



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT ELDORET**

**E&L 992 OF 2012**

*Formerly 201 of 2012*

**BENJAMIN MAIYO .....PLAINTIFF**

**VS**

**BARNABA KICHWEN .....DEFENDANT**

*(Suit by plaintiff as administrator of the estate of his late father; plaintiff alleging that his father bought land from a 3rd party which land was registered in name of the defendant; plaintiff alleging that there was agreement that defendant's father will transfer the land to the plaintiff's father but that he failed to do so; plaintiff's father instituting suit in Kapsabet Magistrate's Court against the defendant's father for specific performance; parties having died before conclusion of the suit; defendant becoming registered proprietor by transmission; whether this suit is res judicata; whether claims of the plaintiff have been caught up by limitation; whether defendant's father had any obligation to transfer suit; whether plaintiff could enforce the alleged contracts for sale of land without anything in writing)*

**JUDGEMENT**

**A. BACKGROUND AND THE PLEADINGS**

This suit was commenced by way of Complaint filed on the 2 October 2012 and amended on 28 January 2013. The plaintiff holds a grant of Letters of Administration Ad Litem for the Estate of Kimaiyo A. Barno (Deceased) and has filed this suit on behalf of the Estate of the Kimaiyo A. Barno (Kimaiyo) for the recovery of the land parcel Nandi/Ndurio/117 from the defendant.

The plaintiff has pleaded that in the year 1973, Kimaiyo, his late father, bought the suit land from one Isaia arap Samoei (Samoei) who had earlier purchased the land from the then owner, one Daniel Kichwen A. Barno (Barno). Barno is the father of the defendant herein.

It is pleaded that the land was in the name of Barno who later refused to transfer the land to Kimaiyo. Kimaiyo then filed suit in the Kapsabet Magistrate's Court being Kapsabet Civil Suit No. 120 of 1995, asking for specific performance to compel Barno to transfer the suit land to him, but unfortunately both parties died before the conclusion of the suit. It is pleaded that later the defendant Barnaba Kichwen (Barnaba) obtained letters of administration to the Estate of Barno while concealing material facts and later had himself registered as owner of the suit land on 25 June 2010. It is pleaded that there lies a Miscellaneous Succession Cause No. 69 of 2010 seeking to annul the grant obtained by the defendant. It is also pleaded that the defendant fraudulently obtained the title deed to the suit land.

The particulars of fraud are pleaded as follows:

- (i) *Moving to Kapsabet Principal Magistrate's Court vide succession cause No. 74 of 2010 to obtain grant irregularly.*
- (ii) *The defendant moved to Kapsabet land registry and caused the transfer to be effected on or about the 1st October, 2010 before the certificate of grant was given and/or issued on the 21st October 2010.*
- (iii) *The defendant acted in bad faith in moving to Kapsabet Land Registry well aware that the plaintiff and his family are in occupation of the suit property.*
- (iv) *The defendant acted fraudulently in moving to Kapsabet Principal Magistrates (sic) to obtain grant to transfer the suit property to his name aware of the case between Kimaiyo A. Barno (Deceased) and Kichwen A. Barno dated 26th June, 1995 for specific performance.*
- (v) *The defendant acted fraudulently in moving to Kapsabet Land Registry and causing to be transferred and subsequently entry of his name to the register aware of his own knowledge that the suit property belongs to the Estate of Kimaiyo arap Barno.*

For the reasons pleaded, the plaintiff has asked for the following orders :-

- (a) *That this Honorable Court make a declaration that the Estate of Kimaiyo A. Barno is the rightful owner of the suit property.*
- (b) *That the title deed issued to the defendant be recalled to the Nandi Land Registry and the same be cancelled forthwith.*
- (c) *That the Nandi Land Registrar revoke and/or remove from the register the name of the Defendant entered on the 25th June 2010.*
- (d) *That the Registrar, Nandi Land District Registry be ordered to enter into the register the administrator to the estate of Kimaiyo A. Barno.*
- (e) *That a permanent injunction do issue against the defendant in respect to the suit property.*
- (f) *Costs and interests of this suit.*
- (g) *Any other or further relief this Honourable court may deem fit and just to grant.*

Upon being served, the defendant entered appearance and filed Defence. In his Defence, he has denied the existence of any agreement in 1973 by which Samoei bought land from Barno. He has stated that he is a total stranger to any agreement between Samoei and Kimaiyo. He has denied that the family of Kimaiyo have been on the suit land since the year 1975 and has averred that the family of Kimaiyo live on the land parcel Nandi/Ndurio/118 and in another farm in Tuiyo.

