



**Kemboi v Singoei & another (Environment & Land Case
35 of 2015) [2022] KEELC 3531 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 35 OF 2015**

SM KIBUNJA, J

MAY 25, 2022

BETWEEN

CHARLES KIPKOECH KEMBOI PLAINTIFF

AND

MARY SINGOEI 1ST DEFENDANT

JOSEPH SINGOEI 2ND DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide the plaint dated the 4th February, 2015, and amended on the 19th February, 2015, seeking for judgment against the defendants jointly and severally for:
 - a. “A permanent injunction be granted restraining the Defendants from interfering with the Plaintiff’s parcel of land.
 - b. An eviction order to be issued against the defendants / his servants and / or agents.
 - c. General damages for trespass.
 - d. Costs of the suit.”

The plaintiff avers that he is the registered owner of LR. No. Tulwet/Tulwet Block 5 (Kapserton)/6 measuring 0.394 hectares, the suit land, since the first registration. That in early 2015, the defendants unlawfully and without reasonable cause forcefully entered onto the suit land claiming rights of ownership. That despite notice and demand, the defendants are still grazing on the land and hence this suit.

2. The claim is opposed by the defendants through their statement of defence and Counter Claim dated the 12th March, 2015 wherein they sought for judgment against the Plaintiff for the following:
 - i. “A declaration that title L.R. Tulwet/Tulwet Block 5(Kapsaret)/6 is null and void.



- ii. A declaration that half of the suit property herein belongs to the 1st Defendant and the same be registered in her name
- iii. A permanent injunction restraining the Plaintiff by himself, his agents, employees, servants or otherwise from dealing or interfering with the title L.R. Tulwet/Tulwet Block 5(kapserton)/6.
- iv. An order compelling the Plaintiff to transfer half of the suit land to the 1st Defendant and in the alternative a vesting order be issued directing the executive officer to execute transfer of the suit land in favour of the 1st Defendant.
- v. The Plaintiff be condemned to pay costs of the suit.”

The defendants aver that on the 13th September, 2004, the 1st defendant bought the suit land, measuring 0.5 acres with the developments thereon, from Martha Cheboo A. Cheri, the plaintiff's biological mother, through a written sale agreement. That 1st defendant and her son, the 2nd defendant, have been in possession of the said land. That on or about September 2006, the plaintiff fraudulently and illegally had the suit land transferred to his name after threatening and coercing his mother.

3. The Plaintiff filed a Reply to the Defence and a Defence to the Counter Claim dated the 22nd March, 2015, in which he inter alia averred that the suit land never belonged to his mother; that the land was lawfully transferred to him and no fraud was involved; and the purported sale agreement referred to by the defendants was null and void for lack of consent from the land control board, and the vendor had no capacity to sell what she did not own.
4. During the hearing Charles Kipkoech Kemboi, the plaintiff, testified on the 27th July, 2016 as PW1. It is his testimony that he bought Tulwet/Tulwet Block 5/kapserton 6, the suit land, from Joseph Kipkurui Kuto for Kshs. 25,000.00, and after going to the chief and the Land Board, the land was transferred to him. During cross-examination, PW1 testified that during the clashes in 1992 his family moved to the suit land and they stayed there until 2004. That his mother sold half an acre of land containing two houses to Mary Singoei, the 1st defendant, without his consent and that he quarrelled her. That although his family signed an agreement before the elders on 11th November, 2003, that was produced as DMFI 2, outlining how the suit land was to be used, they did not deal with the suit land as was agreed upon. When PW1 was shown the letter dated 5th March, 2007 marked as DMFI 3, that was written to the surveyor to subdivide the land, he agreed that he did not allow the surveyors to subdivide the suit land. PW1 stated that the title deed to the suit land was not available in court as he had given it to one Samuel Cheptarus for safekeeping. He conceded that the 1st Defendant and her family are using a portion of the suit land. During re-examination, PW1 stated that DMFI 1 and 2 do not indicate the parcel number of the land in issue. He stated that he had signed DMFI 2 because it related to the subdivision of land.
5. For the defence, Paul Kipsang Kogo, a brother to the plaintiff, testified as DW1. He testified that the suit land herein belongs to their mother, Martha Chesiro, and that the 1st Defendant bought the suit land at a consideration of Kshs. 42,500.00. That a sale agreement was prepared at the Chief's office, and immediately thereafter, the 1st Defendant took possession of her portion of the suit land measuring 0.5 acres. That subsequently the suit land was subdivided by a government surveyor in 2007. That his mother wanted to sell her portion of the suit land because of squabbles caused by the Plaintiff. During cross-examination, DW1 stated that he does not know the person who sold the suit land to his mother, and did not witness the sale agreement that his mother entered into with the 1st Defendant. During re-examination, DW testified that the subdivision of the suit land was done and that the Plaintiff and the Defendants are occupying their respective portions. Mary Singoei, the 1st defendant, testified as DW2 that she had purchased the suit land measuring 0.5 acres in 2004 from the Plaintiff's mother, Martha



