel of land No. Kericho/Kabianga/3920 measuring 5.5 acres. That the said parcel of land had been transferred to his name by Elizabeth Maritim the registered proprietor. That from the green card herein produced as Pf exh 3, the same was explicit that parcel No. 3920 was derived from parcel No. Kericho/Kabianga/2387 and that it had been registered in the name of Elizabeth Maritim on 18th December 2008 and subsequently to the his name on the same date. That they did not fraudulently transfer the suit property to either his name or PW2 as he had paid for it.
 22. On cross examination, the witness confirmed that he understood the process of land transfer and that he was aware that sale of agricultural land was subject to the Land Control Board consent and that he had bought and sold land before this transaction. That before buying land one had to conduct an official search certificate in respect of the suit property. That he did not have the sale agreement in respect of the transaction with Elizabeth Maritim and neither could he remember when the said sale agreement had been entered into. That he had bought the suit land for Kshs. 300,000/- per acre wherein he had paid a total of Kshs. (witness calculates the amount) 1.65 million, money which he had paid at once and in cash. He acknowledged that he did not have any acknowledgment of the payment although he had paid from his own savings after he had sold his lorry.(Again there was no evidence of the said sale tendered.)
 23. The witness went on to testify that although he neither had a report nor a receipt of payments to a surveyor, yet knew that the land measured 5.5 acres because they had engaged a surveyor called Kivova.
 24. He confirmed that Pf exh 3, was a green card in respect of the suit land which was registered to Elizabeth Maritim on 18th December 2008. That she had transferred the land to him on 2009 (although the green card showed that the transfer had been effected on 18th December 2008.) That he had then gone



- to the Land Control Board with Elizabeth Maritim and her daughter Anna on a date he could not remember wherein he had applied for Land Control Board consent. He confirmed that he did not have the application form with him and neither did he have the consent letter, but that he had paid stamp duty, an amount that he did not know.
25. The witness stated that his home was far from the suit land and that although he did not know Kaplachan Maritim he knew both Chepkwony and John Chepkwony whom he had found on the suit land and that they were still in occupation of the same. That he had visited the suit land before he bought it wherein he had seen some houses to which Elizabeth had informed him that they belonged to her children. That he had neither spoken to the owners of those houses nor had the owner of the house accompanied them to the Land Control Board. He also confirmed that although both Rael and John had refused to vacate the land, yet he had not filed any case for their eviction.
 26. He proceeded to testify that although he did not have the sale agreement with him in court, yet he had sold the suit land in the year 2011 to one Sylvester Langat (PW1) for Kshs. 500,000/= per acre. That he had been paid Kshs. 2,750,000/= cash at once, the proceeds which he had used to buy another parcel of land. He confirmed that he did not have the subsequent sale agreement nor any of the conveyancing documents. That during the subsequent sale, he had taken the Plaintiff to the suit land where he had seen the two houses of which he had explained to him that they belonged to Elizabeth's children who had refused to vacate the land. That the Plaintiff had still paid him in spite of their presence. That neither he nor the Plaintiff had taken possession of the land.
 27. He confirmed that entry No. 4 in the green card (Pf exh 3) showed that a restriction had been lodged on the 5th January 2009 but that he had nothing to show that the restriction had been removed before he sold the land.
 28. In re-examination, the witness reiterated that he had bought a subdivision of parcel No.2387 from Elizabeth Maritim and when he conducted a search, Rael Chepkwony's name did not feature. That after the subdivision there were two portions 3920 and 3921. That Elizabeth, who had been registered as the owner of the suit land on 24th September 1990 never complained that he had failed to pay her. That the title for land parcel No. 2387 was issued on 13th May 1992 wherein he had sold it because he got another parcel of land near his home. That he had no problem in the course of the transfer of the land from Elizabeth to his name. He also confirmed that one of the houses was on the land he had bought while the other house was on the remaining portion. That he had no claim against the Plaintiff who had never complained about the transfer.
 29. The Plaintiff closed its case wherein the defence called Rael Chepkwony as DW1 who testified that she lived in Kabianga. That she did not know that she had been sued by Sylvester Langat although she was aware of the reason she was in court. That there had been a land that had been sold by a person she did not know. She adopted her statement and proceeded to state that Elizabeth Maritim was her wife whom she had married under the Kipsigis Customary Law. That she also knew Kaplachan Arap Maritim who was now deceased.
 30. That Kaplachan Maritim was the owner of Kericho/Kabianga/98 and a husband Elizabeth Maritim. She produced the death certificate of Kaplachan Arap Maritim as Df exh 1 stating that he had died on 24th October 1984. She also produced a Rectified Limited Grant of Letters of Administration dated 8th March 2018 as Df exh 2 and went on to testify that it had not been the court which had given them to her but Kaplachan.



