Rorogu & 3 others (Suing as administrators of the Estate of Joseph Kiplele Rorogu - Deceased) v Chesang & 5 others (Land Case 111 of 2015) [2022] KEELC 3941 (KLR) (11 August 2022) (Judgment)

Neutral citation: [2022] KEELC 3941 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE 111 OF 2015

FM NJOROGE, J

AUGUST 11, 2022

BETWEEN

JANE ROROGU ..... 1ST PLAINTIFF

PAUL KIPLANGAT TELE ..... 2ND PLAINTIFF

JOHN KIPLANGAT LELEI ..... 3RD PLAINTIFF

JOSEPH KIPLELE ROROGU ..... 4TH PLAINTIFF

SUING AS ADMINISTRATORS OF THE ESTATE OF JOSEPH KIPLELE ROROGU - DECEASED

AND

MARGARET CHESANG ..... 1ST DEFENDANT

KIPKOECH KORIR ..... 2ND DEFENDANT

RUSI CHELAGAT BUSIENEI ..... 3RD DEFENDANT

STEPHEN CHEPCHILAT ..... 4TH DEFENDANT

ALICE WALEI ..... 5TH DEFENDANT

SHEILA CHEPKOSKEI ..... 6TH DEFENDANT

JUDGMENT

Pleadings

Plaint

1. The plaintiffs filed an amended plaint dated May 18, 2015 in which they prayed for judgment against the defendants for:

    a) A declaration that Joseph Kiplele Rorogu is the lawful proprietor of LR No Nakuru Tinet / Sotik settlement scheme 2220 measuring approximately 50 acres and an order vesting the interest in the suit land in the plaintiffs as administrators of the estate of Joseph Kiplele Rorogu;

    b) A permanent injunction to restrain the defendants their agents, servants or any other person claiming under them from interfering with the suit land and/or the illegal subdivisions arising therefrom being plot Nos 3274, 3276, 3277, 3278, 3279 and 3280;

    c) An order directing the land registrar Nakuru to recall and cancel any title deed held by the defendants and an order prohibiting the issuance of any title deeds in respect of the illegal subdivisions;

    d) Costs and interest

    e) Any other relief.

2. The plaintiffs' claim is that Joseph Kiplele Rorogu (deceased) was the rightful and lawful owner of LR No Nakuru Tinet/Sotik settlement scheme/2220 which measured approximately 50 acres; that he lodged a complaint with the Olenguruone Land Disputes Tribunal being claim No 148 of 2006 against the 6 defendants; that the tribunal awarded the deceased the land and the Molo Magistrate's Court adopted its award in Molo SPM LDT No 5 of 2007; that nevertheless the defendants subsequently caused themselves to be registered as proprietors of subdivisions LR No Nakuru Tinet/Sotik settlement scheme/3274, LR No Nakuru Tinet/Sotik settlement scheme/3276, LR No Nakuru Tinet/Sotik settlement scheme/3277, LR No Nakuru Tinet/Sotik settlement scheme/3278, LR No Nakuru Tinet/Sotik settlement scheme/3279 and LR No Nakuru Tinet/Sotik settlement scheme/3280 carved out of LR No Nakuru Tinet/Sotik settlement scheme/2220 (for ease the plots will be identified by their numeric tail end number in the body of this judgment.) They state that the defendants' entry and claim over the suit land is illegal and fraudulent and their actions have curtailed the plaintiff's peaceful use and enjoyment of the land hence the suit.

The Defendants' Initial Defence.

3. On November 6, 2019 the firm of Gatonye & Gatonye Advocates filed a notice of appointment for the 1st 3rd, 4th, 5th and 6th defendants and subsequently filed on their behalf a joint defence on November 20, 2019.

The Defendants' Amended Defence and The Counterclaim.

4. Later, on February 5, 2020, the said defendants filed their amended defence to include a counterclaim. They denied the plaintiffs' claim regarding their alleged trespass on the suit land and stated that they were not aware of the land disputes tribunal proceedings; that in any event the tribunal must have acted *ultra vires* leading to a void decision whose adoption was of no effect; that the defendants never acted

fraudulently and they are the lawful owners of the suit lands; that they obtained the land after a process of vetting and allocation by the government of Kenya; that their registration is a first registration and is not subject to cancellation on any ground and that the plaintiffs have curtailed the defendants use of the suit lands on the basis of their perception that plot number 2220 extends to and covers the said lands.

5. The counterclaim was not lodged by all the defendants; it was lodged by only the 3rd ,5th, and 6th defendants in the main suit as the 1st, 2nd and 3rd plaintiffs in addition to one Wilson Kipkogei Kipketer Boit (as the 4th plaintiff) against the plaintiffs in the main suit who were named therein as the 1st 2nd and 3rd defendants in the same order they are listed in the plaint. They reiterate the contents of the defence and state that the plaintiffs in the main suit, having laid an unfounded claim that plots Nos 3280,3277,3274 and 3281 are part of plot No 2220 on trespassed onto them in the year 2013, fenced them, grazed livestock thereon and at the same time leased them out for gain to third parties, thus denying the defendants the use thereof. The defendants state that the award by the tribunal and the resultant Magistrate's Court decree can not confer title to the plaintiffs where there was none, and that in any event the defendants were not parties and therefore they can not be bound by the award. The defendants sought the following orders in the counterclaim:

    a. A declaration that the award of the Olenguruone Land Disputes Tribunal dated May 8, 2007 in Olenguruone Land Disputes Tribunal claim No 148 of 2006 and the resulting judgment/ decree are null and void;

    b. A permanent injunction restraining the defendants and/or their agents servants and/or assigns from encroaching, entering remaining, cultivating grazing livestock on leasing or in any other manner interfering with parcels of land known as plots No Nakuru Tinet/Sotik settlement scheme 3280,3277,3274 and 3281.

    c. General damages for trespass;

    d. Costs of the suit and counterclaim;

    e. Interest on (b) and (c) at commercial rates or at such rates as the court shall deem just.