He has admitted obtaining a grant of letters of administration for the estate of his father (Barno) but has denied ever concealing material facts. With regard to Miscellaneous Succession Cause No.69 of 2010 he has pleaded that the same is nothing but an abuse of the court process. He has denied all the particulars of fraud pleaded against him. The defendant has pleaded that there had been Judicial Review proceedings over the same cause of action which was decided in favour of the defendant and that Miscellaneous Succession Cause No.69 of 2010 still subsists hence this suit is *res judicata*.

## **B. PROCEEDINGS AND EVIDENCE**

This matter proceeded before me on various days from 29th January 2013 to 17th April 2013. The plaintiff called four witnesses whereas the defendant called two witnesses.

## ***B. (i) - Evidence of the Plaintiff***

PW-1 was the plaintiff. He testified that the late Kimaiyo was his father. He died on 6 August 2007. The plaintiff stated that before filing this suit he sought and obtained letters of administration ad litem. The death certificate and grant ad litem were produced as exhibits 1 and 2. He stated that Kimaiyo bought the land parcel Nandi/Ndurio/117 from one Isaiah arap Samoei in a transaction of 1975. Samoei is also deceased, having died about 20 years ago. He however stated that there were witnesses to the agreement being Esther Samoei (wife to the late Samoei), Alexander Bwalei, and Ezekiel Kemboi. The late Samoei had bought the land that he sold to Kimaiyo from Daniel Kichwen Barno (Barno) who was the owner. The title remained in the name of Barno who is the father of the defendant and was not transferred into the name of Samoei. Barno is also deceased having died about 20 years ago.

The plaintiff stated that in the year 1995, the late Kimaiyo requested Barno to transfer to him the suit land but Barno refused. Kimaiyo then filed the suit Kapsabet SRMCC No. 120 of 1995 wherein he sued Barno for specific performance. The plaint to Kapsabet SRMCC No.120 was produced as exhibit No.3. The matter in the Kapsabet court was however never concluded as Kimaiyo became sickly and later died.

Later, the plaintiff learnt that the defendant had filed a succession cause in respect of the late Barno being Kapsabet Magistrate's Court Succession Cause No. 74 of 2010. He produced the proceedings and an application for confirmation of grant before expiry of 6 months, as exhibit No.4. The plaintiff stated that the defendant did not include the name of Kimaiyo in the succession cause as a beneficiary and neither was any family member included. The Grant to the Estate of Barno was confirmed on 21 October 2010, the confirmed grant being produced as exhibit No.5. The plaintiff also produced as search certificate to the suit land as exhibit No.6 which shows that the land became registered in the name of the defendant on 1st October 2010.

The plaintiff stated that in the year 1976, part of the family of Kimaiyo moved into the suit land which is Nandi/Ndurio/117. Kimaiyo also owned the adjacent parcel which is Nandi/Ndurio/118. The plaintiff himself was born in the year 1976 and it was his elder brothers who moved into the suit land. He produced a letter from the Assistant Chief to prove residence in the suit land. He therefore asserted that the family of Kimaiyo own the two parcels of land.

The plaintiff testified that a dispute touching on the land was filed in Aldai Land Disputes Tribunal as Case No. 29 of 2010 seeking the land from the family of Barno. The Tribunal ruled in the plaintiff's favour but that decision was quashed by the High Court in Eldoret in the suit Eldoret HCCC Misc. Suit No. 38 of 2010. The decision of the court was produced as exhibit No.8. The plaintiff stated that the court in its ruling held that the plaintiff had obtained title illegally. He asked that the defendant's title be cancelled and the defendant to be permanently restrained from the land.