31. The court then went on to examine her on her age wherein she responded that she neither went to school nor knew her age. She produced an identity card which put her age at 77 years old having been born in 1944.
32. She proceeded to testify that the evidence given by the Plaintiff was true to the effect that Kaplachan was the owner of Kericho/Kabianga/98 but that it was not true that Kaplachan had transferred the land to Elizabeth Maritim in 1990 and that she had not been involved in the subdivision of the land into several pieces of land.
33. That Joseph Ruto did not speak the truth when he said that parcel No. 98 was subdivided into 2387 and later 3920 and 3921. That as a family, they did not receive any money from Joseph Ruto wherein they had gone to the Land Control Board to caution the land because they did not want the same to be sold. That she was not aware that Joseph Ruto sold the land to Sylvester Langat as the family of Kaplachan Maritim was not aware or involved with the sale of the property which she still lived on.
34. Her testimony was that she had lived on the suit land for a period beyond 50 years and that she would like the court to revert the land back to the old man's name and thereafter dismiss the Plaintiff's case. That the Plaintiff had been troublesome to their family and caused her anguish to a point that she was now sick.

By consent the Limited Grant dated 6th May 2014 was produced as Df exh 3.

35. When cross examined, the witness confirmed that she was not a daughter to Kaplachan Maritim but was married by Elizabeth Maritim, now deceased, who was a wife to Kaplachan. That Kaplachan Maritim had 4 wives who, were now deceased. He also had children/families who had been settled on different portions of the parcel of land.
36. She was categorical that the suit parcel was not a resultant of parcel No. 98 and that Elizabeth had been given 5 acres of land by Kaplachan. That parcel No. 98 had been divided into 4 pieces among the wives but that she did not know the parcel number of the land Elizabeth had been given. That out of the 5 acres Elizabeth had been given, there was no land left because Elizabeth's co-wives' children had occupied the same.
37. She went to state that at one time, Elizabeth had been very sick that she had to go to hospital but that she did not know where she got the money to go to hospital and neither did she know if she had sold land as the events happened in Kapsoit. She confirmed that at one time, Elizabeth had threatened to sell the land forcefully claiming that the witness could not occupy the whole portion since the land belonged to Tapnyobe who was a co-wife to Elizabeth. That she had then placed a caution on the same (Pf exh 4) and lodged a complaint to the Land Dispute Tribunal in Belgut.
38. She also confirmed that there was now somebody else staying on the land having been brought there by someone called Anah from Kericho. That out of Kaplachan's co-wives, the only dispute had been from Elizabeth whose land had been subdivided in 1998 and that the portion in question was the one which was sold by Elizabeth. That she was not aware that Elizabeth's land was subdivided into two.
39. The next witness David Kipchumba Sigila testified as DW2 to the effect that Mr. Kaplachan Maritim was his uncle, the eldest brother to his father. That being close to his family, he knew that Kaplachan had land No. Kericho/Kabianga/98 and that he died on 24th October 1984 at which time the land was still registered to his name. When referred to Pf exh 2 which was certified copy of the green card to parcel No. 98, he stated that there was no time his uncle resurrected and subdivided the land. That in 1990, his uncle's 4th wife, Elizabeth Maritim had transferred his title into her name. The parcel No. 98 was then subdivided into 4 parcels being 2387, 2388, 2389 and 2442 and thereafter closed on 13th