Cheboo A. Chesiro. That the portion she bought contained two (2) houses which belonged to Paul, the Plaintiff's brother. That the purchase price was Kshs. 9,000.00 per 0.1acre of land, and that Joseph Tuwei drafted the sale agreement before the Chairman of the location and the Village Elder. That Paul was also present when the sale agreement, produced as PExh 1, was executed. DW2 stated that she has lived on her portion of the suit land from 2004 to date. That two years after taking possession of her portion of the suit land, the Plaintiff lodged a complaint concerning her occupation of the land. During cross-examination, DW2 testified that she does not remember the total consideration that she paid for the purchase of her portion of the suit land. That she has never gone to the Land Control Board. During re-examination, DW2 stated that she does not know how to read, but that the sale agreement was read to her. She further testified that she does not remember the price for 0.1acres. Then on the 5th July 2018, Martha Cheboo, mother to the plaintiff, testified as DW3, and confirmed that she sold a portion of the suit land measuring 0.5 acres, and containing two (2) houses to the 1st Defendant and used the proceeds to buy land elsewhere. DW3 had a letter from the Office of the President outlining the manner in which her land would be distributed among her sons and it gave the Plaintiff 0.2 acres of land. DW3 produced the sale agreement aforementioned as DExh 1. She further testified that she moved away from the suit land because the Plaintiff used to assault her. During cross-examination DW3 testified that she sold 0.5 acres to the 1st Defendant and 0.5 acres to the 2nd Defendant, but did not obtain consent from the Land Control Board. DW3 stated that David Tanui is the father of the Plaintiff, but not the owner of the suit land. She further testified that DMFI 2 was written by the Plaintiff's siblings, but the original document is with the village elder. That she had no report from the police to prove that the Plaintiff had assaulted her. During re-examination, DW3 stated that she has never lived with David Tanui, but agreed that they are parents of the Plaintiff. DW3 stated that the land she sold in Lessos belonged to the her. The next witness was Joseph Korir Tuwei who testified that when he retired from the Ministry of Health in the year 2000, he became the chairman of Tulwet Location where there are 23 other village elders. He stated that he knew the parties to this claim as they are his neighbours. DW4 testified that the Plaintiff disturbed his mother so much that she approached the elders and informed them that she wanted to have her land distributed among her children. DW4 then called ten village elders on the 11th November 2003, to the Chief's office to execute the wishes of Martha Cheboo. DW4 stated that the 1st Defendant is using 0.5 acres of land. During cross-examination, DW4 stated that David Tanui was present when the agreement before the elders of 11th November, 2003 was made and he signed as the father of the Plaintiff. The original of DMFI 3 was given to Martha Cheboo, but a photocopy was made on the same day. DW4 confirmed that he witnessed the sale agreement between Martha and the 1st Defendant, but stated that at that point the title to the suit land was not available as it was in the name of Samuel Kipkurui Kuto, who has not complained to date. During re-examination, DW4 confirmed that the portion of the suit land in issue belongs to Martha, and that the 1st Defendant and her family stay in Kapserton. Julius Limo testified as DW5, that he is a retired Chief of Tulwet location and knew the Plaintiff because he hails from his location. DW5 testified that he wrote the letter dated 5th March, 2007 to the surveyor after the Plaintiff and his mother told him that they wanted to subdivide their one acre of land into two portions, but he is not aware whether the survey took place. During cross-examination, DW5 testified that by the time the aforementioned letter was being written, he knew the suit land belonged to the Plaintiff's family, and that the Plaintiff was in charge. DW5 testified that he did not know the land's reference and was not aware who exactly had purchased it. DW5 testified that there was no consent from the Land Control Board before he wrote the letter to the surveyor. During re-examination, DW5 confirmed that there was no parcel number captured on the letter that he wrote, but the letter referred to the only parcel of land that the Plaintiff's family had in the area. That the Plaintiff's family had told him that land was registered in the Plaintiff's name, as a trustee for the family. Samwel Kipketer Too testified as DW6, that he is a village elder and the parties to this suit are his neighbours. That the suit



