



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chepkwony v Sang & 2 others (Environment & Land Case  
44 of 2017) [2022] KEELC 3128 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3128 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 44 OF 2017**

**MC OUNDO, J**

**JUNE 9, 2022**

**BETWEEN**

**JOSPHAT KIPKORIR CHEPKWONY ..... PLAINTIFF**

**AND**

**RAPHAEL KIPSIGEI SANG ..... 1<sup>ST</sup> DEFENDANT**

**EUNICE SANG ..... 2<sup>ND</sup> DEFENDANT**

**EUNICE CHEBET ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Complaint dated April 18, 2017, the Plaintiff herein sought for the following orders;
  - i. An order that the district surveyor Bomet do fix the beacons demarcating the Plaintiff's land parcel LR No Kericho/Chesoan/2980.
  - ii. An order of eviction against the Defendants, their sons, agents, servants and others whatsoever from the land parcel LR No Kericho/Chesoan/2980.
  - iii. An order of permanent injunction to issue against the Defendants restraining them, their sons, employees, agents, privies and others whatsoever claiming through them from entering, occupying, wasting, tilling, developing, and/or in any other manner whatsoever dealing with the land parcel LR No Kericho/Chesoan/2980 and or in any other way detrimentally affecting the Plaintiff's interest in the land.
  - iv. Mesne profits to be assessed and awarded as general damages by the honorable court for the wrongful derivation of benefits by the Defendants to the detriment of the Plaintiff as well as to denial of user for the period between August 2013 and the date of judgment.
  - v. Cost of the suit and its interest as well as interest in (iii) above.



2. In response to the said Plaintiff, the Defendants herein filed their individual statements of Defence and Counterclaim on September 6, 2017, wherein they denied the allegations contained in the Plaintiff's Plaintiff and sought for the following orders as their Counter-claim;
  - i. That the honorable court do find and declare that LR No Kericho/Chesoan/2980 was obtained fraudulently and without consent of the 1<sup>st</sup> Defendant and that there be an order canceling the same and reverting the registration to the 1<sup>st</sup> Defendant's deceased mother.
  - ii. That the Plaintiff's suit against the Defendants be dismissed with costs and judgment be entered in the Counter-claim as prayed.
  - iii. That any such other or further relief as the honorable court may deem appropriate to be made.
3. The Plaintiff thereafter filed his reply to the defence and defence to counterclaim on November 20, 2017 denying the Defendant's assertion and reiterating on the contents of his Plaintiff thereby seeking that the defense, Counter-claim and set off be struck out with costs.
4. Subsequently after both parties had complied with the provisions of Order 11 of the Civil Procedure Rules, and the matter had been set down for hearing.

#### **The Plaintiff's case**

5. The Plaintiff testified as PW1 on July 3, 2018 and after adopting his statement recorded on April 18, 2017 proceeded to testify that he was a Registrar of Persons. That he had bought a portion of land parcel no Kericho/Chepseon/2980 measuring 0.7 acres which land had subsequently been transferred to him and he had been registered as its proprietor. He produced a copy of the original title deed to the suit property as Pf exh 1, a consent to transfer from the Land Control, an application for consent of the Land Control Board, a copy of mutation consent to sub-divide, a consent to transfer and mutation form as Pf Exh 2 (a, b, c) and d) to prove that the transaction had been above board. He also produced a certificate of official search as Pf exh 3.
6. His evidence was that he was not residing on the suit property as the Defendants had been threatening him and all his efforts to occupy the land have been futile. He sought from the court orders that would stop the Defendants from issuing him with the threats so that he could take possession of his land which was currently occupied by the 2<sup>nd</sup> Defendant, and for costs of the suit. He also confirmed that the 1<sup>st</sup> Defendant was a husband to both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
7. On cross examination, the Plaintiff confirmed that he had no sale agreement to show that he had bought the suit property on May 29, 2005. However he was categorical that he had taken possession of the property in the year 2005 after which he had fenced it. That although the beacons on the land had been put in place, yet he had no beacon certificates or any Photographs to show that he had been farming on the same.
8. He also confirmed that the application for consent from the Land Control Board was dated April 30, 2013 and further that the consent had been prepared 8 years after he had bought the land and that in the year 2005, the title in respect of the suit property was non-existent.
9. He also confirmed that Raphael was the only son of the late Anna Mitei who was the registered owner of parcel No. Kericho/Chepseon/2665 but that he did not know how old Anna was in the year 2015 although she had died in 2017. That there had been a Land Control Board meeting of which the 1<sup>st</sup> Defendant had not attended although the Defendant's refusal to allow him to take possession of the suit land did not stem from the fact that there had been consent of the Land Control Board.