- May 1992. That Elizabeth Maritim was registered to title No. 2387 but that they did not know who had given her the land which had an exaggerated acreage of 4.52 hectares, approximately 11 acres. That the total acreage of Plot No. 98 was 8.2 hectares which was to be divided among 4 wives of the old man wherein each of them was to take 5 acres. That Elizabeth had given herself more than half of the total acreage.
40. That the subdivision had not been done by Kaplachan but that he had just shown his wives where to live. That the family members were unaware of the subdivisions which were not done on the ground as the surveyor did not visit the land. That upon the family realizing what was going on, they had put a caution on the land No. Kericho/Kabianga/2387 which was registered on the 26th July 2005. The restriction had however been removed by a letter written by the Chief dated 21st July 2005, which letter they were not aware of. He produced the extract of register to parcel No. 2387 as Df exh 4.
 41. The witness went on to testify that Parcel No. 2387 had further been subdivided into parcels No. 3920 and No. 3921 of which the family had not been aware of. That when they realized that there could be a subdivision to parcels No. 3920 and No. 3921, they had placed a restriction on 5th January 2009.
 42. His evidence was that the Plaintiff was registered as proprietor of parcel No. 3920 on the 27th December 2011 and that by the time he acquired title from the person who sold it to him, there had been a restriction in place. That the family had never been called upon to go to the Land Control Board. That the land which had been sold by PW2 to the Plaintiff was occupied by DW1 and that as a family they sought for the court to cancel the subsequent sub-divisions so that they could revert to the original title for a Succession Cause to take place.
 43. In re-examination, the witness confirmed that he was a nephew to Kaplachan Maritim who had a family and 4 wives. That he was speaking on behalf of the family as an extended members of the family and on behalf of Kaplachan Maritim although he had not obtained a grant from the court to speak on behalf of Kaplachan.
 44. He also confirmed that he did not know if Kaplachan's 4 wives had been allocated portions of land but that Elizabeth Maritim had complained about the allocation. He also confirmed that there had been a restriction imposed on land No. 2387 which had no conditions. That he remembered attending a Land Dispute Tribunal in Belgut where he had testified that Elizabeth had sold 2 acres of land to Christine Rotich so as to get money for medication. That the Tribunal had been held after the sale of plot No. 2920 when Raeli had complained against Elizabeth.
 45. That at the Tribunal, only two titles had been referred to being No. 3920 and 3921 wherein it had been held that the 2.26 hectares to be registered to Rael. There was mention of the remainder 2.6 hectares. In 1992 when the mother title No. 98 was subdivided, the Plaintiff Sylvester and Joseph Ruto were not part of the subdivision. That the subdivision of No. 98 gave rise to No. 2387 which was subdivided into No. 3920 and No. 3921 which was the portion the Plaintiff was claiming. He stated that it was not the Plaintiff who had acquired the land illegally but he ought to have done due diligence, seen the green card and gone to the ground.
 46. On being re-examined, the witness reiterated that it had been a problem when Elizabeth subdivided the land into 4. That the register had been recorded based on a family dispute. That at the time Elizabeth was said to have done all those things, there had not been a Succession Cause filed and therefore the finding of the Tribunal was unlawful. That to date, no Succession had been done on the estate of Kaplachan. The register showed that there was a dispute and if anybody was interested in buying the property and checked the register, (s)he would have realized that there was a problem. That on the



ground, DW1 has been occupying the land even at the time the people were buying it. The defence closed its case and parties filed their respective written submissions.

The Plaintiff's written submissions.

