



**Rotich v Korir & another (Environment & Land Case 29 of 2018)  
[2022] KEELC 3828 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3828 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 29 OF 2018**

**MC OUNDO, J**

**JULY 28, 2022**

**BETWEEN**

**PAUL KIMUTAI ROTICH ..... PLAINTIFF**

**AND**

**ROBERT KIMUTAI KORIR ..... 1<sup>ST</sup> DEFENDANT**

**GILBERT KIPKOECH KORIR ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. *Vide* a Plaint dated the 28<sup>th</sup> March 2018, the Plaintiff herein sought for orders to declare the Defendants' act of occupation and use of parcel No. Kericho/Kiptugumo/112(*sic*) and No. Kericho/Kiptugumo/1175 to amount to trespass and therefore illegal. The Plaintiff thus sought for an order of permanent injunction against the Defendants stopping them jointly from further entering upon, remaining thereon, occupying, cultivating, using, interfering and/or dealing in any manner with the parcels of land therein. Plaintiff further sought for general damages for loss of use of the two parcels of land, costs of the suit, and any other relief that the court would deem fit and just to grant.
2. The Plaintiff's case was opposed through the Defendants' defence dated the 14<sup>th</sup> May 2018 and amended, to include a counterclaim, on the 11<sup>th</sup> February 2019.
3. Having complied with the provisions of Order 11 of the *Civil Procedure Rules*, the matter proceeded for hearing on the 9<sup>th</sup> October 2019 wherein the Plaintiff, Paul Kimutai Rotich testified as PW 1 to the effect that he came from Sosiot, Kericho County and was a farmer. That he knew the Defendants who were his neighbors. That pursuant to purchasing two parcels of land from Joshua arap Keter, being land parcels Kericho/Kiptugumo/1175 and Kerich/Kiptugumo/1121, the Defendants herein had trespassed upon the first parcel of land in the year 2013 and in the second parcel of land in the year 2014. It was his evidence that he had procured both parcels of land after following all the proper processes. He confirmed that Joshua arap Keter was the Defendants' grandfather and further that he



- had started using the land upon the purchase from Joshua, who was now deceased having died in June 2018.
4. That whereas parcel No. 1121 was registered on 8<sup>th</sup> January 2007, he had been issued with its title on 15<sup>th</sup> February 2007. That Parcel No. 1175 had been registered on 30<sup>th</sup> June 2010 wherein he had been issued with its title on 20<sup>th</sup> April 2015. That the Defendants had been using his land without his permission and therefore the court should grant him the orders as sought in the Plaint.
  5. He confirmed to having recorded his witness statements which was filed on 28<sup>th</sup> March 2018 wherein he had sought that the same be adopted as his evidence. He produced the title deed for parcels No. 1121 and parcel No. 1175 as Pf exh 1 and 2 respectively. He also produced the two copies of searches regarding ownership of the two parcels of land as Pf exh 3 and 4 respectively stating that there had been no fraud at all in the manner in which he had got the titles. That he had bought the land lawfully and no title should therefore be canceled as prayed in the Defendants' counter claim.
  6. In cross examination, the Plaintiff confirmed that he came from Sosiot and that the Defendants were his neighbors of about 15 years. That the Defendants had found him on his land. That he had bought parcel No. 1121 in the year 2000, wherein no written agreement had been entered into. That parcel No. 1175 was bought sometime in the year 2009 and that in order to get the titles, he and the vendor had gone to the Land Control Board in the presence of the vendor's son called Josiah Kipkorir. That he had not been given any document from Land Control Board, and that he could not recall the cost of the purchase price but that the surveyors had visited the land.
  7. Upon being re-examined, the Plaintiff had reiterated that the suit land had been subdivided and transferred by the vendor who was its registered proprietor and who had gone looking for him to buy the land for reasons that he had a sick child and had wanted the money for payment of the treatment of the child. He reiterated that he had visited the Land Control Board in the company of the vendor – Joshua and his son Josiah. That they had gone there twice and that his two parcels of land had been a subdivision of No. Kericho/Kiptugumo/966, which had been subdivided into two giving rise to parcel No. 1121 and parcel No. 1120. That parcel No 1120 was later subdivided to give rise to parcel No. 1175.
  8. At the close of the Plaintiff's case, the defence called 6 witnesses wherein the 1<sup>st</sup> Defendant Robert Korir testified as DW1 to the effect that he lived in Kongen sub-location and was a farmer. That he had recorded his statement at the Advocate's office on 12<sup>th</sup> November 2018 which he wished to adopt as his evidence. That he had also filed his list of documents dated 12<sup>th</sup> November 2018 which he wished to refer to as his exhibits. That he knew the Plaintiff as his neighbor, and that Joshua Arap Keter was his grandfather. That the Plaintiff had sued them over land parcel No. 595 which land had belonged to his grandfather. That the Plaintiff had been given land parcel No. 967 whereas land parcel No. 966 had remained in his grandfather's name, land upon which he resided.
  9. That after the Plaintiff had sued them, they had come to realize that their grandfather's land had been fraudulently subdivided because they were not involved in the subdivision and neither had there been a meeting at the lands office that showed that the land was to be subdivided. The parcel of land No. 966 was important because that was the land where they lived. The witness sought that the court assists them to get back the whole parcel of land so that it could be registered into their grandfather's name. He produced his documents being:
    - i. A copy of the Green Card for No. Kericho/Kiptugumo/1120 and 966 as Df Exh 1(a & b).
    - ii. A copy of a letter dated 9<sup>th</sup> May 2018 as Df Exh 2.