10. After he had confirmed that the beacons that had been fixed on the suit land had been “jua kali beacons” which had been fixed by “jua kali” surveyors, he sought for the issuance of orders to the District Surveyor, Bomet to fix proper beacons demarcating the suit property as well as for an eviction order, an order of injunction against the Defendants for it had been the 1<sup>st</sup> Defendant who had foiled his attempt to occupy the suit land. He also sought for mesne profits for the tie he had been kept away from his land by the Defendants.
11. The Plaintiff was re-examined upon which he reiterated that the property had been transferred by Anna Chebii – deceased and that the surveyors had not gone to the ground. That his title was not fraudulent as he had in his possession all the documentation relating to the transfer and therefore he be allowed to enjoy quiet possession of the suit land.
12. The second Plaintiff’s witness Sigei Harrison Koech testified that he lived in Chesoen location in Bomet County. That he knew both the Plaintiff and the 1<sup>st</sup> Defendant. That whereas the 1<sup>st</sup> Defendant was his father, both Eunice Sang (2<sup>nd</sup> Defendant) and Eunice Chebet (3<sup>rd</sup> Defendant) were his step mothers. That his father had three wives. He adopted his witness statement recorded on April 18, 2017 and proceeded to testify that the Plaintiff was their neighbor who had bought 0.28 hectares an equivalent to 0.7 of an acre from his grandmother Anna Chebii Mitei in the year 2005 for the purchase price of Kshs 210,000/=. That he had been present during the sale agreement wherein the purchase price had been paid in two instalments, the first installment being for Kshs 190,000/= while the second installment had been for Kshs 20,000/-.
13. That the Plaintiff had subsequently been given vacant possession of the suit land in 2005 wherein he had cultivated on the same for four years after which his father had started complaining that that portion was the wrong one. The Plaintiff had then left that parcel of land wherein his father the 1<sup>st</sup> Defendant and his grandmother had agreed to give him a different parcel of land to which the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had objected. The matter had then been reported to the local Chief by the Plaintiff who had then summoned the parties to a meeting which had been attended by his grandmother, his father, himself and the Plaintiff. That it had been at that meeting that his father had agreed to transfer to the 1<sup>st</sup> Defendant (sic) the correct parcel of land.
14. That his grandmother had then been directed to seek the consent of the Land Control Board wherein she had obtained the consent (Pf exh 2(b) and as a result, land parcel No. Kericho/Chesoen/2980 had been given to Josphat the Plaintiff. That in accordance with the mutation form Pf exh 2 (d) Josphat’s portion was parcel No.2980. He himself had been given Parcel No. 2979 but could not recall who had been given the other land. He also confirmed that they had been issued with a letter of consent to transfer (Pf exh 2(c) and that although the Plaintiff had been issued with a title deed, he never got his piece of land because the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had objected to it. He also confirmed that at the time of the all the transactions herein, his grandmother had been in good health wherein she had had all the intention to give Josphat a portion of the suit land.
15. On cross examination, the witness confirmed that his village was in Manjililiet, that his mother’s name was Selina and that the 1<sup>st</sup> Defendant was his father. That he was testifying on behalf of the Plaintiff and that his step-mothers were Eunice Sang and Karen Sang. He also confirmed that the Plaintiff had bought land from his grandmother in 2005 although he did not have a copy of the sale agreement. That further, although the second instalment had been paid to his father, yet he did not have the evidence to prove that his father had received the balance of the purchase price.



16. He also confirmed that he had no evidence to prove that the Plaintiff had used the land for four years. That further his grandmother did not attend the Land Control Board in 2005 and that he had not produced any minutes to show that a meeting had taken place at the Chief's office.
17. That the subdivision have taken place in 2013 whereas his grandmother had died in 2016. That his grandmother did not attend the meeting of the Land Control Board and neither was his father involved in the transaction where he had been given one of the parcels of land. He denied having overlooked his father in the entire transaction and was categorical that his grandmother had directed him to keep her documents although he was not aware if she had left a will.
18. Upon being re-examined, the witness reiterated that both his grandmother and the Plaintiff did not go to the Land Control Board in 2005, but that they had gone there in 2013. That he was aware that it had to be the proprietor of the land and the transferee who were supposed to have gone to the Land Board and that both his attendance and that of his father was not necessary since the contract was between his grandmother and the Plaintiff. That he had witnessed the payment of Kshs 190,000/= by the Plaintiff who should be given his portion of land and that he had no grudge against the Defendants. The Plaintiff subsequently closed its case.