land was bought by the Plaintiff's mother from Samuel Kirui in 2002, and that she sold half an acre of the land to the 1st Defendant in 2004. He confirmed that he was present on 11th November, 2003 when the Plaintiff's family agreed that each of them was to get 2 points of the land. That the sharing of the land was necessary as it would put an end to the frequent disputes between the Plaintiff and his mother. That the Plaintiff's mother bought land elsewhere and she settled there. During cross-examination, DW6 admitted that there were differences on the date and the stamp affixed on the document produced as DExh 3, and the document shown to him by the Plaintiff's advocate. That he has never seen the suit land, but had heard that the Plaintiff registered the suit land in his name after the family agreed to it. That he was not aware whether the Plaintiff bought the suit land personally, but by the time Martha bought the suit land, it had been surveyed and title was in the name of Samuel Kipkurui. He denied that the Plaintiff had purchased the suit land from Samuel Kipkurui in 1991. He added that he had not seen the sale agreement between the Plaintiff's mother and Samuel Kipkurui, and was not aware what consideration was paid for the transaction. DW6 confirmed that four (4) years ago, the DCI had summoned the parties to this suit for investigation. During re-examination, DW6 stated that the Plaintiff's mother had bought the suit land from Samuel Kipkurui. That he was a member of the land buying society from where the suit land came from. The DCI investigation was conducted when the 1st Defendant learnt that the land had been transferred to the Plaintiff. The next witness was John Arap Too, who testified as DW7 that the 1st Defendant is his sister, and he had witnessed her purchase the suit land, resulting in the sale agreement dated 13th September, 2004. He confirmed that the Plaintiff's mother, Martha, sold half an acre of land to the 1st Defendant for a consideration of Kshs. 42,500.00, which amount was paid in full to her. DW7 testified that before the sale transaction was entered into, Martha showed them the agreement prepared before the elders dated 11th November, 2003 and that she further told them that she was selling her half acre of land in order to buy land elsewhere. That after the 1st Defendant bought the half acre land in 2004, a surveyor came and subdivided the land, and the 1st Defendant took possession and has been in possession to date. When the 1st Defendant bought the land from Martha, the title was in the name of the person that Martha had bought the land from. During cross-examination, DW7 stated that when Martha showed them the agreement made before the elders they believed that the suit land was hers. DW7 stated that the agreement before the elders shown to him by counsel for the Plaintiff bears a different date stamp and date from the one produced as DExh 2. During re-examination, DW7 stated that both DExh 2, and the copy held by counsel for the Plaintiff, contain a similar date which date is 11th November, 2003. DW 7 stated that the 1st Defendant did not show him the sale agreement, the consent and the transfer from Samuel Kipkurui. Peter Sitienei testified on 31st January, 2022, as DW8. He stated that he was the secretary of the Tulwet Sub-location office in the year 2003 when he drafted the agreement before the elders dated 11th November, 2003 after a meeting that was held before the Assistant Chief's office, after the Plaintiff's mother lodged a complaint that was referred to the Village Elders by the Assistant Chief. That when an agreement was reached, with the parties, including the Plaintiff, he drafted the agreement that was signed before the elders. The original document was photocopied, and the parties were each given a copy, and the original was left at the Assistant Chief's office. That he has been unable to trace the original document at the Assistant Chief's office since the documents that were more than 10years old had been destroyed. That he had reported the loss of the document to the police on 28th January, 2022 and was issued with a police abstract. During cross-examination, DW8 stated that he wrote the agreement before the elders and the stamp that was affixed on it was the chairman's stamp. The copy of the document produced as DExh 2 was kept by the Plaintiff's mother, and it has four (4) dates, while the document filed in Court on 12th April, 2015 had only two (2) dates. There were 14 people present at the hearing held at the Assistant Chief's office that resulted to the agreement produced as DExh 2. DW8 stated that the parties were not forced to sign the agreement. He testified that the land in dispute herein is one acre and each party was given 2 points. DW8 stated that he did not attend the Land Control Consent Board.