- iii. The copy of the charge sheet in Kericho Cr Case No. 3725 of 2018 as Df Exh 3.
  - iv. A copy of a letter of an application for caution dated 7<sup>th</sup> August 2012 addressed to the District Land Registrar Kericho as Df Exh 4.
  - v. A copy of the map for the location Soin –Kaptugumo, sheet No. 11/117/3/8 SE as Df Exh 5.
10. In his cross examination, the witness confirmed that he was the grandson of Joshua Arap Keter who was now deceased having died in 2018. That he knew the Plaintiff as his neighbor although he did not know that he had titles to land parcel No. 1121 and 1175.
  11. When the witness was referred to Pf exh 3, his response was that he was illiterate and therefore could not read. He went on to testify that he was positive there had been the fraudulent subdivision of their grandfather's land because they as a family had not been involved in the subdivision. That it was not true that the Plaintiff and his grandfather had entered into several land transactions. He was referred to Df Exh 1b which was a Green card for land parcel No. 966, wherein he responded that they had not been informed, and even if the same showed that his grandfather was alive, the reason that they held that the transaction was fraudulent was because at that time, his grandfather was very old and often required to be assisted.
  12. That they were in occupation and possession of land parcels No. 1121 and 1175, parcels of land which they were not aware that they were illegally in occupation since the land belonged to their grandfather. When referred to Df Exh 1a relating to land parcel 1120 at entry No.3, the witness stated that in January 2017, their grandfather had called the Plaintiff to a meeting with their clansmen. The Plaintiff refused to engage them in that meeting and that was when they had realized that the Plaintiff was hiding something. They had then started defending the land wherein they had told the Plaintiff to keep off. That the said meeting had been called by the Chief after the Plaintiff had reported them for being in occupation of the land. That after the meeting, they had not been asked to vacate from the land. His evidence was that at some point they had reported the case of fraud to the police although he could not remember on what date. That they never got any feedback from the police. He also confirmed that he did not have any letters of administration to the estate of his grandfather that that they had only received the summons from the court.
  13. In re- examination, the witness reiterated that they came to know that the Plaintiff had subdivided the land into two when they saw the summons from court. That all along they had not known that he had subdivided the land because they lived on the same. That the Plaintiff lived on parcel of land No. 967 and that their grandfather was not assisted and neither did they take part in the subdivision that took place in the year 2007 when he was 17 years old. That although he did not know how old his grandfather' had been in 2007, yet he was sure that at that time, he was sickly. The witness reiterated that he resided on parcel of land No. 966.
  14. The second defence witness Daniel Kiptiony Cheruiyot testified that he lived in Motero sub-location and was a farmer, that he had recorded his statement with the Advocate which he wished to adopt as his evidence. That in relation to the matter in question, he knew the parties to the suit and that in 1988, he had visited the home of Joshua his brother in law because he had wanted him to pay dowry. That Joshua had asked them to wait so that he could look for money and when they had gone back to again, he had paid them the money.
  15. His evidence was that Joshua had a piece of land No. 595 which he had he subsequently subdivided and it gave rise to parcels No. 966 and 967 and that whereas No. 966 remained in the name of Joshua Keter, parcel No 967 was sold to Paul the Plaintiff. That he was not aware that the Plaintiff had also bought a portion from parcel No. 966 as he did not know about the further subdivisions.