Cross-examined by Mr. Wafula for the defendant, the plaintiff affirmed that he does not live on the suit land but in Tuiyo having moved in the 1990s. Part of the Kimaiyo family live in Tuiyo and the other part live in Ndurio in the area where the suit land is located. He also affirmed that the family of Kimaiyo own the land parcel Nandi/Ndurio/118 and 121 and that there is no physical boundary between the suit land and the parcel No.121.

He testified that Kimaiyo died in the year 2007 and was buried in the land parcel No. 118 and not on the suit land which is No.117. He asserted that in the year 1975, Kimaiyo bought the suit land from Samoei , who had there before, purchased it from Barno. He was 9 years old then. He confirmed that there was no written agreement between Barno and Kimaiyo. Neither was there any written agreement between Samoei and Kimaiyo.

Put to the witness that the plaint in Kapsabet SRMCC No. 120 of 1995 alleged that Kimaiyo had bought the land from Barno in the year 1976, the plaintiff stated that this could have been an error. He agreed that the suit abated.

He stated that he has based this suit on the fact that his father (Kimaiyo) bought the land and his claim is

not one of adverse possession but is based on the agreement between Kimaiyo and Samoei. He confirmed that he has not sued the family of Samoei, as in his view, he has no claim against them. He stated that there was an agreement that Barno would transfer the land directly to Kimaiyo but he had no document to prove this. He was in agreement that Barno died in the year 1999. He also affirmed that Samoei is deceased. He was also in agreement that the suit land is agricultural land, but he was not aware whether there was any consent to transfer, obtained from the land control board. He asserted that the defendant obtained title in the wrong way but he confirmed that he has not sued the Lands Registrar.

PW-2 was Esther Jerono Isaia. She is the wife of the late Samoei. She testified that they (herself and her husband) bought the suit land from Barno and in turn sold it to Kimaiyo. She was not sure who was the registered owner when they sold the land to Kimaiyo, but on their part, they never obtained title to the same. They had lived on the land for 3 years before selling it. A village elder was present as a witness when they sold the land.

Cross-examined by counsel for the defendant, the witness stated that she could not recall the year when they bought the land. She stated that there was a written agreement between Barno and themselves but she was not present when the agreement was put in writing as she was in Kericho. The written agreement got lost. She could not recall the name of the village elder present during the agreement. She was not aware that in 1973 the suit land did not have a registration number. She also stated that there was a written agreement between themselves and Kimaiyo and a village elder by the name of Barosin was present. She was not present when the agreement was put down in writing and did not see any money exchanging hands. She didn't know how much Kimaiyo paid for the land. The agreement did not involve Barno who had already moved away from the land. Neither did they go to the Land Control Board.

PW- 3 was Alexander Bwalei who described himself as a retired village elder. He testified that he knew Kimaiyo and Barno. He testified that Barno sold the suit land to Samoei and he was present as a village elder. He in fact was the one who wrote down the agreement. He stated that Samoei lived for three years on the land and then sold it to Kimaiyo. Again he was the one who wrote the agreement between Samoei and Kimaiyo. There was an agreement that Barno would transfer the land directly to Kimaiyo. He stated that Barno attended the Land Control Board and gave consent to transfer to Kimaiyo. He testified that he was present and that the title deed was changed to the name of Kimaiyo. After the sale, Kimaiyo moved into the land and utilized it ; currently it is Kiprop Maiyo a son of Kimaiyo who lives on the land.

In cross-examination, PW-3 testified that he became a village elder in the year 1964 and remained a village elder upto the year 2010. He denied that it was one Kiptogom who was a village elder at the time and asserted that Kiptogom retired in the year 1963. He stated that Barno sold the suit land to Samoei in 1973. He did not know Samoei by then, but he knew Barno, and it was Barno who invited him to witness the sale. He affirmed that Barno had three brothers but they were not present. He stated that the defendant, who was then 12 years old was present, and that he, ( Kimeli, the defendant) signed as a witness. He agreed that culturally, issues of selling of land were for men and Kimeli being 12 years old was still a boy. He however stated that it was his father (Kimaiyo) who called him to be present and to sign the agreement. He testified that the brothers of Barno, though adults, were not invited to witness the sale and that there was no other relative present, nor anybody from his clan. The people present were himself, Samoei, Barno and Kimeli.