47. The Plaintiff summarized the issue in question to the effect that he had filed the suit against the Defendants seeking for orders as herein above stated. That the Defendants in their defence denied the Plaintiff's claim stating that he had never been an absolute proprietor and parcel of land No. Kericho/Kabianga/3920. (the suit land herein) That they had been beneficiaries of the late Kaplachan Maritim who died intestate and who was the registered proprietor of the original parcel of land No. Kericho/Kabianga/98. That the subdivision of the mother title was therefore as a result of intermeddling with the estate of the deceased and the suit land therefore does not exist lawfully as no the Grant had been issued in respect of the deceased estate.
48. That the Defendants in their counterclaim against the Plaintiff particularized the allegations of fraud and illegality and sought for the orders as herein above stated. That in the cause of the proceedings, both the 1st Defendant in their counterclaim and the 2nd Defendants in the main suit passed away and were never substituted. That pursuant to the provisions of Order 24 Rule 4 of the *Civil Procedure Rules*, the suit against them abated.
49. The Plaintiff further analyzed the facts and the application of the law to the effect that he was the registered proprietor of the suit land with effect from the 27th December 2011, land which he legally purchased from the Ruto the 2nd Defendant in the counterclaim. That the suit land was a result of the subdivision of No. Kericho/Kabianga/2387 which was a resultant parcel from the subdivision of the mother title.
50. That Elizabeth Chemutai Maritim, now deceased and who was the fourth widow to Kaplachan Maritim also deceased and the proprietor of the original land parcel No. Kericho/Kabianga/2387, had confirmed in her statement of 14th February 2021 that Kaplachan Maritim had transferred to her the original land measuring 8.2 hectares on the 24 September 1990 to hold five acres each in trust for her co-widows. That subsequently Elizabeth had caused the mother title to be closed upon sub-division that gave rise to parcels number 2387, 2388, 2389, and 2242. That the resultant parcels of land had been transferred on 13th May 1992 to her co-widows respectively, except parcel number 2387 which had remained in her name.
51. That parcel No. 2387 was subsequently subdivided and sold to Ruto who eventually sold it to the Plaintiff thus giving rise to the suit herein. The Plaintiff summarized the issues for determination as follows;
 - i. The Defendants' claim is statutory barred.
 - ii. The allegations of fraud and illegality abated with the demise of the Elizabeth.
 - iii. The Plaintiff is a purchaser for value without notice of any illegality.
52. On the first issue for determination, the Plaintiff submitted that the claim brought forth by Rael was statutory time barred, the law of limitation having prescribed the time within which claim could be brought in a particular case. That the mother title was transferred to Elizabeth on the 24th September 1990 and by the time the suit land was being transferred to Ruto in December 2008, Elizabeth had been the holder of the mother title for 18 years where no claim had been raised. That Rael, who has now raised allegations of fraud and illegality, was aware of the registration of Elizabeth as the owner of the mother title and the subsequent subdivisions thereafter. She had not pleaded disability against



bringing an action to address the illegality of any. Reliance was placed on the provisions of Section 7 of the Law of Limitations of Actions Act wherein the Plaintiff submitted that the claim herein was time barred having been brought 20 years after the cause of action arose.

53. On the second issue of fraud and illegality, the Plaintiff submitted, while relying on the decided case of Richard Juma Okeyo & Another vs Philip Onyando Okindo & 7 Others [2021] eKLR, that since the case of fraud and illegality had been advanced against Elizabeth, the same abated, upon her death where there had been no substitution effected. The court can therefore not reach any finding in the absence of substitution.
54. That like in the holding in the case of Mutiria Karumbai Macaw vs James Njagi Makembo & 3 Others [2018] eKLR, where it was held that fraud must not only be pleaded but that the particulars of fraud must be particularized by the party pleading fraud, there had been no allegations of fraud leveled against the Plaintiff, and even if there were, no particulars linking him to any irregularity or illegality had been proven against him.
55. On the last issue for determination, the Plaintiff relied on the definition of a *bona fide* purchaser as defined in the Black's Law Dictionary, to submit that the Plaintiff had purchased the suit land in good faith wherein he had paid valuable consideration without any notice of prior adverse claim. That no evidence had been led to show that the Plaintiff knew of any fraud or illegality, if any, had been there.
56. In conclusion, the Plaintiff submitted that there be eviction orders issued to the Defendants to vacate the land parcel No. Kericho/Kabianga/2387, and there be a vesting order thereof in the Plaintiff as well as all other orders as prayed for in the Plaint. The Plaintiff also sought for Rael's counter claim to be dismissed with costs.