16. The witness was cross examined wherein he stated that Joshua's son had married his sister and therefore he was his brother in law. That although it could be true that Joshua had died in the year 2018, yet he was not aware that any further subdivision had been done regarding parcel No. 966. That Joshua was not close to him but he was their relative. That he also did not know whether Paul Rotich the Plaintiff had taken possession of the parcels of land that arose out of the subsequent sub-division.
17. DW 3, Ludia Chepkemoi testified that she was the wife of Arap Keter and that she lived in Kongeren. That Joshua Arap Keter was now deceased although she could not remember when he died. (The court noted that the witness was quite elderly) She proceeded to testify that she did not know the title No. of the land she lived on but that her late husband was buried there. That she knew Paul Kimutai Rotich as their neighbor and that he lived on a different portion of land. That she was in court because her husband had sold a piece of land measuring one acre to the Plaintiff. That there had been another 0.5 points which her husband had sold to the Plaintiff and therefore the total acreage had been 1.5 acres. She adopted her witness statement as her evidence.
18. When examined by the court, the witness testified that it had been long since the land was sold to Paul who took possession thereafter and the land had been transferred to him. That she did not know who had the title of the land she lived on. She confirmed that Paul and her husband were the only ones who had dealt with a sale transaction.
19. In cross examination, the witness confirmed that the Plaintiff Paul had planted sugar cane on the land he had purchased. That the land was his and nobody had denied him access. That she did not know many things (at this point the witness stated laughing) She continued to testify that when her husband was alive, Paul used to use only one portion of land whereas they lived on the other portion. That there existed a dispute all along, even during the lifetime of her sickly husband. She stated that she could not tell her husband's age at the time he died.
20. When further examined by the court, the witness stated that the dispute had arisen when Paul the Plaintiff had extended the boundaries of his land. That although she did not have the treatment chits yet her husband had been mentally challenged.
21. In re- examination, she reiterated that the Plaintiff had planted sugar cane on his land which he had purchased from her husband who had sold it to pay dowry. That they lived on their own land.
22. DW4, Ezekiel Kirui testified that he hailed from Chemon village, Kongeren sub-location and that he was a farmer. That he had recorded his statement with Counsel to which he sought to adopt as his evidence.
23. In cross examination, he responded that he did not know how the Plaintiff fraudulently subdivided the land but that he had just heard about it. That in 1988 there had been a case regarding land parcel No. 595 wherein a portion had been given to Paul. That at the time, Robert's father did not have anything to give as dowry. Joshua called him as a village elder together with the Assistant Chief Rt. William Chepkwony wherein Joshua had agreed to give 1 acre of land so that he could pay Robert's mother's dowry. That subsequently, he had heard that Paul was given ½ acre which now gave a total of 1.5 acres. He confirmed that he was not there when the Plaintiff was given the half acre of land that he and had not gone to the homestead over any case or settlement until 12<sup>th</sup> November 2018 when he recorded his statement.
24. He confirmed that parcel No. 595 was subdivided into two and that whereas parcel No. 966 remained with Joshua parcel No. 977 was given to Paul. That he did not know anything about parcel No. 1120 and No. 1121.