#### **Defendants' case.**

19. The 1<sup>st</sup> Defendant, Raphael Arap Sang testified to the effect that he lived in Chesoen in Bomet County and that he was a farmer. That although he was unwell yet he was willing to testify. That the subject matter was his land to which he had inherited from his father as an only son. That he did not know the number of the land, because the title deed used to be in the custody of his father. That later the said title deed had been taken by Aron Sigei was a son of the 'other house'. He proceeded to ask that he adopts a statement that he had recorded before an advocate but which statement the court noted was not on record.
20. The 1<sup>st</sup> Defendant then continued to testify that he knew the Plaintiff as his neighbor who had filed the suit against him so that he could take his land. He confirmed that he had three wives and that he had divided the land into three with the biggest house getting the largest portion. That it had been the son of the elder wife who had sold  $\frac{1}{4}$  acre of the land to the Plaintiff, but that the Plaintiff now wanted to encroach into the land of his other wives. That he was not opposed to the land that was sold to the Plaintiff.
21. On cross examination, the 1<sup>st</sup> Defendant confirmed that Anna Bii was his mother and the proprietor of Kericho/Chesoen/2665. That although he did not have documents, yet he was the only son in his family. He also confirmed that he did not have any land registered in his name and that the suit land was still registered in his mother's name. That he did not have any evidence to prove that his mother was sick at the time the land had been sold.
22. He confirmed that although it had been his son who had sold the land, yet he had no evidence to prove the same. That it had been his mother who had subdivided the land into three, amongst his wives. He also confirmed that since the land had been registered to his mother, she could sell it to anybody although he was not aware that she had sold it to the Plaintiff.
23. He also confirmed that he had objected to the sale of the land since his mother had not sought his consent but he had no objection to the transfer of the land. That he was not aware of his mother's visit to the Land Control Board. He also confirmed that he did not have the capacity to file the suit on behalf of the estate of his mother and neither did he claim anything.



24. When addressed by the court the 1<sup>st</sup> Defendant responded that he had no objection to the land that was sold to the Plaintiff and the only thing he sought was that there should not be an encroachment on his other wives' land.
25. The 3<sup>rd</sup> Defendant Eunice Chepkirui Sang testified as DW2 to the effect that she was a farmer who lived in Chesoen in Bomet. That she was aware of the matter before court and that initially the land parcel No Kericho/Chesoen/1105 had been registered to her mother in law Anna Chebii Mitei. That when she got married, the land No 1105 had been subdivided into 3 portions. That after her mother in law became old, the sons of the 1<sup>st</sup> house had taken the title deed and had subdivided the land without the knowledge of the 1<sup>st</sup> Defendant. That subsequently these sons had sold the whole land leaving them with a small portion measuring 4 (four) acres out of land that was initially 9.8 hectares. That the land that had been sold to the Plaintiff by Harrison Sigei, one of the said sons of the first house, to be excised from her portion. That they had resisted the sale because of the fact that despite the 1<sup>st</sup> house having taken the larger share, they still wanted to take land from the 3<sup>rd</sup> Defendant's small portion.
26. She proceeded to testify that after the land had been sold by force, the matter had been reported to the chief, who had noted the discrepancy but before anything could be done, the Plaintiff had filed suit against them. She sought for orders that the land be divided into 3 portions wherein the Plaintiff can claim his portion from the first wife.
27. On cross examination the Defendant confirmed that the subdivision of parcel No. 1105 resulted into No 2665 which was registered to Anna Chebii Mitei, her mother in law. She confirmed that although they had filed their defence through the firm of M/S Onesmus Langat Advocate, yet they had not sought consent to file anything on behalf of the estate of Anna Bii. That she was not aware that Anna Bii had sold land to the Plaintiff-Josephat or that she had gone to Land Control Board. She was adamant that Anna Chebii had no right to dispose of her land and that it had been the sons to the elder house, William Sigei and Aron Sigei who had been misleading her as she had been sick.
28. She confirmed that she did not have the medical chits as they were in the custody of the elder wife. She was also categorical that she would not accept any sale agreement but that the land should revert back to No. 1105. She also confirmed that she was a wife to the 1<sup>st</sup> Defendant who had no title deed to the land.
29. When examined by the court the witness confirmed that Anna Chebii died on February 2, 2017. That it had been one Aron who had sold the land to the Plaintiff and not Anna Chebii. She also confirmed that Anna Chebii's Succession Cause had been conducted in Bomet but that she had left the documents at home.
30. Eunice Chebet the 2<sup>nd</sup> Defendant testified as DW3 to the effect that she also lived in Chesoen and was a farmer. That she was the second wife to the 1<sup>st</sup> Defendant who was an only son to Anna Chebii Mitei the proprietor of land parcel No 1105. Her evidence was that after her mother in law became old and sick, the sons to the elder house took the title from her and cheated her to sub-divide the land wherein they started selling the same. That the 1<sup>st</sup> Defendant had been left without a title deed. That whereas one son had moved to Kuresoi, another one had remained at home. That the matter had been reported to the chief who had written a letter stopping any subdivision of plot No. 1105 until the family had settled the matter. That they had also held a meeting with the village elders who had recommended that since the land had been fraudulently subdivided, the same be reverted to the 1<sup>st</sup> Defendant so that he could subdivide it amongst his three wives.
31. That they had been surprised when the Plaintiff and the son to the elder wife had issued them with court summons alleging that they had evicted the Plaintiff from the land. It was her evidence that the