Defendants' submissions

57. The Defendants submissions, based on the evidence adduced by both parties was to the effect that the Plaintiff had failed to prove his case on a balance of probabilities and that the 1st Defendant had made out a case for the dismissal of the suit in favour of his counterclaim.
58. That despite the Plaintiffs evidence that he had purchased the suit property from PW2, the said witness testified that he had bought the property from one Elizabeth yet no sale agreement, evidence of the payment mode considering that it was a substantial amount of money, or any instrument of transfer of the interest they had purported to have acquired, had been produced in evidence and neither was the said Elizabeth called as a witness (sic) which was contrary to the provisions of section 3(3) of the Law of Contract Act. That the suit property being an agricultural land, any transaction of sale on the same had to be subjected to the Land Control Board for consent. However in this instant there was no evidence adduced to the effect that the Plaintiff and 2nd Defendant in the counter claim and sought such consent from the Land Control Board to the effect that any agreement and/or transaction for sale touching on the said suit property became null and void for lack of consent after six months from the date of the agreement.
59. The Defendants further submitted that the failure to call the land registrar, Elizabeth's daughter Anna Chebor Misik as the Plaintiff's witnesses, yet they had recorded their statements, lead to an inference that their evidence would have been detrimental to the Plaintiffs case. This commission caused the collapse of the Plaintiff's case.
60. The Defendants conceded that the suit property belongs to the deceased Maritim and could only be dealt with as part of his estate as provided for in the Law of Succession Act. That the transfer of the suit property to Elizabeth had been done way after the demise of Maritim and without any Letters of



Administration, therefore the subsequent dealings and subdivisions of the suit property were in breach of the provisions of Section 45 of the Law of Succession Act and this acts not only became void but were criminal as they amounted to intermeddling with the deceased's property. That section 26(1) of the Land Registration Act only protected a purchaser for value without notice of any illegality or fraud.

61. The Defendants relied on the decided case in Kenya Anti-corruption Commission vs Online Enterprises Limited & 4 Others [2019] eKLR to submit that it was not enough that a person held a lease or certificate of lease to property, what was important was that that person had to prove that the lease he held was properly acquired. That should the court find that the lease was acquired illegally, un-procedurally or through a corrupt scheme, then the court had a duty to impeach the said title the title holder's ignorance or none participation notwithstanding.
62. That in this matter, the narration of the events leading up to the registration of the property and issuance of title confirmed without any question that no payment had been done and the title was obtained through a scheme that was the illegal and corrupt.
63. That the fact that the counterclaim was time barred pursuant to the statute of limitation as stated by the Plaintiff, was not pleaded as per the requirements of Order 2 Rule 4 of the Civil Procedure Rules and therefore the Plaintiff cannot raise the same in its submission without giving a chance to the parties to respond and/or the court to try it. That parties were bound by their pleadings and cannot be allowed to introduce un-pleaded issues in the pleadings that would ambush the other party. The Defendant sought that the Plaintiff's suit be dismissed and the counterclaim upheld with costs of the suit and cross- suit.