The Plaintiff's mother did not have the title to the suit land, as it was still in the name of the person who had sold the land to her, and whose name DW8 was not able to recall. During re-examination, DW8 stated that the suit land belonged to the Plaintiff's mother and the people present in the meeting held on 11th November, 2003 willingly signed the document produced as DExh 2, after which, the chairman signed it and certified it as a true copy. DW8 stated that there was nothing shown to them to suggest that the land was not fully paid up.

6. The learned counsel for the Plaintiff and the Defendants filed their written submissions dated the 16th February, 2022 and 17th March, 2022 respectively.
7. The Plaintiff among others submitted that the Defendants' have failed to prove fraud on his part. That contrary to the allegations of the 1st defendant, it was him who bought the suit land from Samwel Kipkurui Rutto, and not his mother. The Plaintiff argued that the sale agreement that the 1st Defendant seeks to rely on is null and void for reasons that the land was agricultural, and that no Land Control Board consent was obtained within Six (6) months of the sale agreement. That the sale agreement should be disregarded as it does not indicate the parcel number of the land that is the subject matter of the sale agreement, and therefore this suit be dismissed with costs to the Plaintiff.
8. The Defendants submitted that the Plaintiff's title over L.R. Tulwet/Tulwet Block 5 (kapserton) 6 was acquired fraudulently, and therefore under the exceptions of section 26 (1) of the Land Registration Act, it ought to be cancelled. The Defendants relied on the decision in Muranga Environment And Land Court E.L.C Case No. 63 of 2017 Kibiro Wagoro Maki-jmi V Francis Nduati Macharia & Another [2018] eKLR where the court *inter alia* dealt with the definition of fraud, restated the fact that fraud must be both pleaded and proved, and the standard of proof to be met for fraud to be established plus the fact that fraud cannot be inferred from the facts. They further submitted that since the Plaintiff's title was under challenge, it was not enough for him to dangle the instrument of title as proof of ownership, and cited the decision of the Court in Nairobi ELC Suit No. 887 of 2013 Mongeri Mirieri Nyanganyeria V District Land Registrar Thika & 2 Others [2018] eKLR where the Court of Appeal's decision in Munyu Maina v Hiram Gathiba Maina [2013] eKLR was cited with approval. The Defendants also relied on the decision of the Court in Kisumu ELC No. 417 of 2015 Samuel Odhiambo Oludhe & 2 others V Jubilee Jumbo Hardware Limited & another (2018) eKLR where the Court cited with approval the decision in Chemei Investments Limited Vs The Attorney General & others Nairobi Petition No. 94 of 2005 which was cited by Kiage JA as follows:

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be sidestepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others - vs - City Council of Nairobi & Another (supra) where the court stated as follows, “we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principal has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest...”