He wrote the agreement in Nandi dialect. He could not recall the purchase price. He also affirmed that he was present in the second agreement between Samoei and Kimaiyo which was made in 1975. Barno was not present. Put to the witness that in his witness statement he stated that Barno refused to go to the Land Control Board, he confirmed that Barno did refuse.

PW-4 was Joel Maiyo a brother to the plaintiff. He testified that he is the person who lives on the suit land. Kimaiyo, his father, told him to settle on the suit land in the year 1985. In cross-examination, he could not tell why Barno failed to transfer the land to Kimaiyo. He also affirmed that there was no physical boundary between the suit land and the parcel No.121 owned by the Kimaiyo family.

The plaintiff then closed his case.

## ***B. (ii) - Evidence of the Defendant***

The defendant gave evidence as DW-1 and stated that he is the son of Barno. Barno died on 3rd November 1999 and the Certificate of Death was produced as an exhibit. The defendant asserted that the suit land was his father's land and that the same is now registered in the defendant's name through transmission.

He denied that his father sold land to Samoei. He stated that he was born in 1949 as the first born. He was circumcised in 1965 (a critical matter in Nandi culture as it is after circumcision that one can be regarded as a man). He was 25 years in 1975 and not 12 years as alleged by PW-3. He denied being present when an agreement was drawn between his father (Barno) and Samoei. He also denied that in 1973 PW-3 was a village elder, and stated that he became a village elder in 1976.

He stated that there is no physical boundary between the suit land and parcel No.121 owned by the Kimaiyos and there was thus a boundary dispute. He also denied the existence of any agreement between Samoei and Kimaiyo. When his father died, Kimaiyo did not show up to claim anything from the family as is their custom. He stated that he was not aware of the suit in Kapsabet filed against his father.

Cross-examined by Mrs. Boinett for the plaintiff, the defendant stated that he lives in a separate parcel of land in Chepnoet. They are only two brothers but none resides on the suit land. He stated that no one resides on the suit land but that there is tea planted on the same. Challenged on why none of them reside on the suit land, the defendant stated that their father instructed them to live in Chepnoet, but not because he had sold the suit land. He never knew Samoei. According to the defendant the issue between the two families is a dispute concerning the boundary between parcel Numbers 121 and the suit land.

DW- 2 was Richard Kipkemboi Sang who lives in Ndurio. He testified that his grandmother was the initial owner of the land parcel No.121 and that she sold it to Kimaiyo. In 1995, he overheard a conversation between Barno and his father wherein Barno was complaining that Kimaiyo has destroyed the live boundary between their respective parcels of land, being Nos. 117 and 121. From then on, a feud developed between the two families. He stated that he knows PW-3 but that he was a village elder only from the year 1976 and not 1964.

## **C. SUBMISSIONS OF COUNSEL**

The hearing of the matter then closed and I invited the counsels to make submissions. Counsels opted to make written submissions.

Mrs. Boinett for the plaintiff submitted that the following issues are to be determined :-

*(i) Whether or not there existed a contract between the plaintiff and/or defendant and/or between the late fathers namely Kimaiyo Barno and Kichwen Barno respectively.*

*(ii) Whether or not the defendant lawfully acquired title deed in respect of the subject matter.*

*(iii) Whether or not right to own the subject matter accrue to the plaintiff by occupation thereof.*

*(iv) Whether or not the plaintiff is entitled to an injunction against the defendant.*

Counsel has conceded in her submissions that there was no privity of contract between Barno and Kimaiyo but has contended that among the exceptions to the doctrine of privity "are covenants on land to the extend that a third party should be able to sue a promisor if the promisee had performed its end of the bargain" (sic). Her argument is that under this exception, Barno was bound to transfer the land to Kimaiyo despite the two not having an agreement. She also argued that under Section 7 of the Limitation of Actions Act, CAP 22, the defendant cannot claim the suit land as the family of Kimaiyo have been in possession since 1975. She also submitted that the defendant obtained title illegally. Finally she asked me to employ principles of equity, to mitigate the rigours of the law of evidence, as the subject agreements

were entered into long ago and are not available. She relied on the case of **Paul O. Ogada v Kassim Owango & Another (Nairobi Milimani HCCC No. 394 of 2001)**.