6. The memorandum of appearance was amended on January 15, 2021 to delete the 1st and 4th defendants. However, the amended defence dated December 9, 2019 remained the same, and submissions filed on June 29, 2022 were expressed to be on behalf of the 3rd 5th and 6th defendants only. The 3rd, 5th and 6th defendants gave written authority to Wilson Kipkogei Kipketer Boit to *inter alia* give evidence on their behalf in the suit. For the avoidance of doubt regarding service there is an affidavit of Jacob S A Obulemire filed on July 15, 2019 describing how service was effected on all the defendants. The 2nd defendant reportedly met his demise before the institution of this suit as seen in the proceedings of this court dated November 6, 2019, and therefore the claim against him must be deemed to be null *ab initio* for that reason. All the other defendants are deemed served, and the defence on record, which was not withdrawn in respect of the 1st and 4th defendant, must be deemed to cover them all.

The Plaintiff's Reply to Amended Defence and Counterclaim

7. The plaintiffs filed their reply to the defence and counterclaim on February 19, 2021. In that pleading, the plaintiffs stated that before the allegedly illegal subdivision, plot No 2250 measured 50 acres; that the defendant's claim to land that was part of 2250 is constructive trespass; that any declaration that the tribunal lacked jurisdiction is a legal issue that can only be subjected to declaration by a court of law in an appeal or judicial review proceedings; that the defendants did not follow the laid down procedures in acquiring their titles and they are subject to cancellation by reason of fraud and irregularity. In the defence to the counterclaim the plaintiffs reiterate the alleged fraud and irregularity in the defendants'

process of acquisition of titles and assert that they are the owners of the plot No 2220, that the proceedings in the tribunal case are enforceable and binding, and especially binding regarding the size of the plot No 2220; that the defendants participated therein and failed to appeal or file judicial review proceedings against them, and that by raising the issue of the tribunal's jurisdiction, the defendants are trying to circumvent the proper process. They seek that the counterclaim be dismissed with costs.

Evidence

The plaintiff's evidence.

8. PW1, the 1st plaintiff, gave her oral evidence on June 15, 2021 and adopted her witness statement dated June 15, 2015. Her evidence is that she is the administrator of the estate of the deceased, her late husband; that the deceased was allocated plot No 2220 measuring about 50 acres, being the suit land; that she and family took possession of the suit land in 1996 and that they have been in possession thereof to date; that they have been living in a house that was on it at the time of taking possession; that the plot had been surveyed by the time of allocation; that her husband lodged a claim at the Olenguruone Land Disputes Tribunal against the defendants, being tribunal case 148 of 2006 which tribunal ruled in his favour; that the award was adopted by court and decree issued; that the deceased was not issued with a title deed but was told the plot had been subdivided yet in PW1's entire stay on the land she has never seen a surveyor come to the land; that the defendants subdivided the land on paper only; that titles were issued for the settlement scheme in 2005; that PW1 does not know how much land remained after subdivision by the defendants.

9. Upon cross-examination, PW1 stated that her husband was from the Ogiek ethnic origin and of the Kimete which clan was also known as Kap-Kiwagok; that the land in the area was being given to the Ogiek community; that he was allocated as a member of the clan; that he worked as an administrator, a chief; that he was in charge of organising allocation committees and submitting Ogiek community members' names for allocation; that the allotment card was given to him by the district commissioner; that she has been in occupation of the plot, which neighbours the chief's office and which extends to a nearby river, since 1996; that a surveyor fixed beacons to the land; that her husband was suspended from his position as a chief when there were allegations concerning land but the suspension lasted for only a month, for he defended himself successfully and was reinstated; that the deceased was in charge of allocations and he determined who would get what; that PW1 was allocated a plot by the committee, whose number she cannot remember; that the deceased lodged the claim at the tribunal after the subdivision; that there was no title issued at the time of the tribunal case and that the defendants acquired their titles without visiting the ground.