Determination

64. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. From the summation of the same, the Plaintiff herein seeks for orders of eviction against the Defendants from parcel of land known and described as Kericho/Kabianga /3920 measuring 2.26 hectares and for vesting orders thereto. According to the Plaintiff, Elizabeth Chemutai Maritim had sold the land to Joseph Kipkemoi Ruto (PW2) who did not take possession of the same but sold it to him instead in the year 2011 at Kshs. 300,000/- per acre wherein he had paid a total of Kshs. 1.65 million, money which he had paid at once and in cash That the land had then been transferred to him in December, 2011 and a title issued on the 27th December 2011. There was however no evidence adduced of the sale agreements, consent from the Land Control Board or the transaction of such a large sum of money.
65. That the suit land had been a sub-division of the original suit parcel No. Kericho/Kabianga/98 which according to a green card produced as Pf exh 2, had been registered originally to one Kiplachan Maritim on 16th February 1970 wherein on the 9th February 1971 he had been issued with a land Certificate. That subsequently on the 24th September 1990, a transfer had been made to Elizabeth Chemutai Maritim and a Title deed issued wherein on the 13th May 1992 the title had been closed upon sub-division giving rise to title Nos 2387, 2388, 2389 and 2442. Again no the evidence had been adduced to confirm that Elizabeth Chemutai Maritim had obtained the relevant letters of administration to the estate of Kiplachan Maritim to deal with his property.
66. That through an award issued in the Belgut Land Disputes Tribunal in a matter between Rael Maritim and Elizabeth Maritim (who had contacted a "woman to woman" Marriage, it had been ordered that parcel No. Kericho/Kabianga/2387 be subdivided between the two parties. A subdivision was done that gave rise to parcels No. Kericho/Kabianga/3920 and 3921. That whereas No. Kericho/



- Kabinaga/3921 was to be transferred to Raeli Maritim, parcel No. Kericho/Kabinaga/3920 was transferred to Elizabeth who had sold her share.
67. According a green card produced by the Plaintiff as Pf exh 3, Parcel No. Kericho/Kabianga /3920 (a resultant of the subdivision of parcel number Kericho/Kabianga/2387) had been registered to Elizabeth Chemutai Maritim and transferred to Joseph Kipkemoi Ruto on the 18th December 2008 wherein title had been issued on the same day to Joseph Kipkemoi Ruto. The Plaintiff's case is that upon purchase of the suit property and when he went to the ground he had found Elizabeth Maritim and John Kipkemoi, a son to Raeli in occupation of the same but they had refused to vacate the land hence his reason for filing the suit against them.
68. The Defendants on the other hand were categorical that although Kaplachan Maritim was the owner of Kericho/Kabianga/98 and a husband to Elizabeth Maritim that the said piece of land had never been sold. That the said Kaplachan Maritim died on 24th October 1984 as per the death certificate herein produced as DFexh1 wherein a rectified Limited Grant of Letters of Administration rectified on the 8th March 2018 and which had been issued on 6th May 2014, was produced as Df exh 2.
69. According to the Defendants, Kaplachan Maritim had 4 wives and Elizabeth Maritim was one of them. That the late Kaplachan Maritim's wives were now deceased but his children and their families had been settled on different portion of the parcel of land. That at the time Elizabeth Maritim is said to have transferred parcel No. Kericho/Kabianga/98 into her name and thereafter had the same subdivided into 4 parcels being 2387, 2388, 2389 and 2442 wherein the original title had been closed on 13th May 1992, there had not been any Succession done. That the findings of the Tribunal was therefore unlawful.
70. The Defendants position in their counterclaim is that since neither the Plaintiff nor one Joseph Kipkemoi Ruto were the registered proprietors of the suit land, the Plaintiff was not entitled to the orders sought. But they're had been intermeddling with the estate of Kaplachan Maritim (deceased) who was the registered proprietor of the original parcel of land registered as Kericho/Kabianga /98, resulting into illegal sub division thereafter.
71. That in their counterclaim the 1st Defendant now the Plaintiff and administrator of the estate of Kaplachan Maritim, had sued Elizabeth Chemutai Maritim, Joseph Kipkemoi Ruto and the Plaintiff seeking that the Plaintiff's suit be dismissed and judgment be entered in her favour. That the subsequent subdivisions of the original suit land Kericho/Kabianga /98 into titles No. Kericho/Kabianga /2387, 2388, 2389 and 2442 be canceled and the further subdivision of parcel number Kericho/Kabianga /2387 into parcels No Kericho/Kabianga /3920 and 3921 wherein parcel No. Kericho/Kabianga /3920 was transferred to the 2nd and 3rd Defendants in the counterclaim, be also canceled and all these resultant parcels of land be restored back to original title No. Kericho/Kabianga /98. The Plaintiff in the counterclaim also sought for a permanent injunction against the Defendants therein, from interfering, trespassing, and/or remaining on the original parcel of land No. Kericho/Kabianga /98.
72. Indeed from the narration above what comes out for determination is the following ;
- i. Whether the Plaintiff's registration as proprietor of the suit land was lawful or obtained through fraud.
 - ii. Whether the Plaintiff is entitled to the orders sought in his Plaint
 - iii. Whether the Defendant is entitled to the orders sought in the counter claim
 - iv. Who is entitled to pay the costs of the suit