The Defendants argued that their claim over the half an acre portion of the suit land was corroborated by the evidence of among others DW6, DW7 and DW8. That further, their interests are protected by the provisions of section 26, 27, 28, 30(g) and section 126(1) of the Registered Land Act (repealed), as the Plaintiff created an implied or constructive trust in favour of the Defendants and his mother, Martha Cheboo A. Chesiro, DW3, who sold the suit land to the 1st Defendant. The Defendants relied on the decision of the Court of Appeal in Nyeri Civil Appeal No. 6 of 2011 Consolidated With Civil



“The evidence on record reveals that the appellants are in possession of plots in L.R No. 6324/10 and as such they come within the protection in Section 30 (g) of the Registered Land Act. We find that the respondent having put the appellants in possession of the suit property created an overriding interest in favour of the appellants in relation to L.R No. 6324/10. It is our considered view that the Honourable Judge erred in law in failing to give due consideration to the fact that the appellants were in possession and occupation of L.R No. 6324/10 prior to the title being issued and registered in the name of the respondent...

19. Pending the sale of all 240 plots by the respondent, the question that comes to mind is what was to be the legal status and relationship between the respondent and the appellants as purchasers who had paid the purchase price for individual plots? It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots. In *Mwangi & another -vs- Mwangi* (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under Section 126 (1) of the Registered Land Act is merely permissive and not mandatory...
25. The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice. We are reminded and guided by the dicta of Madan, JA (as he then was) in *Chase International Investment Corporation and Another vs. Laxman Keshra and Others*, 119781 KLR 143; [1976-801 1 KLR 891 to the effect that:

“If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed...”

26. Article 159 (2) (b) of the Constitution requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159 (2) (a) of the Constitution requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of the constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of



substantive justice to all parties having legal and equitable interest in the suit property.”

And the case of *Willy Kimutai Kitilit Vs Michael Kibet* [2015] eKLR where the court held that:

- “7. The defendant was put in possession of the suit land in 2009. The defendant fenced the land and planted trees on half an acre and utilized the other 1 h acres for farming. The defendant has been in possession with full knowledge of the plaintiff. The plaintiff had thus created an implied or constructive trust in favour of the defendant who had paid the entire purchase price and was only awaiting to be taken before the land control board for consent. Instead of the plaintiff taking the defendant before the board on obtaining title, he instead kicked out the defendant and filed this suit in court seeking the reliefs enumerated at the beginning of this judgement The plaintiff herein had sold 2 acres to the defendant who was put in possession. The plaintiff is now seeking for a declaration that the defendant has no proprietary interest in the land and that he should be restrained from utilizing it.... The above court of Appeal decision was quoted with approval in a subsequent decision of the same court in Kisumu court of Appeal Civil Appeal No.3 of 2014 between Sammy Likunyi Adiema and Charles Shamwati Shisikani where it was held as follows: -

“Before we conclude this judgement, we venture to state that even if the respondent had not invoked the limitation of Actions Act, he would have succeeded on the basis of constructive trust. In the case of *Macharia Mwangi Maina & 87 others -vs- Davidson Mwangi Kagiri* (2014) eKLR, we held that the appellants who were purchasers of portions of the suit land and had been put in possession of the said portions by the respondent, were protected by section 30(g) of the Registered Land Act. The act of the respondent, we held had created an overriding interest in favour of the appellants in relation to those portions of land.

The Defendants argued that a constructive trust arose between the Plaintiff and his mother, DW3. That the Plaintiff violated the said trust when he procured the registration of suit land without the knowledge of his mother and his siblings. That DW3 had disposed of half an acre of the suit land to the 1st Defendant, and that the Plaintiff was holding the said land in trust for his mother, and the 1st Defendant. The Defendants urged the Court to cancel the Plaintiff’s title, and issue an order directing the Land Registrar to issue another title in their favour as is provided in section 80(1) of the *Land Registration Act*. The Defendants submitted that the Plaintiff suit ought to fail, and their Counterclaim be allowed as prayed. The Defendants urged this Court to use its discretion as is provided in Section 27 of the *Civil Procedure Act* to award costs to the Defendants as the costs follow the events. They relied on the decisions in *Alton Homes Limited & Another V Davis Nathan Chelogoi & 2 Others* [2018] eKLR and *Joseph Mwangi Recho & another* (SUPRA).