10. After the evidence of PW1, the plaintiffs closed their case on June 15, 2021.

11. DW1, Wilson Kipkogei Kipketer Boit, the 4th plaintiff in the counterclaim testified on January 26, 2022 and adopted his witness statement dated February 3, 2020 filed on January 15, 2021. He owns plot No 3281. He has a title deed in his name issued on October 12, 2005 (DExh1) He also produced copies of: title for plot No 3280 (Dexh2,) title for plot No 3277 (DExh3); title for plot No 3274 – (DExh4;) certificate of official search dated December 3, 2012 (Dexh5) registry index map sheet No 3 (Tinet) – (Dexh5,) letter of July 16, 2015 (NLC) (Dexh6) and a letter of January 15, 1999 (PC R Valley) (DExh7;)

12. DW1 stated that plot 3280 belongs to Lucy Busienei the 3rd defendant in the case, plot No 3277 belongs to Alice Cheruto A Wade, the 5th defendant and that plot No 3274 belongs to the 6th defendant Sheila Chepkoskei, all from whom he had written authority dated November 10, 2009 to testify in their defence. He, a member of the Ogiek community from the Kabotoo clan, was allocated the land by

the government, which settled the Ogiek community. Several meetings were convened. Committees were formed in respect of the Ogiek land. The committees headed the different clans of the Ogiek community. His name was included in the list. The president visited Keringet and issued titles to him and other people. The allocations took place between 1996 – 1997; there were earlier allotment letters; those letters raised a lot of issues and they were abandoned and the list by the committee was adopted; the committee was entrusted with collecting and submitting allottees' names; there were lots of allotment letters for non-existent parcels; when his name was taken the process of allotment letters had been abolished; only approval of the committee entrusted by the clan was relied on; he paid Kshs 10,370 for processing of title by the Government but he lost the receipt while transferring to Nairobi; the process for plots 3280 and 3277 was similar. Rusi (3rd defendant) and Alice (5th defendant) come from the Kab Negatam clan. Sheila (6th defendant) comes from Kab Kiwagok clan; each clan had its own different committee which compiled its own list; there were no allotment cards. He does not know the 3 plaintiffs. However, he once saw the deceased person that they represent. I came to know the title number once I received the title deed in 2005. He obtained a map, RIM sheet No 3 (DExh 6) from the Nakuru lands office; he asked through the chair of the committee to be shown the beacons of his plot; the chief and Rono, the chair took him to the beacons and he saw the beacons. His land bordered a river. There were several trees. The land was still forested. Few trees had been cut. It was vacant and not fenced. In 2006, he decided to fence the land and build; he went to the land and raised a structure of 5 iron sheet with timber walls; he had several workmen erecting boundary posts; he did not complete the task for the late Joseph Kiplele came and chased the team; That was the first time he met Joseph Kiplele; he reported to Keringet police station and got an OB number which he does not remember. He has subsequently visited the area administration and complained that Joseph had barred him from going into his land; the assistant commissioner wrote to the land commissioner on the issue (see DExh7) but no help has been forthcoming. He learned later that Joseph was earlier on before the area chief. DExh8 contains complaints against the chief, including: corruption, selling government land and lack of integrity; plot No 2220 (DExh6) is adjacent to plot 3274; plots Nos 3277 and 3281 were approximately 5 acres. He said that it is not possible that the defendants' plots are subdivisions of plot No 2220 for in his view, if it had been subdivided it would not be in the map. When shown DExh2 (plaintiffs' allotment card) he stated that it was not issued when the other titles were being issued; when shown PExh4 he stated that he was not aware of these proceedings. Joseph Rorogu, David Busienei and Charles Rono were the parties in claim No 148 of 2006 after PW1 received his title deed. Joseph Rorogu was granted plot No 2220 measuring 50 acres. When shown PExh5 he stated that he was not a party in the Molo LDT case No 45/2007; Tinet settlement scheme was a government initiative. Most parcels appear equal in size save the primary school. When shown 1st plaintiff's map (PExh3) he observed that it was prepared in 1998 and that allottees did not know their land by 1998; there were no title deeds then. He does not know when beacons were fixed in the ground; he did not influence the committee he was not involved in the process leading to issuance of title deeds. The defendants just got title deeds when they were ready; they had given names and ID card numbers; he did not know of the orders in the tribunal case before this case began. He prayed on his own behalf and on the other defendants' behalf to be allowed to go into the land.

13. Upon cross-examination by Mr Muriithi, DW1 stated that 1986 – 1987 is when the adjudication began. He is not familiar with the adjudication process but to him it meant subdivision into smaller parcels for allocation, and it involves, survey, giving numbers and titles later. He never saw any allotment letters. The defendants have no allotment letters. He never produced minutes or the evidence of registration of the clans. He said he did not enter the land until title deeds came. He had never been in the area before the title deeds. His father had been a squatter. 2005 is when their titles issued; his plot is not in the initial map produced by the plaintiffs; there are several plots with numbers ranging from No 3000 and above in my map but he can not see any in the plaintiff's map. His map was prepared in 2005

and he does not know if that was after after subdivision; he came to learn of the tribunal proceedings concerning plot No 2220 (PExh.4) when he came to see his Advocate. However he conceded that Margaret Chesang (1st defendant) Kipkoech Korir (2nd defendant) Rusi Chelangat (3rd defendant) and Stephen Chepchilat (4th defendant) Alice walei (5th defendant), some on whose behalf he was testifying, were all named therein; he is not aware if they attended those proceedings.

14. He tried to obtain possession in 2005. And later went to the NLC Nakuru county in search of justice and the person on the ground was summoned; he learnt later that there is a case trying to nullify my title deed. Around 2006, he got a map and went to the Tinet area chief on the ground to be shown the land. He admitted that Joseph had been a chief there.

15. Upon re-examination by Mr Gatonye DW1 stated that he has not seen any other allotment card; that he learnt of allotment cards from my committee chair but he never saw them being used; he had relocated from Uasin Gishu with his father and he had been registered on his father's behalf; the plaintiff's map does not exist today.