25. He also testified that sometime back, Joshua had a sick child wherein he had given out ½ acre. That Joshua had died about 2 or 3 years ago, and that he used to attend hospital many times because of his cough. That he did not know what Paul did with the ½ acre. He also confirmed that Robert's father had some mental issues. That Joshua's sons threw Paul out of the land at one time because he had left his land and started using their land, and that this was around the year 2018 although the parties had started the dispute long before. That he did not know about anything on titles to parcels of land No. 1120 and 1175 but that these two latter parcels of land had been fraudulent because the elders had not been involved in the transaction.
26. In re- examination, the witness reiterated that he was a retired village elder and that Joshua had only sold a portion of land in parcel No. 595 wherein he had remained with parcel No. 966. That Joshua had given parcel No. 967 which measured 1 acre to Paul wherein he had been a witness at the time. That Paul used to visit Joshua when he was sick and they had transacted the business alone. That he did not know what happened/transpired thereafter.
27. DW5 Ezekiel Kiplangat Rono also adopted his statement as his evidence wherein during cross examination he testified that land parcel No. 595 was initially subdivided into parcel No. 966 which is land upon which Robert and Ismael lived. That parcel No.967 had been given to Paul. That he was not aware that Joshua had further subdivided parcel No. 966 but that at one time Policemen had arrested Robert wherein he had been denied access to him. Subsequently when Robert had been brought to court, he had secured his freedom. That he had not been informed why Robert had been arrested but Paul had suddenly disappeared. That he did not know anything about the case that involved threats and neither did he know anything about parcels of land No. 1121 and 1175 since he lived far from the parties and therefore would not know what was happening.
28. In re-examination, the witness reiterated that there had been a land dispute regarding a road that had been given to Paul for the purpose of money for treatment and that was why Robert had been arrested. That the dispute had been in regard to land parcel No. 966.
29. The last defence witness Isamel Korir adopted his statement recorded on 12<sup>th</sup> November 2018 as his evidence whereby upon being cross examined, he had confirmed that they lived on land parcel No. 966 and that Paul, the Plaintiff's land was No. 967. That although he was not in a position to tell how parcel No. 966 became No. 1175, yet the way he knew it was that they resided on parcel of land No. 966 and that its subdivision was only rumors. That Joshua may have been cheated to subdivide it but they lived on the same and that was why they had denied the Plaintiff its occupation because it was their land.
30. That his grandfather must have been cheated by Paul since he was old and could not reason well. That he could not testify on the issue of the medical treatment the cause he had not been there. He however confirmed that the Plaintiff was in possession and occupation of parcel No. 967 and that they did not know about the other land. That parcels No. 1121 and 1175 are the parcels of land that the court ought to revert to original numbers.
31. When the witness was referred to Df Exh 1b which was the Green Card for parcel No. 966, he had confirmed that the subdivision had been done on 8<sup>th</sup> January 2007 and that the same may have been approved as the card showed. He was also referred to Df Exh 1a which was the Green card for parcel No. 1120, wherein he again confirmed that the subdivision had been done on 30<sup>th</sup> June 2010 where the resultant parcels of land had been No. 1174 and No.1175. That he knew that they lived on parcel of land No. 966 and that he did not know about the two resultant parcels of land. All he knew was that his grandfather had been misled the cause he was old. That the court ought to order that there be cancellation of the latter parcels of land and that the same reverts to parcel No. 966 land upon which they resided.



32. That they had been living on this parcel of land for a long time, the land which the Plaintiff had wanted to evict them from after the death of their grandfather. That their grandfather had been very sick and only used to drink milk and he could accept anything one told him. That they had not taken him to a mental hospital and that at that time he (the witness) was still young and did not understand anything in as far as the reporting of the fraudulent registration of the subsequent land was concerned. He also confirmed that he did not have letters of administration to his grandfather's estate.
33. In re-examination, the witness testified that in the year 2010 his grandfather was around 70 years old. That he had health issues and only consumed milk and that was during the same time that land parcel No. 1120 had been subdivided giving rise to parcel No. 1175. That during the lifetime of their grandfather, he had only known of parcel No. 966 and when we had been told that it had been subdivided, that was the time when the Plaintiff had attempted to evict them. That the Plaintiff had not given him the titles to parcels No. 1174 and 1175. That further before they had been issued with the summons, there had been a dispute wherein Robert had been cut. That the resultant parcels of land No. 1120 and 1121 were fraudulent because their grandfather was old and he could have been cheated to sell what he did not know.
34. At the close of the defence case, Parties were directed to file their written submissions wherein only the Defendants complied.