9. The following issues are for determination by the court:
- a. Whether the Plaintiff has proved his claim that the Defendants are trespassers on the suit land, and if so whether the prayer(s) sought should issue against them or one of the two.



- b. Whether the Defendants have proved their claim in the counterclaim that the plaintiff's registration with the suit land was obtained fraudulently, and is so whether they are entitled to the prayer(s) sought against the Plaintiff.
 - c. Who pays the costs of the suit and counter claim.
10. The court has carefully considered the parties' pleadings, evidence tendered, submissions filed, superior courts decisions cited thereon and come to the following determinations;

a. The Plaintiff produced a copy of the title deed of LR No. Tulwet/ Tulwet Block 5(kapserton)/6 as PExh 1, that confirms that he became the proprietor of the suit land on the 18th September, 2006. That the court is obligated under section 26 (1) of the [Land Registration Act](#) No. 3 of 2012 to prima facie take the plaintiff as the "absolute and indefeasible owner of the suit land, subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the certificate...". That section goes on to provide that "the title of that 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; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

That even though the Defendants' have contested the legitimacy of the Plaintiff's title to the suit land, claiming that he acquired it through fraudulent means, the Plaintiff has urged the court to uphold the doctrine of indefeasibility of title as is embodied in Section 26 [Land Registration Act](#).

- b. The Defendants in their Counterclaim alleged that the Plaintiff fraudulently registered himself as the proprietor of the suit land herein, after the 1st Defendant had purchased 0.5 acres of the suit land from the Plaintiff's mother, the rightful owner of the suit land, vide a sale agreement dated 13th September, 2004. The law has been settled that where the validity of a title deed is in issue, the title deed holder needs to show how they acquired proprietary interests in the suit land. The title deed holder in such an instance also need to show that the correct procedure was followed in their registration as proprietors. That while I agree with the Defendant's submission to the effect that it was not sufficient for the Plaintiff to dangle his title before the court as the only basis of his entitlement, and that he needed to show that he acquired the proprietary interests in the suit land procedurally, no evidence has been adduced by the defendants to show that the plaintiff acquired the title to the suit land through fraud or misrepresentation that he was a party to, or that his title was obtained illegally unprocedurally or through a corrupt scheme. That it must be borne in mind that mere allegation of fraud is not enough to succeed in a claim based on fraud.
- c. That in the case of [Munyu Maina V Hiram Gatbiha Maina](#) [2013] eKLR the Court of Appeal 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."



That in the circumstances of this case, though the plaintiff is the registered proprietor of the suit land, the evidence called by the defendants including that of DW1 and DW3, who are brother and mother to the plaintiff, show that the family had agreed to share the land each member getting two (2) points in 2003 before the elders. That though DW3 went on to sell half acre of the land to the 1st defendant while her entitlement under the 2003 agreement was only two (2) points, the court cannot hesitate but find that the defendants were lawfully placed on that portion of the suit land in 2004, and have every right to continue in possession of that portion. That in any case the plaintiff was all along aware of the transaction between his mother, DW3, and the 1st defendant and it was not until he filed this suit in 2015 that he signalled his displeasure with the sale.

- d. That the original owner of the suit land, Joseph Kipkurui Kuto, was not called as a witness in this case but from the evidence tendered by all, he has no claim over the land. That had he testified he would possibly have disclosed who between the plaintiff and his mother, DW3, was the actual purchaser of the suit land. That from the evidence tendered, I find the Plaintiff has failed to show that the defendants are trespassers on the suit land, and in the circumstances, the court finds the plaintiff has failed to prove his claim on a balance of probabilities.
- e. That in view of the circumstances apparent in this case, the court is of the view that each side should bear their own costs in the plaintiff's suit the provision of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding.
- f. That going to the counterclaim, the Defendants submitted that the Plaintiff procured his registration as the proprietor of the suit parcel of land by fraud. Other than alleging fraud on the part of the Plaintiff, the Defendants did not make any efforts to prove fraud against the Plaintiff to a standard that is acceptable in law. In the case of *Lukutsa v Sebenzia Achitsa Amuti (suing as the Personal Representative of the Estate of Abraham Mukanzi Alias Ibrahim Mukanzi)* (civil Appeal 43 Of 2019) [2021] KECA 241 (KLR) (3 December 2021) (Judgment) the Court cited with approval the decision in *Koinange & 13 Others V. Charles Karuga Koinange* 1986 KLR where at page 23 Justice Amin cited the case of *Ratilal Patel Makanji* (1957) EA 314 as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. 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 balance of probabilities is required”