- Plaintiff had never been on the land, and that the land had not been subdivided with beacons thus the family had been conducting their daily activity of planting tea on the land with no complaints.
32. That she did not know why Aron Harrison Sigei had sold the land and was now a witness in the case. That there was also an elder son called Wilberforce Sigei who had migrated to Kuresoi. The Defendant sought that the portion that had been sold be excised from the vendor's share of land and that the Plaintiff's title be revoked.
  33. In cross examination, the witness confirmed that the land had initially been registered as No 1105 to Anna Chebii. That she did not know land parcel No 2665, but all she knew was that land parcel number 1105 had been subdivided by the Land Registrar. That she also did not know that Anna Chebii had sold the land to the Plaintiff and that if indeed there was testimony that she had gone to the Land Control Board, then the same was fraudulent as Anna Chebii was old and sick and the 1<sup>st</sup> Defendant could have accompanied her if it was a genuine deal. That the 1<sup>st</sup> Defendant had no title deed, the land had not been sub-divided, although they had only been shown where they could farm. She also confirmed that at the time they had filed their defence, Anna Chebii was alive but very sick such that she could not comprehend anything. That she had subsequently died on January 20, 2017.
  34. The 2<sup>nd</sup> Defendant also confirmed that she did not have any documents that gave her the status to file anything on behalf of the estate of Anna Chebii. That they had not filed any succession cause. That she would object if land was sold to the Plaintiff because the 1<sup>st</sup> Defendant was not involved yet he was the only son and heir to Anna Chebii. That in the Kipsigis culture, the son was supposed to be involved.
  35. The court allowed the defence to produce a search certificate to the original suit No. 1105 and the subsequent titles as Df exh 1 for reason that the Defendants were lay persons, their advocate having abandoned them halfway through the proceedings and further for reason that the said official search would enable the court write a substantive judgment.
  36. The defence closed its case and parties filed their written submissions to which I shall summarize as follows;

### **Plaintiff's submissions**

37. The Plaintiff's submissions is anchored on the evidence adduced in court and their issues for determination framed as follows;
  - i. Whether or not the Plaintiff is entitled to the prayers sought.
  - ii. If the answer to the issue number one is in affirmative, what quantum of damages is sufficient under the mesne profit, trespass and denial of user,
  - iii. Which party bears the cost of the suit.
38. On the first issue for determination, the Plaintiff submitted that he had proved on a balance of probabilities that he had bought the land from Annah Chebii Mitei who was the mother and mother in law of the 1<sup>st</sup> Defendant, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. That as per the documentary evidence herein produced that he was the registered owner of land parcel No Kericho/Chesoen/2980 the late Anna Chebii Mitei having followed the due process before having the original land subdivided and a portion thereto transferred to him.
39. That the Defendants' claim of fraud and ill health on the part of Anna Chebii Mitei now deceased was not supported by any evidence, contrary to the provisions of Section 107 of the Evidence Act, and therefore the said allegations remained as assertions. That the deceased Anna Chebii Mitei, having been



the registered owner of land parcel No. Kericho/Chesoan/2665 had every right to deal and/or dispose of her property in any manner she chose and evidence from exhibit 1 and 2 clearly showed that she had subdivided her land into five portions. That it had not been disputed that the portions that benefited the 1<sup>st</sup> Defendant were ever challenged on the basis of fraud.