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

35. The Defendants gave a background of the matter in question to the effect that No. Kericho/Kiptugumo/595 was registered to one Joshua Arap Keter now deceased. That upon its subdivision, there emerged No. Kericho/Kiptugumo/966 and No. Kericho/Kiptugumo/967 wherein the latter parcel of land was transferred to the Plaintiff by the deceased. That No. Kericho/Kiptugumo/966 was further subdivided giving rise to No. Kericho/Kiptugumo/1120 and No. Kericho/Kiptugumo/1121. The Plaintiff lay ownership to No. Kericho/Kiptugumo/1121 because he had bought the same from the deceased in the year 2000. Later parcel No. Kericho/Kiptugumo/1120 was also subdivided giving rise to No. Kericho/Kiptugumo/1174 and No. Kericho/Kiptugumo/1175, wherein the Plaintiff has again laid claim to No. Kericho/Kiptugumo/1175 because he had bought the same from the deceased in the year 2009.
36. That the Defendants conceded that the Plaintiff had purchased parcel No. Kericho/Kiptugumo/967 which had been transferred to him but are opposed to the allegations that the Plaintiff had purchased the subsequent parcels of land which had been subdivisions of parcel No. Kericho/Kiptugumo/966 thus parcels No. Kericho/Kiptugumo/1121 and Kericho/Kiptugumo/1175.
37. The Defendants framed their issues for determination as follows;
  - i. Whether the Plaintiff is entitled to No. Kericho/Kiptugumo/1121 and Kericho/Kiptugumo/1175.
  - ii. Whether the Defendants' occupation of the subject parcels amounted to trespass.
  - iii. Whether the titles No. Kericho/Kiptugumo/1174 and Kericho/Kiptugumo/1175 resulting from title No. Kericho/Kiptugumo/1120 should be cancelled and reverted back to the name of the deceased owner Joshua Arap Keter.
  - iv. Whether the Plaintiff is entitled to the reliefs sought.
  - v. Whether the Defendants are entitled to the prayers in the counterclaim.



38. On the first issue for determination the Defendants submitted that the Plaintiff failed in his evidence to explain how he had acquired the suit parcels of land and how the transfer had been effected from the deceased's name into his names. That there had been no consent from the Land Control Board to subdivide and transfer the suit parcels to the Plaintiff as well as there had been no sale agreement for the purchase of the suit parcel of land. That although the Plaintiff produced copies of the title deeds and official searches, yet pursuant to the provisions of Section 26 of the *Land Registration Act*, protection on the two titles, if they had been obtained illegally, un-procedurally or through a corrupt scheme, fraud or misrepresentation, was removed and his title could be impeached.
39. That the acquisition of consent from the relevant Land Control Board being a compulsory stage in the subdivision, and/or transfer of agricultural land, the Plaintiff ought to have demonstrated having complied as is provided for under Section 6 of the *Land Control Act*. Having not complied with the said provisions of the law and further pursuant to the many holdings by courts to the effect that the lack of consent constituted an illegality, the Plaintiff was not entitled to the suit parcels of land.
40. On the second issue for determination, the Defendants submitted that pursuant to the evidence adduced by the defense witnesses that they had been living on the suit parcels of land No. Kericho/Kiptugumo/966 for a long time and that the same had not been sold to the Plaintiff save for suit parcel No. Kericho/Kiptugumo/967. That they having been legally in occupation of No. Kericho/Kiptugumo/966, they could not be termed as trespassers to the same and the Plaintiff's allegation was therefore untenable.
41. On the third issue for determination, the Defendants submitted that they had demonstrated that the subdivision and transfer of the resultant parcels of land to land parcel No. Kericho/Kiptugumo/966 being No. Kericho/Kiptugumo/1120, 1121, 1174 and 1175 were illegal and should be cancelled as at the time it is said that there was the subdivision and transfer, the deceased was senile and therefore could not transact any sale agreement. That this fact was confirmed by the non-production of any sale agreement by the Plaintiff which was contrary to the provisions of Section 3(3) of the *Law of Contract Act*.
42. The Defendants relied on the decided case in *Perter Mbiri Michki v Samuel Mugo Michuki* [2014] eKLR to support their argument and to further submit that despite there being no sale agreement, if at all there had been an oral agreement, then it had been incumbent upon the Plaintiff to prove that he had been put in occupation of the suit land upon making such oral agreement to purchase the land. No such evidence was tendered and in fact the Plaintiff confirmed that the Defendants were in occupation of the suit lands and that was why he had sought that their stay on the land be declared as trespass and they be evicted therefrom.
43. On the issue as to whether the Plaintiff was entitled to the reliefs sought, the Defendants' response was in the negative. They submitted that having demonstrated that the Plaintiff's ownership of the suit properties was illegal and that the said property still belonged to their deceased grandfather and that the Defendants had been in occupation of the same since their childhood, which occupation did not amount to trespass, the Plaintiff's prayer was untenable.
44. The Defendants submitted that they were entitled to the prayers as sought in their counterclaim having demonstrated that the land parcel No. Kericho/Kiptugumo/966 and No. Kericho/Kiptugumo/1120 had been illegally subdivided and transferred to the Plaintiff. That in effect thereof there be an order of cancellation of the said titles to enable them to revert to the original deceased owner Joshua arap Keter as sought in the counterclaim and that the Plaintiff's suit be dismissed with costs.