That in the matter before the court, though the Defendants alleged that the plaintiff obtained registration with the suit land through fraud, coercion and threats, they failed to call any evidence to show fraud on his part. It is trite that fraud must be strictly proved as it cannot be inferred from facts. In *Loise Wanja Rugendo & Another V Festus Mbaka Murango & 3 others* [2020] eKLR the Court cited with approval the decision of the Court in *R. G. Patel v. Lalji Makanji* where the former Court of Appeal for Eastern Africa stated thus:

“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.

From the foregoing, I agree with the plaintiff's submission that the Defendants have failed to prove fraud on his part, in relation to his registration with the suit land, and the issuance of a title deed in his favour. That the word of the plaintiff's mother, DW3, that the plaintiff used to assault her, cannot be taken as a substitute to, or evidence of fraud in the plaintiff's registration with the suit land.



- g. The Defendants' claim herein relies largely on the existence of the agreement before the Elders dated 11th November, 2003 and the sale agreement dated 13th September, 2004. The 1st Defendant argued that the agreement before the Elders dated 11th November, 2003 assured her that Martha Cheboo, DW3, was the lawful proprietor of the suit land, and upon that she agreed to purchase 0.5 acres of the suit land from her. On the other hand, the Plaintiff admits that the agreement before the Elders dated 11th November, 2003 exists, but he contends that his family did not abide by the terms outlined therein. The agreement before the Elders dated 11th November, 2003 is reproduced in verbatim here below:

Tulwet Location 11th Nov, 2003

David Tanui & Martha Cheboo

The land of Mrs. Martha Cheboo is 1 acre

I, Martha Cheboo has agreed to share the land to four children and remain with 2 points.

1. David Tonui & Martha Cheboo 2 points – Signature & RHT- 11/11/2003
2. Charles Kipkoech Kemboi 2 points - 11/11/2003
3. Paul Kipsang Kogo 2 points - 11/11/2003
4. Jonah Kiplagat Kemboi 2 points - 11/11/2003
5. Phillip Cheruiyot 2 points - 11/11/2003

The elders present during this dispute are:

1. Chairman Josephh Tuwei
2. V. Chair Nicodemus Tororei
3. Lawrence Birgen
4. Arour Rutto
5. William Rotich
6. Isaack Biwott
7. Samwel Too
8. Samson Arusei
9. Peter Sitiency
10. Simon Tarus

Chairman Sign (signature) 11th November, 2003

That from the said agreement, it is clear it does not contain the reference number of the land that is the subject matter of the dispute, even though in their evidence before the court DW 6, DW4 and DW 8 testified that the said agreement referred to the suit land. I further note that the agreement indicates that the 1 acre parcel of land owned by the Martha Cheboo, DW3, was to be subdivided into 5 parts of 2 points each. That being the case, I am persuaded that even



if the court was to take the said agreement as legally enforceable, Martha Cheboo, DW3, had only 2 points of land at her disposal, and not half acre.

- h. That with the above in mind, practical challenges arise at this juncture as Martha Cheboo, DW3, purported to sell 0.5 acres of land to the 1st Defendant, while under the agreement, all that was at her disposal was 2 points of the suit land. The Defendants sought to rely on that agreement before the Elders to establish that Martha Cheboo, DW3, was the owner of the suit land, and in doing so, they appear to have turned a blind eye to the fact that the agreement was crystal clear that her entitlement was only 2 points of land, out of what was allegedly her 1acre parcel of land. I find that the conduct of the Defendants and their witnesses to only rely on the agreement where it favours their position that the suit land belonged to Martha Cheboo, but disregard its contents that she only had 2 points of land left at her disposal, to be self-defeating as DW3 could not have sold what she did not own.
- i. That courts of law frown upon conduct such as was exhibited by the Defendants, as can be discerned in the decision in the case of *Republic V Institute Of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria* [2010] eKLR where the Court cited the following authorities on approbate and reprobate with approval:

“*Evans V Bartlam* (1937) 2 ALL ER 649 at page 652 where Lord Russel of Killowen said;

“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which conferred the benefit.”