40. The Plaintiff relied on the provisions of Section 26 of the [Land Registration Act](#) to submit that he, being the holder of a title deed was *prima facie* evidence that he was the absolute and indefeasible owner of parcel of land No Kericho/Chesoan/2980. That Parcel of land No Kericho/Chesoan/2665 was not registered to the 1<sup>st</sup> Defendant and therefore he could not claim that consent to subdivide and transfer the same to the Plaintiff had not been sought from him. Reliance was placed on the decided case in [Wilson Kipkoeb Lelei vs Stephen Kipsand & Another](#) [2019] eKLR.
41. That the Defendants' Counter-claiming that parcel of land No. Kericho/Chesoan/2980 be reverted to the original No Kericho/Chesoan/1105 that belonged to their late mother, they had imposed themselves as legal representatives of the estate of their late mother Anna Chebii Mitei wherein in essence they had not acquired and/or obtained the Grant of Letters of Administration and therefore this Counter-claim ought to be dismissed as the Defendants had no *locus standi* to represent the estate of Anna Chebii Mitei.
42. The Plaintiff further submitted that his evidence was not controverted by the Defendants to the effect that they had evicted him from his land and destroyed the boundaries demarcating his parcel of land. Indeed the 1<sup>st</sup> Defendant had admitted in cross examination that he had no claim or objection to the Plaintiff taking back possession of his land. The Plaintiff further submitted that since the Defendants had denied him occupation and use of his property from the month of August 2013 to date which was a period of eight years, that an award of compensatory general damages of Ksh 400,000/ would suffice. Reliance was placed on the decided case of [Telecom Kenya Limited vs County Government of Muranga](#) [2019] eKLR to buttress their submissions He also submitted that the Defendants should also bear the costs of the suit as sought in his prayers in the plaint'

#### **Defendants' submissions.**

43. The Defendants' main submissions was that they had been aggrieved to learn that Anna Chebii Mitei who was a mother to the 1<sup>st</sup> Defendant and mother in law to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively and proprietor of land parcel No Kericho/Chesoan/1105, had subdivided the land resulting into parcels Nos Kericho/Chesoan/2665, 2666, 2667, 2688 (sic), 2669, 2670, 2978, 2979, 2980 and 2981, land which she had transferred to the sons of the 1<sup>st</sup> Defendant's first wife and even disposed of other portions to "outsiders" without involving the 1<sup>st</sup> Defendant who was her only son. That at the time the said Anna Chebii Mitei was said to have dealt with her land, she was above 80 years old, was almost senile and prone to manipulation by anybody including her grandchildren.
44. That it was the tradition and custom of the community (Kipsigis) that an outsider ought to avoid entering into a transaction over property that was disputed amongst family members. That the Plaintiff, who had earlier bought a piece of land that had been excised from No. Kericho/Chesoan/1105, was their neighbor and had been aware of the wrangles in the family and therefore he ought not to have bought the second piece of land, the suit land herein, from Anna Chebii Mitei.
45. That it had been erroneous for Anna Chebii Mitei to have sub-divided parcel No Kericho/Chesoan/1105 and sold part of it to outsiders without considering her son the 1<sup>st</sup> Defendant and his other two wives. That through the wisdom of village Elders in a meeting held in June 2010, it had been decided that the new titles emerging from parcel No Kericho/Chesoan/1105 be revoked and the



land reverted to its original title, and thereafter the case be referred back to them for subdivision and distribution to the respective family members.

46. The Defendants questioned how a caution placed on the suit land had been removed if not by someone who had ill intention. This evidence had not been adduced during the defence hearing. That according to a book titled '*A Guide to Inheritance Amongst the Kipsigis Property Rights*' herein annexed, sons were given prominence, an issue which had been flagrantly violated in the purported sale of the disputed land. That the suit land herein had never been surveyed, beaconed or fenced as purported by the Plaintiff. That the Plaintiff fraudulently bought the suit land there having been a caution in place. The Defendants thus sought that the court considers the resolution by the Elders to have all titles emerging from parcel No Kericho/Chesoan/1105 be cancelled so that the land can revert to its original title.