## Determination.

45. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. From the summation of the matter in question, the Plaintiff's suit is based on an allegation that pursuant to purchasing land parcel No. Kericho/Kiptugumo/1121 in the year 2000 and parcel No Kericho/Kiptugumo/1175 sometime in the year 2009 from the Defendants' deceased grandfather one Joshua arap Keter, he had been issued with the title to parcel No. 1121 on the 15<sup>th</sup> February 2007 and title to Parcel No. 1175 on the 20<sup>th</sup> April 2015. His evidence had been that both parcels of land had been as a result of the subdivision of land parcel No. Kericho/Kiptugumo/966. That despite being the registered proprietor of both parcels of land, the Defendants herein had entered upon the first parcel of land No. 1121 in the year 2013 and in the second parcel of land No. 1175 in the year 2014. His evidence was that he had procured both parcels of land after following due process.
46. The Defendants' defence and counterclaim on the other hand is that their grandfather, the late Joshua Arap Keter who died in in the year 2018 was the proprietor of No. Kericho/Kiptugumo/595. That subsequently the said parcel of land had been subdivided giving rise to No. Kericho/Kiptugumo/966 and No. Kericho/Kiptugumo/967 wherein the latter parcel of land was sold and transferred to the Plaintiff by the deceased so that he could pay dowry.
47. That their grandfather had been left with land parcel No. Kericho/Kiptugumo/966, land upon which they all resided. That it had been after the Plaintiff had sued them that they had come to realize that their grandfather's land being parcel No. Kericho/Kiptugumo/966 had been fraudulently subdivided. That they were not involved in the subdivision and neither had there been a meeting at the Lands office that showed that the land was to be subdivided. Their evidence was that the land had been fraudulently subdivided and transferred to the Plaintiff who resided on parcel No. Kericho/Kiptugumo/967 while they resided on parcel of land No. 966 where their deceased grandfather had been buried and land which they called their home.
48. Having set down the background of the evidence as adduced in court, I find the issues that arise for determination thereon being as follows;
- i. Whether the Plaintiff's registration as proprietor of the suit land No. Kericho/Kiptugumo/1121 and parcel No Kericho/Kiptugumo/1175 was lawful or obtained through fraud.
  - ii. Whether the Plaintiff is entitled to the orders sought in his Plaintiff
  - iii. Whether the Defendants are entitled to the orders sought in the counter claim.
  - iv. Who is entitled to pay the costs of the suit.
49. On the first issue for determination as to whether the Plaintiff's title was lawful or obtained through fraud to land parcels No. Kericho/Kiptugumo/1121 and parcel No Kericho/Kiptugumo/1175, the onus was on the Defendants to prove these allegations. Fraud is a serious matter which must be proved to the required standard. In *R.G Patel v 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”.



50. In the case of *Arthi Highway Developers Ltd v West End Butchery Ltd & Others* [2015] eKLR, the Court of Appeal cited the following passage from *Bullen & Leake precedents pleadings* 13<sup>th</sup> edition at Page 427:

“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of ..... It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved ..... General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

51. I have no doubt in my mind that the Defendants herein have distinctly pleaded the facts on which fraud is alleged against the Plaintiff. The next step however was for them to prove those allegations to the required standard.