Mr. Wafula for the defendant, on his part submitted that the suit ought to be dismissed. He framed 11 issues on his part being :-

(i) *Whether or not on or about the year 1973 one Isaia arap Samoei (deceased) bought that land comprised in title No. Nandi/Ndurio/117 from Daniel Kichwen arap Barno (Deceased), the defendant's father.*

(ii) *Whether subsequently in the year 1975 Isaia arap Samoei sold the said Title No. Nandi/ Ndurio/117 from Daniel Kichwen A. Barno (Deceased), the plaintiff's father.*

(iii) *Whether or not that family of Kimaiyo A. Barno has been in occupation of the suit land from the year 1975 to date.*

(4) *Whether occupation can confer the rights of ownership.*

(5) *Was their (sic) privity of contract between Kimaiyo A. Barno (the plaintiff's father) and Daniel A. Barno (the defendant's father) as regards the suit land ?*

(6) *Was the defendant's father obligated to transfer the suit property to the plaintiff's father ?*

(7) *When seeking the grant of letters of administration in respect of his late father's estate (Title No. Nandi/Ndurio/117) did the defendant owe the estate of Kimaiyo A. Barno any duty.*

(8) *Is the defendant guilty of the alleged fraud by the plaintiff ?*

(9) *Does this suit offend the doctrine of res judicata ?*

(10) *is the plaintiff entitled to the reliefs he is seeking or not ?*

(11) *Who is to pay the costs of this suit ?*

The issues as drawn by Mr. Wafula are more comprehensive, and in my view, take care of all issues in this matter.

Mr. Wafula submitted that none of the two contracts of sale of the suit land alluded to by the plaintiff were produced in evidence. His view was that the witnesses were not being truthful in stating that there was ever any of the sale agreements. He referred me to Section 3(3) of the Law of Contract Act, CAP 23, Laws of Kenya which requires contracts for the sale of land to be in writing before they can be enforced. On this point, he referred me to the case of **Florence Chepkirui Chepkwony vs William Chebii (Eldoret E&L Case No. 1014 of 2012)**.

Mr Wafula also disputed that the family of Kimaiyo has been on the suit land since 1975, but that even if this were true, the plaintiff's claim is not one of adverse possession. He averred that even if they were in possession, they were in illegal possession which ought not to be protected. He argued that possession in itself does not entitle one to the actual right to the property. He buttressed this argument by relying on the court of appeal decision in **Samuel Mwangi v Jeremiah M'Itobu Nyeri Court of Appeal Civil Appeal No. 264 of 2007 and Kiprop Kanda vs Gabriel Biwot Kanda & 3 Others (Court of Appeal at Eldoret Civil Appeal No.219 of 2003)**.

Counsel also contended that there was no privity of contract between Barno and Kimaiyo and therefore the defendant cannot be compelled to transfer the land to the plaintiff as there was no nexus between the two. On this point, he relied on the case of **Clement Kipkoech Korat vs Duncan Njogu Njoroge (Eldoret E&L Case No. 855 of 2012)**.

On whether there was fraud in obtaining the letters of administration, counsel stated that there was none and that the defendant has no obligation to involve the plaintiff in the succession cause. He further stated that all allegations of fraud had not been proved beyond a balance of probabilities and on this point he relied on the case of ***Mary Jerono Mengich vs David Kipleting Rugut & 2 Others (Eldoret E&L No. 132 of 2012)***. In any event he stated that if there was a fault in the succession proceedings, this was not the forum to ventilate them but the same ought to be in the succession proceedings. To support his point, Mr. Wafula relied on the case of ***Hellen Jepkosgei Kipkorir vs Petrolina Kipkurgat (Eldoret E&L No. 778 of 2012)***.

Finally, Mr. Wafula contended that this suit is *res judicata*. He stated that the issues herein were determined in Eldoret Judicial Review No. 38 of 2010. He supported his argument with the decision in ***Samwel Kirwa Boen vs Attorney General (Eldoret E&L No. 734 A of 2012)***.