16. When shown the map labelled DExh6, he stated that there are other more than 5 plot numbers above 3000 3262 and 3283 and they are not inside the area claimed by plaintiff. The deceased, Charles Rono and Busienei were parties to the proceedings before the tribunal but both his name Sheila's do not appear there. Page 2 of Exh4 says the map was made in 1996. The tribunal commented on validity of the plaintiff's allocation. DW1 submitted his name in 1996/97. He was not aware of any 2002 allocation. He disagrees with the LDT decision and he has challenged that decision in the counterclaim in this suit.

17. At that juncture the defence case was marked as closed.

Submissions.

18. The plaintiffs filed submissions on May 22, 2022 and the defendants on June 29, 2022.

The Plaintiffs' Submissions.

19. The plaintiffs recapitulated the matters in the pleadings and the evidence and stated that the issues arising are as follows: whether the defendants were parties in the tribunal proceedings, whether the defendants can at this juncture challenge the tribunal award for lack of jurisdiction; and whether the defendants' titles ought to be cancelled by this court. In terms of substance, they submitted that the deceased and David Busienei and Charles Rono were named as parties in the tribunal case but the 2nd -5th defendants attended on the side of the objectors and participated in the proceedings and testified that they were allocated the plots by the Negatam clan in 2002; only the 6th defendant and Wilson Kipkogei Kipketer Boit (the 4th plaintiff in the counterclaim) did not participate in the tribunal case. It is stated that one Kipsang Kilel presented evidence on behalf of the objectors, now defendants herein and that the only logical conclusion that can be drawn from those proceedings is that the defendants were parties in the tribunal dispute. The plaintiffs relied on the case of *Elizabeth Nyambura Njuguna (suing as the legal representative of Njuguna Mbogo) & 3 others v EK Banks Ltd & 3 others* and urges the court to find that then defendants are bound by the tribunal decision. The plaintiffs also urge that the defendants are inviting this court to review the tribunal decision yet the issue was never raised in the proceedings; that even if the tribunal may have lacked jurisdiction the defendants failed to exhaust all proper mechanisms for setting aside or reviewing of the decision; citing *Owners of Motor Vessel Lillian S v Caltex oil Kenya Ltd* 1989 eKLR, the plaintiffs submit that the defendants never by themselves challenged the decision but only did so in this suit upon its filing by the plaintiffs which was after an inordinately long time.

20. The case of *Primrose Management Ltd v Chairman of The Business Premises Rent Tribunal Nairobi & another* 2015 eKLR was cited for the proposition that the issue of jurisdiction ought to have been raised in the first instance at the tribunal and that once the matter was heard without it being raised, it can not be raised unless in the context of judicial review proceedings, and that even in such proceedings the applicant for review orders must demonstrate that he has exhausted the internal mechanisms available before lodging the proceedings. The plaintiffs submitted that section 8 of the *Land Disputes Tribunal Act* cap 303 (repealed) set out elaborate mechanisms for hearing of a tribunal case and appeal against the tribunal award as well as specific timelines for lodging the appeals. The LDT Act remained operational for a long time after the tribunal award was made and the defendants failed to challenge the decision and this court thus has no jurisdiction to review that decision. The plaintiffs cited the case of *Kefa Were v Benedict Chepkering* 2018 eKLR. Lastly on the issue of whether the defendant's titles ought to be cancelled the plaintiffs submitted that the plaintiffs established a factual and legal basis for claiming plot No 2220 while the defendants had not established the legal root of title for the title deeds they possess; that the defendants never demonstrated that the letter of allotment *vide* which the deceased was allocated the land had been cancelled; that the defendants never produced any evidence to support their claim that they were allocated the suit land. The case of *Nakuru Automobile Warehouse Ltd v Lawrence Maina Mwangi & another* ELC No 204 of 2014 was cited in aid of the plaintiff's argument. It was urged that the under the provisions of section 26 and 80 of the *Land Registration Act*, an order cancelling those titles should issue.

The Defendants' Submissions.

21. For the defendants, it was submitted that the issues arising are as follows: whether the plaintiffs have proved their claim to the required standard; whether the plaintiffs in the counterclaim have proved their claim to the required standard; what are the appropriate orders to issue and who should bear the costs of the suit and the counterclaim.

22. Section 107(1) of the *Evidence Act* was called in aid of the proposition by the defendants that the plaintiffs had not proved the deceased's ownership of the suit land or that plots No3280, 3277 3274 and 3281 are subdivisions of plot No 2220; the reasons for this argument by the defendant are as follows: that the allotment card to the deceased was challenged by the defence; that there was no proof that the land measures 50 acres; that there is no evidence that the deceased made an application for a title deed for the suit land; that no mutation was produced to demonstrate that the 4 parcels were subdivisions of the plot No 2220. It was urged that sections 27 and 28 of the *Registered Land Act* (repealed) also replicated verbatim in sections 24(b) and 25(1) of the *Land Registration Act* 2012, are applicable in the circumstances where the deceased's alleged ownership of the land is repugnant to the registered interest of the defendants. Citing the case of *Stephen Mburu & 4 others vs Comat Merchants & another* 2012 eKLR, it was urged that the registered interest of the defendants supersedes the alleged interest of the deceased in the suit land. That case holds that from a legal standpoint a letter of allotment is not title to property but a transient right, a right or offer to take property. The defendants averred that the authenticity of the title deeds of the defendants was not challenged and they are therefore *prima facie* evidence that the defendants are the indefeasible and absolute owners of the four parcels subject only to the provisions of section 26 of the LRA. The defendants further submitted that the registry index map the defence produced as D Exh 6 showed that plot no 2220 still exists to date and so the 4 parcels in this suit are not its subdivisions but standalone parcels. It was urged that section 25 (2) of the *Registered Land Act* and section 22(2) of the LRA stipulate the closing of the register belonging to a subdivided parcel and the opening of new registers for the subdivisions. Consequently, the tribunal decision does not aid the plaintiffs. The defendants also submitted that the fact that evidence was adduced to the effect that the deceased was suspended from being a chief of Tinet location