52. The Plaintiffs case is that he had purchased land parcel No. Kericho/Kiptugumo/1121 in the year 2000 and parcel No Kericho/Kiptugumo/1175 sometime in the year 2009 from the Defendants’ deceased grandfather, one Joshua arap Keter. That subsequently he had been issued with titles to the same on the 15<sup>th</sup> February 2007 and on the 20<sup>th</sup> April 2015 respectively. This was after a period of 7 years and 6 years respectively.

53. From the documentary evidence herein tendered, it is not in dispute that these parcels of land were resultant sub-division of the following; Parcel of land No. Kericho/Kiptugumo/966 was subdivided giving rise to No. Kericho/Kiptugumo/1120 and No. Kericho/Kiptugumo/1121 wherein the Plaintiff lay claim to No. Kericho/Kiptugumo/1121 on the allegation that he had bought the same from the deceased Joshua Arap Keter in the year 2000. Later parcel No. Kericho/Kiptugumo/1120 was also subdivided giving rise to No. Kericho/Kiptugumo/1174 and No. Kericho/Kiptugumo/1175, the Plaintiff again lay claim to No. Kericho/Kiptugumo/1175 on the allegation that he had also bought the same again from the deceased Joshua Arap Keter in the year 2007.

54. The Defendants have refuted the claim made by the Plaintiff on the said sub-divisions for reason that parcel No. Kericho/Kiptugumo/966 was never sub-divided and they still live on the said land. That they had not been called to the Land Board for a meeting to subdivide the land and that at the time the said subdivisions are said to have occurred, their grandfather was old and required assistance, therefore those transactions could not have occurred without their assistance. Their argument was based on the fact that there had been no forms or other relevant documents produced by the Plaintiff that had supported his allegation that there had been the sub-division of parcel No. Kericho/Kiptugumo/966, the sale and transfer of the resultant subdivisions therein being parcel No. Kericho/Kiptugumo/1121 and 1175 to Plaintiff. That in fact they had only come to learn of the subdivisions upon institution of this suit by the Plaintiff.

55. I have anxiously considered both the Plaintiff’s case as against the defendants’ defense and counterclaim and what comes out clearly is that despite the Plaintiff having alluded to having bought the suit parcels of land from the deceased Joshua Arap Keter, he could not distinctly remember when he purchased the same nor the amount of the purchase price he had paid for the same. Interestingly enough, there was no sale agreement produced as his exhibit to buttress his claim. It is further in evidence that the Defendants are and have been in occupation of the suit land where they have remained throughout the proceedings of this matter. In the instant case, even if there was no sale agreement, the Plaintiff ought to have satisfied the Court that he had been in possession of the suit lands herein.



56. Section 3(3) of the [Law of Contract Act](#) provides that no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit is founded is;
- (i) is in writing;
  - (ii) is signed by all the parties thereto; and
  - (iii) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

57. Section 3(7) of the same act further provides as follows:

The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection.

58. The Plaintiff's claim is that he had bought parcels of land No. 1121 in the year 2000, wherein no written agreement had been entered into wherein parcel No. 1175 was bought sometime in the year 2009.
59. In the case of [Peter Mbiri Michuki v Samuel Mugo Michuki](#) [2014] eKLR, the Court of Appeal had held as follows:

“Section 3(3) of the [Law of Contract Act](#) provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the [Law of Contract Act](#) excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the [Law of Contract Act](#), came into effect on 1st June, 2003. .... Prior to the amendment of Section 3(3) of the [Law of Contract Act](#) in 2003, the subsection read as follows: -

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (1) Has in part performance of the contract taken possession of the property or any part thereof; or
- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.” (Emphasis added)

60. The Court of Appeal in the case of [Anne Jepkemboi Ngeny v Joseph Tireito & another](#) [2021]eKLR held as follows:

“Similarly, in the instant case even if there was no sale agreement, the 1<sup>st</sup> respondent only had to satisfy the Court that he had been in possession, which he did as the Court found that he had been in occupation of the suit land from the year 1971 and still remained on the suit land throughout the proceedings of this matter. We note however that although no sale agreement was exhibited in court, the 2<sup>nd</sup> respondent admitted at paragraph 2 of



his statement of defence that he had entered into an agreement with the 1<sup>st</sup> respondent although according to him the agreement was for 24 acres and not 26.5 as claimed by the 1st respondent.”