He further stated that principles of equity cannot override any legal provisions and he relied on the case of ***Frankline Lukhale Namatsi vs Wilbourne Kosgei (Eldoret E&L No. 951 of 2012)***. He averred that the suit land was agricultural land and the law requires consent of the land control board for the same to be enforceable and there was none in this case.

He distinguished this case from that of ***Paulo Ogada vs Kassim Owango*** relied upon by Mrs. Boinett.

He asked that this suit be dismissed with costs.

#### **D. DECISION OF THE COURT**

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

The plaintiff's case is that his father, Kimaiyo, bought the suit land from one Samoei. It is claimed that Samoei had bought the land from Barno, the father of the defendant. The plaintiff has therefore alluded to two contracts of sale. It is now the plaintiff's contention that owing to those two transactions, the Estate of Kimaiyo ought to be declared the owners of the suit land and that the title of the defendant ought to be cancelled.

The evidence adduced to demonstrate the existence of the two contracts of sale is oral evidence. It is alleged that the written contracts got lost. The defendant has of course contested the existence of any of the two contracts of sale. To prove the existence of the contracts of sale, the plaintiff called PW-3 who stated that he not only witnessed the agreements but that he was indeed the person who recorded the same in writing. On the first agreement, PW-3 stated that it was only himself, Samoei and the late Barno who were present. As to the second agreement, it was only himself, Samoei, Kimaiyo and the defendant, who was then 12 years old, that were present.

I have my own difficulties in believing the evidence of PW-3. Evidence was led that culturally it is common to involve other people in the sale of land, whether a clan member or family member. These transactions were allegedly entered into in the early 1970s when culture was still strong and I find it difficult to believe that these transactions were entered into without the involvement of any of the family members. Kimeli himself said that he was born in 1949 and was in his twenties in the year early 1970s. He is the first born. He could not have been 12 years as alleged by PW-3 at the alleged time of the contract of sale of land between Barno and Samoei. He was a fully grown man and I find it difficult to believe that his father sold the land without a word to him.

PW-3 further stated that he accompanied Barno to the land control board so that consent would be issued to transfer the land to Kimaiyo. He testified that indeed consent to transfer was issued. Again, I find difficulty in believing this piece of evidence. If at all consent to transfer was issued, there would have been nothing easier but to produce the records of the land control board to show that consent was indeed issued. The Land Control Board has minutes and records of all transactions in which they have given consent and no explanation was given as to why the records or minutes could not be produced in evidence. The minutes and records are available and the only inference that I can draw for a failure to

produce the same is that they show no such entry as alleged.

The above makes me have serious doubts as to whether these contracts of land ever existed. None of the written contracts were produced in evidence the excuse being that they got lost. I am not convinced that the written contracts ever existed and I have serious doubts as to whether there was any oral contract for the sale of the suit land.

Even if I am wrong, it makes no difference. The plaintiff is seeking the land through the enforcement of oral contracts, for there is no written contract before me. Section 3(3) of the Law of Contract Act, CAP 23 provides as follows :-

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

*(a) the contract upon which the suit is founded-*

*(i) is in writing;*

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

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

*Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

Thus to be enforceable, contracts for the sale of land must be in writing. If they are not in writing, they cannot be enforceable.

There is nothing in writing presented to me showing the existence of any contract between Barno and Samoei, and between Samoei and Kimaiyo. Such contract, if it existed, is therefore not enforceable. The plaintiff's suit is hinged on contracts for the sale of land. Since there is nothing in writing, there is nothing to enforce.

The plaintiff's suit is further dented for the reason that no consent of the land control board was exhibited. I have already mentioned that in my own assessment, no consent of the land control board was ever issued, because if there was one, then it ought to have been exhibited. Section 6 of the Land Control Act, CAP 302 provides 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) ...*

*(c) ...*

*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 therefore be seen that for want of consent of the land control board, the transactions, if any existed, between Barno and Samoei, and between Samoei and Kimaiyo, are in any event void. None of the two contracts can be enforced for want of consent of the land control board.