Again in *Banque De Moscou V Kindersley* (1950) 2 ALL EER 549 Sir Evershed said of such conduct;

“This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating and reprobating, or in the more homely English phrase blowing hot and cold.”

That having considered the agreement dated 11th November, 2003 that was made before the elders, and upon which the 1st defendant relied on, to believe that DW3 was with authority to sell to her 0.5 acre of land, the court finds that if the document had any evidential value, then it can only be that DW3 could only sell what she was entitled to, and that is two (2) points of the suit land.

- j. The Defendants’ claim of ownership of the suit land is founded on the sale agreement dated 13th September, 2004. The Plaintiff contended that the aforesaid sale agreement is invalid since it does not contain the registration details of the suit land in issue. That however, I take cognisance of the fact that DW4 to DW8 testified that the sale agreement was entered into with reference to the suit land, even though it was not captured. A valid sale agreement at the very least should indicate the registration number of the subject matter of the sale. The Court in *Joseph Ngareh Kanyeria v Sarah Wandia Njogu (sued In Her Capacity as the*



Legal Representative of the Estate of Njogu Kibaka (deceased) [2020] eKLR made the following observation:

“From the sale agreement which was produced and which the plaintiff in cross-examination admitted lack fundamental ingredients of a binding sale agreement of land such as the parcel number, the consideration and the Identity Card of the parties and their witnesses, the absence of these fundamental ingredients in a sale of land makes the sale agreement not binding between the parties. It renders it void for all purposes. The agreement must describe the land being sold and the consideration. These are not mere irregularities.”

That with the above decision in mind, the sale agreement relied upon by the 1st Defendant is incurably defective, as it does not contain a description of the land that was the subject matter of the sale. That further, the vendor, DW3, was incapable of selling 0.5 acres of land when under the agreement before the elders, her entitlement was two (2) points of the suit land. That further, DW3 the vendor, and DW2 the purchaser, never obtained the consent of the land control board within six months of the date of their sale agreement. That accordingly their sale agreement of 13th September, 2004 became void after six (6) months from the date it was made for failure to obtain a consent from the Land Control Board as required under section 6 of the Land Control Act Chapter 302 of the Laws of Kenya. The defendants’ counterclaim must therefore fail for failure to prove their case to the standard required by the law.

- k. That though the defendants have extensively submitted that the plaintiff held that portion of the land that he bought on trust for his mother, DW3, and for them thereafter, their pleadings in the original and amended plaint do not contain any averments of a claim or prayer based on trust. That as parties are bound by their pleadings, and DW3 is only a witness and not a party, the court is of the considered view that it does not need to make any determination on whether or not the plaintiff holds the title to the suit land in trust for the defendants or his mother, DW3. That submissions are not a legal media through which a claim is commenced in litigation before a court of law.
 - l. That as held earlier in respect of the costs in the plaintiff’s suit, the court likewise finds each party should bear their own costs in the defendants’ counterclaim.
11. That flowing from the foregoing the court finds that the plaintiff and the defendants have failed to prove their claims in the main suit and counterclaim, and both are dismissed with an order that each side bears their own costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 25TH DAY OF MAY, 2022

S.M.KIBUNJA, J.

ENVIRONMENT & LAND COURT - ELDORET

In the virtual Presence of;

Plaintiff: Absent.....

Defendants: Absent

Counsel:



Ms. Bosibori for Dr. chebii for Plaintiff and

Mr. Kibii for Defendant

Court Assistant: Oniala

S.M.Kibunja,J.

Environment & Land Court - Eldoret