on the ground of corruption, want of integrity and irregularities involving land allocation and that this weakens the plaintiff's case and tilts the balance in favour of the defendants. Regarding proof of fraud by the plaintiffs it was urged inter alia, that no evidence was led to the effect that the defendants misled the land registrar; that no knowledge that the defendants knew of the deceased's claim of ownership of the suit land and that the process by which the defendants titles were acquired was explained in evidence by the 4th plaintiff in the counterclaim; that there was no evidence of how the defendants subdivided the land; that the claim of lack of due diligence would apply only if the lands was available for allocation; that since the defendants were registered as proprietors in 2005 and the orders of court issued in 2008 there could be no contempt committed. The case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* 2000 eKLR and *Kinyanjui Kamau v George Kamau* 2015 eKLR were cited for the nature of appropriate pleading regarding fraud and the standard of proof of required regarding fraud. Citing the case of *Peris Wanjiku Mukuru suing as the legal representative of the Estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* 2020 eKLR, the defendants submitted that no fraud was reported to the police.

23. It was further submitted that the plaintiff never distinctly pleaded that all the title deeds held by the defendants were obtained illegally unprocedurally or through a corrupt scheme for the purpose of prayer (c) of the amended plaint being deemed to be made under section 26 LRA and that no such features of section 26 LRA were distinctly proved.

24. The defendants submitted that the counterclaim had been proved to the required standard; that the tribunal lacked jurisdiction as it sat over titled land and acted beyond the scope of section 3 of cap 303; the case of *George Christopher Odondo v Francis Tobias Akello & another* 2020 eKLR was cited in that regard. The defendants further submitted that the tribunal award bound only the named objectors against whom it was filed; that there was no indication that service of the tribunal claim was effected as per section 3(4) of the *LDT Act*, (now repealed) or that the persons alleged to have participated were accorded an opportunity to file an answer to the claim and that in any event the 3rd and 4th plaintiffs in the counterclaim were not accorded an opportunity to participate in the tribunal proceedings, and were not aware thereof and could not appeal or file review proceedings; that the defendants in the main suit and the 4th plaintiff in the counterclaim were condemned unheard; as they were not parties they could not file an appeal against the decision. Citing the decisions in *John Mwangi Waithaka v Jackson K Cherop & another* 2014 eKLR, *Jamin Kiombe Lidodo v Emily Jerono Kiombe & anor* 2013 eKLR the defendants urged that the decision of the tribunal could be challenged by way of both judicial review proceedings and a suit for a declaration of nullity. The decision in *Kefa Were* (supra) was distinguished for the reason that, in the defendant's view, the defendant, a party in the tribunal proceedings, tried to re-litigate the issue in court in a counterclaim, whereas the present defendants were not parties in the tribunal case and also that the doctrine of *res judicata* presupposes the former court or body was of competent jurisdiction. The defendants urge an award of Kshs 6 million each as damages for trespass on their land by the plaintiffs over a span of 16 years.

Determination.

25. Having analysed the pleadings, evidence and submissions as above, this court arrives at the following as the issued arising for determination in the instant suit:

    a. Whether Joseph Kiplele Rorogu was the allottee of plot No 2220 – Tinet settlement scheme;

    b. Whether plot No2220 was subdivided to create the defendants' plots;

    c. Whether the title deeds held by the defendants ought to be cancelled for reason of fraud and/or illegality;

d. Whether the defendants were parties in the Olenguruone Land Disputes Tribunal case No 148 of 2006 and whether the defendants can competently challenge in this suit the decision of that tribunal for want of jurisdiction; and

e. Who should bear the costs of these proceedings.

26. Regarding whether Joseph Kiplele Rorogu was the proprietor of plot No 2220 – Tinet settlement scheme, it is noted that the plaintiff's claim is that the allocation of that land to him in 1996 preceded the issuance of titles in the Tinet settlement scheme. The allocation of land card No 16897 which bears the stamps of the office of the district commissioner and the provincial forest officer Rift Valley province was produced in evidence of the alleged allocation to the deceased of 50 acres. It was not denied by the defendants that such cards were in use at one time. What the defendants only witness stated is that he was informed that the use of such cards had been discontinued owing to some perceived irregularities.

27. Of that card labelled P Exh 2 the witness for the defence stated as follows under cross-examination by Mr Muriithi:

> " It is signed and sealed. I have no other document showing revocation of the allotment cards."

28. When pressed further he stated as follows concerning the allocation of land to the defendants:

> " We have no allotment letters. I am from Kabatoo clan. I never produced minutes or the evidence of registration of the clans. I said I did not enter the land until title deeds came.I had never been in the area before the title deeds. My father was a squatter.
>
> 2005 is when our titles issued. My plot is not in the initial map produced by the plaintiffs."