### **Determination.**

47. I have considered the matter before me the evidence as well as the submission, the authorities and the applicable law. I find the undisputed facts of this case being that the deceased Anna Chebii Mitei was the mother to the 1<sup>st</sup> Defendant and a mother in law to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were wives to the 1<sup>st</sup> Defendant.
48. It is also not in contention that the said Anna Chebii Mitei was the proprietor of parcel No Kericho/Chesoan/1105 and that during her life time, she had caused the sub division of land No Kericho/Chesoan/1105 on April 29, 2010, which gave rise to No Kericho/Chesoan/2665 -2671 herein produced as Df exh 1(a-g).
49. A consent letter dated October 3, produced as Pf exh 2(b) was indicative that consent was given for the subdivision of parcel of land No Kericho/Chesoan/2665 into five portions thereby giving rise to No Kericho/Chesoan/2980 the suit land herein. That the said land was then registered to the Plaintiff as its proprietor on November 10, 2015. Meanwhile Anna Chebii Mitei passed away on January 2, 2017.
50. The bone of contention then comes in from the Plaintiff's assertion that on May 25, 2005, he had purchased 0.28 hectares of land from Anna Chebii Mitei who was the registered proprietor of parcel No Kericho/Chesoan/2665. That he was subsequently registered as the proprietor of parcel No Kericho/Chesoan/2980 which had been a sub-division of No Kericho/Chesoan/2665.
51. The Defendants on the other hand allege that the registration of the Plaintiff to parcel number Kericho/Chesoan/2665 was fraudulent as parcel No. Kericho/Chesoan/2665 was not in existence in the year 2005. That further according to the Kipsigis tradition, it had been erroneous for Anna Chebii Mitei to have sub-divided parcel No Kericho/Chesoan/1105 and sold part of it to "outsiders" without first considering his son the 1<sup>st</sup> Defendant and his other two wives. They thus sort in their counterclaim that LR No Kericho/Chesoan/2980 which was obtained fraudulently and without consent of the 1<sup>st</sup> Defendant be cancelled and the same reverted in the name of the 1<sup>st</sup> Defendant's deceased mother Anna Chebii Mitei.
52. From the evidence adduced in Court, the following issues arise for determination.
- i. Whether the Plaintiff has proved his case.
  - ii. Whether the Plaintiffs title to No Kericho/Chesoan/2980 was illegally obtained.
  - iii. Whether the Defendants have proved their case in their counter claim
  - iv. Who should pay the costs



53. The law is very clear on the protection of a holder of title to land. Having established that that the Plaintiff's parcel of land LR No Kericho/Chesoan/2980 was registered under the Land Registration Act, 2012, the same is governed by the provisions of Section 26 (1) of the Land Registration Act of 2012 which provides as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all Courts 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 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.

54. It thus follows that in order to challenge the Plaintiff's title so as to have it cancelled as prayed by the Plaintiff, evidence according to Section 26 of the Act ought to have been led to prove that the Plaintiff's title to parcel No LR No Kericho/Chesoan/2980 was acquired fraudulently, through misrepresentation, illegally, un-procedurally, or through a corrupt scheme.

55. Indeed the Defendants have alleged that the Plaintiff's title was obtained through fraud, because at the time of such sale, land parcel No Kericho/Chesoan/2665 was not in existence and further that at the time the said Anna Chebii Mitei was dealing with her land, she was above 80 years old, was almost senile and prone to manipulation by anybody including her grandchildren.

56. The onus was therefore on the Defendants to prove these allegations. Unfortunately the Defendants did not prove the said allegations as stipulated by law because they had been abandoned by their Counsel half way through the proceedings whereby as lay persons they did not know what was expected of them.

57. Fraud is a serious matter which must be proved to the required standard. *In R G Patel vs Lalji Makanji 1957 E A 314*, the Court of Appeal stated 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”.

58. However the Defendants having attacked the Plaintiff's title and this being a court of justice I am obliged to adhere to the holding by the Court of Appeal in the case of Munyu Maina vs. Hiram Gathiba Maina [2013] eKLR where it had been held as follows:

“...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.... 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.....”