There have been numerous decisions on this point one being the court of appeal decision in the case of

**Kariuki vs Kariuki (1983) KLR 225.** In the said case, it was emphasized that where there is no consent of the land control board, the transaction is declared void.

Even assuming that the contracts were enforceable, the defendant cannot be sued on them because he was not a party to these contracts. The party to be sued is his father, and though deceased, the plaintiff in order to enforce these contracts, ought to have sued the defendant, not in his personal capacity, but in his capacity as administrator of the estate of Barno. The plaintiff cannot seek to enforce the contracts herein against the defendant in his own personal capacity.

The defendant cannot also be bound by the contract between Samoei and Kimaiyo, if any existed as he (or his father) was not a party to it. Even assuming that the defendant herein was sued on behalf of the Estate of Barno, there was no privity of contract between Barno and Kimaiyo. The duty to transfer title to Kimaiyo could not have been the duty of Barno in the absence of a contract. It was the duty of Samoei and the plaintiff has not deemed fit to sue the Estate of Samoei to compel them to transfer the suit land. The general principle was laid out in the case of **Agricultural Finance Corporation vs Lengetia Limited (1985) KLR 765.** In the said case, the first respondent rendered certain contracted farm services to the second respondent for which it sought payment from the appellant on the basis that the services had been provided on the condition that the appellant would pay for them out of certain monies to be advanced by the appellant to the second respondent. There was however no formal agreement existing between the appellant and the first respondent. It was held that as a general rule, a contract only affects the parties to it. The same, as a general rule, cannot also be enforced by a person who is not a party to it.

There can of course be exceptions depending on the nature and circumstances of each case. But I have seen none in our case that would make me except the alleged contract herein from the general principle of privity. Mrs. Boinett sought to rely on the case of **Kassim Owango** but this was not a case where the plaintiff was suing a third party that was not party to the subject matter. I can see nothing in this decision that disregarded or gave an exception to the doctrine of privity of contract. On the contrary, the decision actually emphasized the doctrine of privity of contract. The plaintiff in the said case had deposited some money with the 2nd defendant for the purchase of land from a third party. The land was not forthcoming and the plaintiff sued the defendants. The court held that the 2nd defendant was liable to the plaintiff for the money deposited with it, the 1st defendant being absolved because he was merely an agent of the 2nd defendant. There was also an issue of money paid to the Commissioner of Lands by the 2nd defendant and it was held that since the plaintiff was not privy to that payment, he could not sue on it, but that he could recover the money from the 2nd defendant because the plaintiff gave the money to the 2nd defendant. I cannot see any decision in that case which supports the arguments of Mrs. Boinnet.

I also note that the alleged contracts being enforced are said to have been entered into in the years 1973 and 1975 respectively. This suit was filed in the year 2012. This is about 39 years to the time of the first contract and 37 years to the time of the second contract. Can these be enforced after the lapse of this time ?

Section 7 of The Limitation of Actions Act provides as follows :-

**Section 7.** *An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.*

It will therefore be seen that to enforce a contract on land, the same must be brought within 12 years of the contract. Any proper suit ought to have been filed in the year 1985-1987 which is long past. This suit is therefore hopelessly out of time.

It is apparent that the alleged contract, if any existed, cannot be enforced by law. Counsel for the plaintiff stated that equitable principles ought to be imported. I do not agree. Equity cannot be imported to override clear provisions of the law.

Counsel for the plaintiff also argued that the plaintiff's title has been extinguished because of the

continuous possession of the family of Kimaiyo on the suit land. First, it must be appreciated that the question of possession was hotly contested. But, more importantly, the issue is irrelevant to the circumstances of our case. The plaintiff has not filed this suit alleging adverse possession. He has sought this suit to enforce a sale agreement entered into in the year 1973 and 1975. The issue of possession is peripheral in the circumstances of this suit. If the plaintiff wished to make possession an issue, then he ought to have filed a proper suit for adverse possession so that the court may determine whether on the facts, the plaintiff has acquired the suit land by way of adverse possession. He has no basis for arguing that the title of the defendant has been extinguished because of time.