61. I find that in regard to land parcel No. 1121 which was allegedly purchased in the year 2000, although the provisions of subsection (3) did not apply, yet in relation to the decided case in Peter Mbiri Michuki (*supra*) the Plaintiff only had to satisfy the Court that he had been in possession thereto. In this case, there had been no evidence adduced of any part performance of the contract or the taking of possession of the property or any part thereof. As regards the second parcel of land No. 1175 which the Plaintiff allegedly bought in the year 2009, the provisions of subsection (3) of the Law of Contract Act applied squarely and the sale agreement became null and void for lack of a written agreement. This said and done, I find that the whole alleged transaction for sale of land parcels No. 1121 and No. 1175, if there ever was, did not conform to the requisite of a valid contract as per the law herein above stated and therefore both the alleged transactions became void *ab initio*.
62. Secondly the suit lands being agricultural land, it was incumbent upon the Plaintiff to produce as exhibits the Land Control Board consent or even the minutes of the Board that deliberated on the consent, which he failed to do and despite testifying that consent had been issued. Indeed a look at Def exh 2 which was a letter dated 9<sup>th</sup> May 2018 addressed to the Secretary of the Land Control Board Kericho seeking for the said minutes, there had been no response. The said contract for the sale of the suit lands, if any, became void when no application for consent of the Land Control Board was made.
63. Section 6 of the Land Control Act, provides as follows :-
- Transactions affecting agricultural land
- (1) Each of the following transactions that is to say—
- (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
  - (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
  - (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.
64. The Land Control Act at Section 8, stipulates that an application for consent of the Land Control Board is supposed to be made within 6 months of the agreement. The said provision is as follows :-
- Application for consent
- 8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:



Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

65. The court is aware of the different views taken by the Court of Appeal in the cases of *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* (2014) eKLR, and *Willy Kimutai Kitilit v Michael Kibet* (2018) eKLR where the Court of Appeal allowed parties to proceed to execute a contract of sale of land where there had been no consent from the Land Control Board. In the case of *David Sironga ole Tukai v Francis arap CMuge & 2 Others* (2014) eKLR, a different bench of the Court of Appeal had arrived at a contrary decision to the effect that the consent of the Land Control Board was a requisite condition to a transaction on the sale of Agricultural land. I would ascribe to the second School of thought although in the present case, having found that there existed no sale agreement and that the transaction was void ab initio, I will not delve further into the issue as to whether or not the consent by the Land Control Board was necessary.
66. The Court of Appeal in the case of *Munyu Maina v Hiram Gatbiha Maina* [2013] eKLR, held as follows:
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
67. Section 80 (1) of the *Land Registration Act* provides that:-
- “Subject to sub Section (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
68. From the above provisions it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
69. After all is said and done, I find that the registration of the Plaintiff to both parcel No. Kericho/Kiptugumo/1121 and No. Kericho/Kiptugumo/1175 were a nullity having had been acquired illegally, un-procedurally or through a corrupt scheme and the same are herein liable for impeachment. The Defendants have not laid any claim to the deceased’s Joshua arap Keter property as no letters of Administration have been taken out and I find in favour of their counter-claim. I therefore issue orders as follows;
- i. I dismiss the Plaintiff’s suit.
  - ii. I uphold the Defendant’s counterclaim
  - iii. There be cancellation of the registration of the Plaintiff as proprietor of land parcel No. Kericho/Kiptugumo/1121 and No. Kericho/Kiptugumo/1175 within 30 days as the same is null and void
  - iv. Parcels No. Kericho/Kiptugumo/1121 and No. Kericho/Kiptugumo/1175 be reverted in the name of Joshua arap Keter within 30 days.



- v. The Defendants are herein also awarded costs of the suit and Counterclaim plus interest thereon from the date of filing of the suit till payment in full.

It is so ordered.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 28TH DAY OF JULY  
2022**

**M.C. OUNDO**