59. The same reasoning was adopted in the case of *Daudi Kiptugen vs Commissioner of Lands & 4 Others* [2015] eKLR where the Court held that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

60. The Plaintiff's case was that he was the proprietor of land parcel No LR No Kericho/Chesoan/2980 having entered into a sale agreement with the vendor Anna Chebii Mitei on May 29, 2005 for sale of 0.28 hectares at a consideration of Ksh 210,000/- wherein he had taken possession of the land and had fenced it. That his stay had been disrupted in August 2013 when the 1<sup>st</sup> Defendant claimed that he (Plaintiff) was occupying his (1<sup>st</sup> Defendant's) portion of land.

61. No evidence had however been adduced of any such sale agreement contrary to the provisions of Section 3(3) of the *Law of Contract Act* which provides as follows:

3(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* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

62. I thus find that there was no sale agreement enforceable by the parties in the purchase of the suit land which was contrary to the laid down procedure in law.

63. Secondly from the pleadings and evidence adduced, it was the Plaintiff's case that on May 29, 2005 he had purchased 0.28 hectares of land from Anna Chebii Mitei who had been the registered proprietor of parcel No Kericho/Chesoan/2665. Now looking at the exhibits herein produced herein more so Df exh 1(a) it is clear that the mother title No Kericho/Chesoan/1105 was subdivided on April 29, 2010 giving rise to No Kericho/Chesoan/2665-2671 and that subsequent Kericho/Chesoan/2665 which gave rise to LR No Kericho/Chesoan/2980 had been subdivided, going by the Pf exh 2(b), around the year 2013. This means that in the year 2005, none of the resultant sub-divisions to No Kericho/Chesoan/1105 were in existence and there being no sale agreement produced as an exhibit, we are not certain what land parcel was sold to the Plaintiff, by whom, more so the Plaintiff having laid claim to land parcel LR No Kericho/Chesoan/2980 through purchase.

64. Of critical importance was the lack of explanation as to why it had taken more than 8 years to effect the transfer and registration of the Plaintiff to the suit land after the alleged sale agreement. My take is that there needed to be some kind of accountable documents that are expected to be kept by the Plaintiff as this was not the type of case that could be determined based on guess work, conjecture or circumstantial evidence. Although the Plaintiff is seeking a remedy from court, he ought to have



- shown a good account of himself because the Court would be reluctant to extend its hand to a person who is not diligent.
65. It is trite law in evidence that he who asserts must prove her/his case where the burden of proof lies with whoever would want the court to make a finding in his favour in support of what (s)he claims.
66. Section 107 of *Evidence Act* succinctly states:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
67. And Section 108 of *Evidence Act*, further states thus:
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
68. In the case of *Kirugi & Another vs Kabiya & 3 others* [1987] KLR 347 the Court of Appeal held that the burden is always on the Plaintiff to prove his case on the balance of probabilities, and that such burden is not lessened even if the case is heard by way of formal proof.
69. That being the case, I find that the Plaintiff, has not proved his case on a balance of probabilities and proceed to dismiss his suit with costs.
70. The Defendants have raised a counterclaim seeking for the court to find and declare that LR No Kericho/Chesoan/2980 was obtained fraudulently as there had not been any consent obtained from the 1<sup>st</sup> Defendant, who was the deceased proprietor’s only son. I find that this line of argument must fail. As the legal and registered owner of the suit property, Anna Chebii Mitei was entitled to deal with her property being land parcel No LR No Kericho/Chesoan/1105 as she wished. That she had the right to determine who would live on the same, as well as a right to subdivide, use, sale and develop it as she wished since no evidence had been adduced that the land was ancestral land and therefore there had been a trust established.
71. The Defendants have also sought that the Plaintiff’s title to LR No Kericho/Chesoan/2980 be cancelled so that it could revert to Anna Chebii Mitei. On this issue, I find that the Defendants have no locus standi to seek these orders on behalf of the estate of the deceased Anna Chebii Mitei.
72. In *Alfred Njau & Others v City Council of Nairobi* [1982-88] 1 KAR 229 the Court of Appeal gave meaning to the term locus-standi by stating:
- “.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”
73. No evidence had been adduced to the effect that the Defendants were administrators to the deceased’s Anna Chebii Mitei’s estate herein and therefore had the capacity to sue on behalf of the deceased’s estate or seek for the said prayers which renders the counter- claim to the suit incompetent and the same (counter claim) is herein struck out with no costs. These orders could only be sought once they have obtained the requisite Letters of Administration.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 9<sup>TH</sup> DAY OF JUNE 2022**

**M C OUNDO**

**ENVIRONMENT & LAND – JUDGE**