The plaintiff also alleged that the defendant obtained title fraudulently. I have seen that the defendant became registered as owner of the suit land through transmission. If the plaintiff feels that the succession proceedings were irregular, then the proper forum is to file an application to nullify the grant within the succession proceedings. That was indeed my holding in the case of **Hellen Jepkosgei Kipkorir vs Petrolina Kipkurgat (Eldoret E & L No. 778 of 2012)** cited by Mr. Wafula. It was pleaded in the plaint that a Miscellaneous Succession Cause No. 69 of 2010 was filed to annul the grant. The proper cause of action therefore is for the plaintiff to pursue that matter to conclusion. I can see that the defendant became registered as proprietor on 1st October 2010 and the grant was confirmed on 21st October 2010. There appears to be an anomaly as the title was issued before the grant was confirmed. But I guess that this is the issue in Miscellaneous Succession Cause No. 69 of 2010. I agree that there is apparently some irregularity, but without prejudice to the pending application to annul, I do not think, for the circumstances of this case, that the plaintiff has any locus standi to seek to impeach the title deed of the plaintiff. This is because I have held in the reasons above that the plaintiff has no valid claim over the suit land.

Mr. Wafula raised the issue of *res judicata*, his position being that the matters herein were decided with finality in Eldoret High Court Judicial Review No. 38 of 2010. I have seen that decision, which was one of the exhibits produced by the plaintiff. The Judicial Review proceedings were commenced to quash the award of the Land Disputes Tribunal which had held in favour of the plaintiff. I am not of the view that the issue of who is entitled to the suit land was before the court in those proceedings. What was before the court was whether or not the decision of the Land Disputes Tribunal was legal or whether it was liable to be quashed by an order of certiorari. The court did not dwell nor decide with finality as to who was entitled to the suit land.

My view however, is that this suit is *res judicata* is because there existed (or still exists) the suit Kapsabet SRMCC No. 120 of 1995. The plaintiff in that suit was Kimaiyo and the defendant was Barno. Kimaiyo had sought for orders of specific performance in that suit. He could as well have sought orders to have the title of Barno cancelled just as the plaintiff has done in this suit. The parties in this suit are the successors in title to the plaintiffs in the Kapsabet matter. The very matters that were sought to be determined in the Kapsabet case are in my view similar to the matters to be decided in this suit.

Section 6 and 7 of the Civil Procedure Act are the Sections which bring forth the doctrine of *res judicata*. The cause of action in this matter, which is fraud, could have been a ground of attack in Kapsabet SRMCC No.120 of 1995. As was held in the case of **Pop-In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich (1990) KLR 609**, the plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time.

In the case of **Madede & Another vs Fita & 2 Others (1988) KLR 211** the appellants were sons of the 2nd respondent. They had sued their father and the 1st and 3rd respondents to claim land that was registered in the names of the 1st and 3rd respondents. There had been a suit over the same land between the 1st and 2nd respondents which had been decided. The 2nd respondent lost the suit. The sons of the 2nd respondent now sued to recover the land from the 1st respondent alleging a trust. It was held that the suit was *res judicata*. This was despite the position that the parties in the second suit were not the same parties in the first suit, the court reasoning that the subject matter, being an issue of ownership, had already been decided in the previous suit.

In our case, the Kapsabet Case is either still existing or has abated. If it is still existing, then this suit is caught up by Section 6 of the Civil Procedure Act, which bars the court from proceeding with a matter which is in issue in another suit which was filed prior. If it has abated, then this suit is caught up by the provisions of Section 7 of the Civil Procedure Act, for under Order 24 Rule 7, no fresh suit may be brought where a suit has abated on the same cause of action. That being the case, the plaintiff is precluded from instituting a suit claiming similar reliefs, or reliefs that could have been claimed in the former suit. From the foregoing, I come to the conclusion that this suit is res judicata.

It will be seen that the plaintiff's suit must fail on various grounds which I have enumerated to above. I am therefore unable to grant the plaintiff the prayers that he has sought.

I proceed to dismiss this suit with costs to the defendant.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE 2013

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Read in open Court***

***In the Presence of:-***

***Miss E.M. Sumba holding brief for Mrs Boinett for the plaintiff.***

***Miss M.S. Adhiambo holding brief for Mr. R.M. Wafula for the defendant***