73. I note that the above captioned 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 counts 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
74. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of the same. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party, and the second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
75. 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.
76. I have considered with great anxiety the facts of this matter and indeed it is not in contestation that the suit properties herein being No Kericho/Kabianga/2387, 2388, 2389 and 2442 as well Kericho/Kabianga /3920 and 3921 subdivisions of Kericho/Kabianga/2387 all originated and/or were subdivisions of the original parcel of land No Kericho/Kabianga /98.
77. It is further not in contention that the original parcel of land No Kericho/Kabianga /98 measuring 8.2 hectares, being a first registration, had been registered to Kaplathan Arap Maritim on the 16th February 1970 wherein he had been issued with a title deed on 9th February 1971. It is also not in contention that the said Kaplathan Arap Maritim had married four wives including Elizabeth Chemutai Maritim and Rael Maritim the (1st Defendant herein) and that he had settled his family on the suit land before he passed away on the 24th October 1984 at the age of 89 years old. That upon the passing away of Kaplathan Arap Maritim, no succession proceedings had been filed in court but evidence adduced in court was that on the 24th September 1990, parcel No Kericho/Kabianga /98 had been transferred to one of his wife’s Elizabeth Chemutai Maritim on the 24th September 1990 and a title deed issued on the same date. That on the 13th May 1992 title to the said property was closed upon subdivision thereby resulting into land parcels number No Kericho/Kabianga/2387, 2388, 2389 and 2442. Parcel No. Kericho/Kabianga /2387 was further subdivided on the 18th December 2008 giving rise to parcels No Kericho/Kabianga /3920 and 3921.



78. Fraud, as alleged by the Plaintiff in the counterclaim is a serious matter which must be proved to the required standard as was held by the Court of Appeal in the case of *R.G Patel vs Lalji Makanji* 1957 E.A 314, where the Court held as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

79. I shall stop at this point and interrogate the allegation of fraud by reflecting on the manner in which the deceased’s estate was handled upon his demise. Indeed it is clear that upon the demise of Kaplachan Arap Maritim on the 24th October 1984, no Succession proceedings had ever been filed in respect of his estate meaning that the said estate had not been distributed, by the time the same was allegedly transferred to his wife Elizabeth Chemutai Maritim, on the 24th September 1990, who subsequently caused its subdivision on the 13th May 1992 giving rise to Nos. 2387, 2388, 2389 and 2442.

80. It will therefore not be necessary to belabor the point that the allegedly transfer of title and registration of parcel No Kericho/Kabianga /98 to Elizabeth Chemutai Maritim was improper in the absence of the grant for letters of administration, as she could not claim to be the beneficiary of her husband’s land. Indeed Section 45 of the *Law of Succession Act* provides as follows:-

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this Section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

81. In the case of *Bahola Mkalindi vs. Michael Seth Kaseme & 2 others* [2012] eKLR the court held that; “The *Law of Succession Act*, Cap. 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.