29. DW1 admitted that 1996 – 1997 was the period during which land allocation in the settlement scheme took place. His evidence also admitted that there were earlier some allotment letters but that system of allotment letters was abandoned and allocation by way of lists by the committees was adopted. In his evidence he stated that only approval by the committees entrusted by the clans was relied on thereafter. By the time of his submission of his name for inclusion into the list, the process of allotment letters had been abolished. He paid a fee for processing of title but he did not produce the receipt which was allegedly lost. He stated that the same process of allocation applied in respect of the other defendants' plots.

30. It is clear from the defendant's own evidence that they arrived on the land later than the deceased and found the deceased in actual occupation of the land that they claim, and that he resisted their taking of possession thereof on the basis of earlier allocation of the same to him. It has been argued for the plaintiffs that no evidence was produced that the process of allocation on the basis of land allocation cards had been discontinued or the cards earlier issued revoked in favour of the clan lists DW1 testified about.

31. Both parties produced their respective maps, P Exh 2 and D Exh 6. There was no evidence adduced by either party as to the registration status of the said maps. What is apparent is that the plaintiffs' map is an earlier version of the defendants' map. In the plaintiff's map (P Exh 2) parcel No 2220 appears to be a very large portion of land and the defendants' plots do not appear thereon. On the defendants' map (D Exh 6) parcel number 2220 is seen as a much smaller parcel, plot Nos 3274, 3276, 3277, 3278, 3279 and 3280 having been apparently created within its former boundaries. Both maps proclaim at their bottoms that they are registry index maps prepared by the survey of Kenya department, the plaintiff's being the 1998 version and the defendants' being the 2005 version.

32. The Olenguruone Land Disputes Tribunal appears to have recognised the plaintiff's allocation of land card and map in their proceedings in claim No 148 of 2006. It is a fact that in the year 2006 the deceased had sought relief at the tribunal since he had learned that plot No 2220 had been reduced on the map by reason of creation of the defendants' plots within its former boundaries. It is this court's finding, arising from the analysis herein above, that the plaintiff was allocated plot No2220 measuring approximately 50 acres long before the defendants appeared, and that the defendants have failed to demonstrate to this court that the said allocation was revoked through any process that would be countenanced by the law or in which the plaintiffs participated.

33. From what this court has already stated above it is clear from the evidence of both parties in the present suit that the defendant's plot Nos 3274, 3276, 3277, 3278, 3279 and 3280 were carved out of plot number 2220.

34. At this juncture this court must examine whether the title deeds held by the defendants ought to be cancelled for reason of fraud and/or illegality. Section 26 of the *Land Registration Act* provides as follows:

> " 26. (1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a 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.
>
> (2) A certified copy of any registered instrument, signed by the registrar and sealed with the seal of the registrar, shall be received in evidence in the same manner as the original."

35. The above cited provisions protect the proprietor's title save in instances where he is a party to prove fraud and misrepresentation involving that title or where it is established to have been obtained illegally, unprocedurally or through a corrupt scheme. The question that arises is whether the defendant's titles qualify to be classified under any of the afore stated categories of grounds for invalidation set out under section 26.

36. While denying the plaintiffs' claims of fraud against them, the defendants relied on issuance of titles to their plots to state that theirs is a first registration that is not subject to cancellation on any grounds. This court must be cautious regarding the claim of first registration not subject to cancellation for the reason that the land in question has not been demonstrated by either party to have been subjected to the *Land Adjudication Act* and the processes thereunder to warrant such a conclusion. The defendants merely stated that the allocation was by the government. It would be expected that any allocation process would be fair to every allottee, and where any previous allotments to individuals had been made through the recognised process and they were subsequently deemed irregular, they would be procedurally cancelled prior to re-allocation to other persons. The plaintiffs produced a land allocation card as evidence that the deceased had been allocated plot No 2220 in the 1990s. From the evidence from both parties, I find that card to be genuine evidence that the deceased was allocated the land. No

credible evidence was adduced by the defence that the use of such cards was discontinued, or that a new system of allocation was adopted.

37. I have already found that there are two different maps, each relied on by either party. The earlier map produced by the plaintiffs shows plot No 2220 before it was affected by allocations to the defendants. The more recent map produced by the defendants indicates that the defendants' plots were carved out of plot No 2220 thus considerably reducing its size. There is no explanation as to why plot no 2220 measuring 50 acres had to be reduced in size while a decision had already been made earlier to have it allocated to the deceased. It had been included in the official map as 50 acres. The icing on the cake in the case of the defendant and the counterclaim is the allegation that plot No 2220 was not in fact subdivided because it still appears on the current RIM under that same number. However, this also turns out to be the greatest undoing of their claim, for if the maps proclaim that their titles were carved out of the original plot No 2220, how then that can that subdivision not have resulted in the official extinction of plot No 2220 from the map and records as is usually the case? The conclusion would be that some fraud was involved in the creation of the defendants' plots.

38. It is not pleaded by the defendants that any hearings were conducted between them and the deceased prior to carving out of their plots from his land. It is true that the deceased's land was much larger than the other parcels but then a clear perusal of the maps produced shows the presence in the settlement scheme of other similarly larger parcels.