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

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

83. Having considered the evidence before me as well as the exhibits herein produced, it clearly emerges that the provision of Section 55 of the *Law of Succession Act* was not complied with before the deceased Kaplachan Arap Maritim’s properties could be transferred. I therefore find that the registration of the same to Elizabeth Chemutai Maritim was a nullity as the estate of deceased could only have been dealt with under the *Law of Succession Act* after his death and not otherwise.



84. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiba 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.’

85. Indeed the findings in the celebrated case in *Macfoy vs. United Africa Co. Ltd* [1961] 2 ALL ER 1169 at 1172, have been adopted by our own courts in their decisions including the Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR to the effect that;:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

86. Section 45 of the *Law of Succession Act* outlaws handling of estate assets by persons who have no authority to handle it. Such authority comes only from a grant of representation, and anyone who does so handle estate property without a grant intermeddles with the estate. The fact that one is a surviving spouse of a deceased person or a child of the deceased grants them no authority to handle estate property unless and until they are granted representation. That would mean that all those persons who registered themselves and /or handled the resultant subdivisions of No Kericho/ Kabianga /98 immediately upon the demise of Kaplachan Arap Maritim and before they were appointed administrators, are guilty of intermeddling with his estate which act was void and a nullity in law ab-initio .

87. 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.”

88. 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 and having found that the transfer of the deceased’s estate was contrary to the provisions of Section 45 of the Law of Succession, I hereby find that the Plaintiff’s title to No Kericho/Kabianga /3920 was acquired illegally, un-procedurally and/or through a corrupt scheme of fraud, as pleaded by the Defendants in their counterclaim and the same is herein liable for impeachment.

89. That said and done I need not go into the other otherwise important lacunas herein noted to wit that the Plaintiff did not adduce evidence of the any agreement contrary to the provisions of Section 3 (3) of the law of contract and no consent had been applied for and/or obtained from the Land Control Board contrary to the provisions of Section 6 and 8 of the *Land Control Act*. I hold that the Plaintiff in the main suit has not proved his case on a balance of probabilities and his suit is herein dismissed with cost.



90. On the other hand I find in favour of the Plaintiffs in the Counter claim and enter judgment for them in their counter claim as against the Defendants in the counterclaim jointly and/or severally in the following terms:
- i. The transfer of title No Kericho/Kabianga /98 from the deceased to the 1st Defendant in the counterclaim as well as the issuance of a title deed to the 1st Defendant in the counterclaim on 24th September 1990 and the subsequent sub division of the said title into title Nos Kericho/Kabianga/2387, 2388, 2389 and 2442 on 13th May 1992 is hereby canceled and title No Kericho/Kabianga/98 restored.
 - ii. The subdivision of title No. Kericho/Kabianga/2387 into title Nos Kericho/Kabianga/3920 and 3921 and the subsequent transfer of No Kericho/Kabianga/3920 to the 2nd Defendants in the counterclaim and then to the 3rd Defendant in the counterclaim and any titles issued are hereby canceled.
 - iii. The County Land Registrar Kericho County or the land Registrar in charge of the area which the suit parcel is situate shall be served with these orders for compliance.
 - iv. A permanent injunction is herein issued restraining the Defendants in the counterclaim whether by themselves, their agents, servants, or persons claiming through them, from trespassing upon, remaining on, or otherwise interfering with any part of the original title No Kericho/Kabianga/98 or with the use or possession thereof by the Plaintiff in the counterclaim and by any of the beneficiaries or persons entitled to claim any part of the estate of the deceased.
 - v. Costs of the counterclaim is herein awarded to the Plaintiff in the counter claim.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 26TH DAY OF MAY 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