39. This court is not entitled to assume the role of the allocation authorities and determine the parcel sizes or the criteria for allocation. It was the duty of the defendants in this suit to establish that they were properly allocated land that had already been alienated to the deceased. According to the evidence of the defendants, when their names were taken by the committee, the process of issuance of allotment letters had been abolished; only approval of the committee entrusted by the clan was relied on; that may explain why the defendants do not have their own allocation letters or land allocation cards. However, despite their claim that the land allocation cards had given way to area lists managed by the committees, they failed to produce the area lists made in respect of the respective clans they belonged to. This was a major omission on the part of the defendants.

40. It has been stated time and again in numerous decisions that when a title is under challenge, it is not sufficient to merely wave it as proof of proprietorship. In the Court of Appeal case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR it was 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."

41. There is correctness in the defendants' reliance on the decision in *Stephen Mburu & 4 others v Comat Merchants & Another* 2012 eKLR to urge that the registered interest of the defendants supersedes unregistered interest in land, such as that of the deceased. Indeed, a registered proprietor's interest is protected by the law in section 25 of the *Land Registration Act* and its antecedent corresponding provisions in the *Registered Land Act* (now repealed). Section 26 warrants the consideration of title deeds such as that produced by the defendants as *prima facie* evidence of ownership to land. However, much as I agree with those provisions of the law, and the holding in *Shadrack Kuria Kimani v Stephen Gitau Nganga & another* 2017 eKLR and the decision in *Stephen Mburu* (supra) that a letter of allotment is of lesser value than registered title to property, I must also appreciate the fact that no letter

of allotment nor area lists were produced by the defendants in the instant case. Therefore, the mere inclusion of the defendant's land in the official registry index map does not absolve them from the duty to explain how it happened and the rationale therefor. Considering then that the issuance of a title must have a proper and legal basis, the defendants, unlike the plaintiffs who produced a land allocation card, failed to prove that their titles were issued on the basis of any credible process and thus rendered their allocation suspect for having been arbitrarily done to the detriment of the deceased. In this court's view, only the plaintiffs have a genuine land allocation document. Only the defendants, who stood to benefit therefrom, or persons acting on their behalf could have caused the amendments to the registry index map and issuance of titles in their favour. I therefore find that the plaintiffs' claim of illegality and fraud levelled against the defendants under paragraph 9(b), (c), and (d) have been satisfactorily proved against them. The defendants, having failed to explain their acquisition of titles, the singular conclusion is that they had been acquired irregularly or through fraud or a corrupt scheme. The defendants' titles are therefore illegal and subject to cancellation by this court.

42. This court must now address the issue whether the defendants were parties in the Olenguruone Land Disputes Tribunal case No 148 of 2006, and whether they can challenge that decision of the tribunal vide the instant suit. The plaintiffs submit that they were parties while the defendants deny the fact.

43. The proceedings of the Olenguruone land disputes tribunal produced cite all the defendants save the 6th as having attended and participated in the proceedings, where they were represented by one Samuel Sitienei, who is described as the vice-chairman of the Negatam clan and one Kipsang Kilel. Strangely, despite the award in favour of the deceased and the locking out of the defendants from what they perceived to be their rightful allocations, they never challenged the Olenguruone Land Disputes Tribunal decision in the prescribed manner or at all until they filed a counterclaim on February 5, 2020 in response to the present suit, which action the plaintiffs protest as being after an inordinate delay. The plaintiffs also aver that jurisdiction having not been raised as an issue before the tribunal, the defendants are barred from raising it in the present proceedings and that even if the tribunal may have lacked jurisdiction the defendants failed to exhaust all proper mechanisms for setting aside or reviewing of the decision. The plaintiffs cited the decision in *Primrose Management Ltd v Chairman of the Business Premises Rent Tribunal Nairobi & another* 2015 eKLR for the further proposition that jurisdiction not having been raised in the first instance at the tribunal, it can not be raised unless in the context of judicial review proceedings, and that even in such proceedings the applicant for review orders must demonstrate that he has exhausted the internal mechanisms available before lodging the proceedings.

44. It is the case, as the plaintiffs submitted, that section 8 of the *Land Disputes Tribunal Act* cap 303 (repealed) set out the appropriate mechanisms for hearing of a tribunal case and appeal against the tribunal award as well as specific timelines for lodging the appeals, and that the LDT Act remained operational long after the tribunal award was made and the defendants failed to challenge the decision through the prescribed appeal mechanism. It is the correct position that the defendants are challenging the tribunal in the first instance in this suit and not by way of an appeal but by way of a counterclaim.

45. The defendant's attack on the tribunal decision comprises primarily of an objection to its jurisdiction and two observations must be made here about that plea.

46. First, I hardly see any reason why jurisdiction was not raised at the tribunal proceedings. The dispute was heard and determined in favour of Joseph Kiplele Rorogu. This court agrees with the holding in the case of *Owners and Masters of the Motor Vessel Joey v Owners and Masters of the Motor Tugs Barbara and Steve "B" 2008* 1 EA 367 to the effect that a party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter has been heard and determined. In the tribunal case the dispute was heard and determined on its merits. It is improper for a party to sleep on

his rights to raise the issue of jurisdiction and only rise to agitate them when sued by his opponent 13 years later on in a counterclaim. In my view, it is too late for the defendants in the main suit and who are the plaintiffs in the counterclaim to raise the issue at this stage. It should be left to lie.

47. Secondly, the defendant's attempt to have the tribunal decision declared null and void must also be rejected for as the plaintiffs have rightly pointed out, the appropriate appeal mechanisms set out under the *Land Disputes Tribunals Act* were never exploited by the defendants. The decision in Speaker of the *National Assembly v James Njenga Karume* [1992] eKLR is authority for the proposition that that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of parliament, that procedure should be strictly followed. The proper manner of proceeding would have been for the defendants filing an appeal on the merits before the appeals committee constituted under the act and they failed to do this. They could also have filed judicial review proceedings to have the decision of the tribunal quashed for want of jurisdiction. The also failed to do that. In the case of *Kefa Were v Benedict Chepkering* 2018 eKLR which is now persuasive in view of the finding that the defendants were parties in the tribunal proceedings, my brother Yano J, had this to say of such a situation:

> " From the foregoing, it is not in dispute that the plaintiff filed his claim against the defendant before the Land Disputes Tribunal to assert his right of ownership or title to plot No 300 Kosprin settlement scheme. The law existing at the time provided for an avenue for appeal for any party dissatisfied with the decision of the Land Disputes Tribunal. A party who was dissatisfied could also move to the High Court by way of Judicial review to quash the decision of the Land Disputes Tribunal, including raising the issue of jurisdiction. The defendant herein has not taken either of the avenues stated above. Instead, the defendant has filed the counter-claim in this suit challenging the decision of the Land Disputes Tribunal. In my view, this court is not seized of the jurisdiction to re-examine the merits of that decision and it would be futile to do so in this suit. The defendant is litigating under the same title and the plaintiff was the same."

48. This court is also of the view that in the instant case the defendants are trying to re-litigate the same issue that was before the land disputes tribunal and they can not be permitted to do so.

49. Regarding the issue of costs, I find that the defendants in the main suit and the plaintiffs in the counterclaim ought to bear the costs as it is their claim over the plaintiff's land that has precipitated the instant proceedings.

50. The upshot of the foregoing is that this court finds that the plaintiffs have proved their claim against the defendants and all the plaintiffs in the counterclaim on a balance of probabilities while the defendants have failed to prove their counterclaim to the required standard. Consequently, I enter judgment for the plaintiffs in the main suit and I dismiss the counterclaim and I issue the following orders:

    a. A declaration that the estate of Joseph Kiplele Rorogu is the lawful proprietor of LR No Nakuru Tinet /Sotik settlement scheme/2220 measuring approximately 50 acres.

    b. A declaration is hereby issued declaring that titles Nos Nakuru Tinet /Sotik settlement scheme/3274, Nakuru Tinet /Sotik settlement scheme/3276, Nakuru Tinet /Sotik settlement scheme/ 3277, Nakuru Tinet /Sotik settlement scheme/3278, Nakuru Tinet /Sotik settlement scheme/3279 and Nakuru Tinet /Sotik settlement scheme/3280 were illegally carved out of or superimposed on title No Nakuru Tinet /Sotik settlement scheme/2220;

    c. Titles Nos Nakuru Tinet /Sotik settlement scheme/3274, Nakuru Tinet /Sotik settlement scheme/3276, Nakuru Tinet /Sotik settlement scheme/ 3277, Nakuru Tinet /Sotik settlement

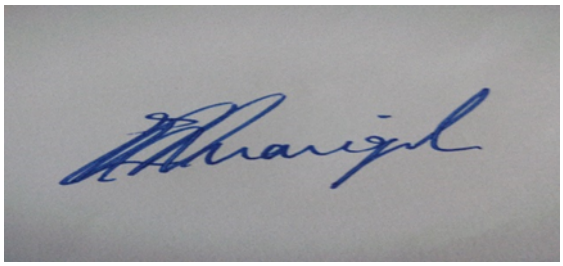
scheme/3278, Nakuru Tinet /Sotik settlement scheme/3279 and Nakuru Tinet /Sotik settlement scheme/3280 are hereby cancelled and the county surveyor and the land registrar Nakuru shall collaborate to rectify the registry index map and the land register respectively to reinstate the boundaries of LRNo Nakuru Tinet /Sotik settlement scheme 2220 as they were in the map and on the ground before Titles nos Nakuru Tinet /Sotik settlement scheme/3274, Nakuru Tinet /Sotik settlement scheme/3276, Nakuru Tinet /Sotik settlement scheme/ 3277, Nakuru Tinet /Sotik settlement scheme/3278, Nakuru Tinet /Sotik settlement scheme/3279 and Nakuru Tinet /Sotik settlement scheme/3280 were carved out of it.

d. An order is hereby issued vesting the interest in LR No Nakuru Tinet /Sotik settlement scheme 2220, as reconstituted in order no (c) herein above, in the plaintiffs as administrators of the estate of Joseph Kiplele Rorogu (deceased);

e. A permanent injunction is hereby issued restraining the defendants their agents, servants or any other person claiming under them from interfering with LR No Nakuru Tinet /Sotik settlement scheme 2220;

f. The defendants in the main suit and the plaintiffs in the counterclaim shall bear the costs of this suit and the counterclaim.

Dated, signed and issued at Nakuru by way of electronic mail on this 11th day of August, 2022.



MWANGI NJOROGE

JUDGE, ENVIRONMENT AND LAND COURT, NAKURU