



**Bett v Rono & another (Environment & Land Case 20 of 2015)  
[2022] KEELC 13665 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13665 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 20 OF 2015  
MC OUNDO, J  
OCTOBER 13, 2022**

**BETWEEN**

**JOSEAH KIPKEMOI BETT ..... PLAINTIFF**

**AND**

**JOSHUA WESLEY MARAMBE RONO ..... 1<sup>ST</sup> DEFENDANT**

**JOHN KIKWAI BETT ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By consent parties agreed that the District Surveyor visits land parcels No Kericho/Kabianga/3617 and 2640, Kericho/Kabianga 4274 and 4275 to establish their acreage. The court obliged them. A report dated the 5<sup>th</sup> February 2018 was filed in court on the same date, wherein parties sought and were granted leave to amend their pleadings.
2. The Plaintiff, in his Complaint of 4<sup>th</sup> June 2015 which was amended on the 12<sup>th</sup> March 2018 and further amended on the 29<sup>th</sup> January 2020, sought declaratory orders that land parcel LR No Kericho/Kabianga/4275 was excess land discovered after resurvey of land parcel No LR No Kericho/Kabianga/1907 and that he be entitled to half a share of the said excess land. He also sought for alienation of 0.3 acres from land parcel No LR No Kericho/Kabianga/4275 to be added to his land parcel No LR No Kericho/Kabianga/3617. The Plaintiff further sought for mesne profits and interest therein for the entire period the Defendants had been in occupation of half his share of land, and for general damages to trespass. He also sought that there be issued permanent injunction orders against the Defendants barring them from entering into or occupying his share of land in No LR No Kericho/Kabianga/4275. Lastly he sought for costs of the suit at court rate, as well as for any other relief that the court would deem fit and just to grant.
3. The 1<sup>st</sup> Defendant, in his defence of 21<sup>st</sup> July 2015 which was amended 18<sup>th</sup> May 2018, denied the particulars as stated in the Plaintiff's amended complaint putting up a defence that he had purchased parcels



of land namely LR No Kericho/Kabianga/1907 measuring 2.3 hectares from the 2<sup>nd</sup> Defendant. That after registering the same in his name, it had been discovered that it was in excess by 2.2 acres. Subsequently there had been a subdivision which had resulted into Kericho/Kabianga/4274 and Kericho/Kabianga/4275 wherein Kericho/Kabianga/4274 measuring 2.3 hectares had been registered to his name and the excess 2.2 acres had been registered to the 2<sup>nd</sup> Defendant as LR No Kericho/Kabianga/4275. That he was wrongly joined to the suit as the land which the Plaintiff sought, was registered to the 2<sup>nd</sup> Defendant.

4. The 2<sup>nd</sup> Defendant on the other hand in his defence dated the 10<sup>th</sup> May 2018, amended on 21<sup>st</sup> April 2021 and further amended on 27<sup>th</sup> April 2021 contended that the original parcel of land LR No Kericho/Kabianga/955 measuring 5.4 hectares registered to Kibet Arap Menjo was subdivided giving rise to LR No Kericho/Kabianga/1905, 1906 and 1907. That subsequently parcel LR No Kericho/Kabianga/1905 was registered to his father and that he was not aware of the subsequent sale to the 1<sup>st</sup> Defendant. He denied having trespassed on or utilized the Plaintiff's land. He sought that the Plaintiff's suit be dismissed.
5. The matter proceeded for hearing after compliance with the provisions of Order 11 of the [\*Civil Procedure Rules\*](#) wherein the Plaintiff herein testified as PW1 to the effect that in 1981, his father Kibet Arap Mayo decided to sub-divide his land parcel No Kericho/Kabianga /995 so as to give him and his brother John Kikwai Bett (2<sup>nd</sup> Defendant) some portions of land. That the land originally measured 5.4 Ha or approximately 13.5 acres. That he had been given 5.7 acres while his brother was also given 5.75 acres. That their father had been left with 2 acres. He testified that his portion was parcel No Kericho/Kabianga/1906 whereas his brother's title was No Kericho/Kabianga /1907 and their father's parcel of land was No Kericho/Kabianga /1905.
6. That after the sub-division, he had realized that his portion was smaller than his brother's wherein he had lodged a complaint at the District Officer's office. That the officer then tried to resolve the dispute but his brother was uncooperative and that was the reason why he had resorted to filing the case in court. That he had also instructed a surveyor to take measurements of the suit land and prepare a report which he produced as Pf exh 1.
7. That indeed the surveyor had confirmed that his portion had been smaller than his brother's portion because whereas he was meant to get 5.7 acres, he had received only 5.4 acres. He produced the mutation form as Pf exh 2.
8. He then proceeded to testify that his brother had sold his entire portion to the 1<sup>st</sup> Defendant and what he now sought was costs for general damages and costs.
9. In cross-examination by Counsel to the 1<sup>st</sup> Defendant, the Plaintiff confirmed that the 2<sup>nd</sup> Defendant, Joshua Marambe Rono, was his elder brother and that Land parcel no. Kericho/Kabianga/995 had been divided into 3 portions as follows:
  - i. Land parcel No Kericho/Kabianga/1905 measuring 0.8 hectares.
  - ii. Land parcel No Kericho/Kabianga/1906 measuring 2.3 hectares 5.4 (acres) which was only on paper but on the ground it was less.
  - iii. Land parcel No Kericho/Kabianga/1907 measuring 2.3 hectares on paper but on the ground it was 8.5 acres.
10. The Plaintiff reiterated that he was claiming his share from the 1<sup>st</sup> Defendant who had sold his share in the year 1981 soon after the sub-division. That he had discovered that he had been short changed soon after the sub-division had been done. That he did not know whether his brother had transferred



his land to the 2<sup>nd</sup> Defendant and neither was he aware of the dispute at the Land Disputes Tribunal between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

11. That although Land parcel No Kericho/Kabianga /1907 had been sold, yet he did not know that it had been sub-divided into parcels No Kericho/Kabianga/4274 and 4275. That he was only claiming his share from the 1<sup>st</sup> Defendant and was not aware that the excess land that was meant be his was given to the 2<sup>nd</sup> Defendant.
12. In cross-examination by Counsel to the 2<sup>nd</sup> Defendant, the Plaintiff had responded that the portion he was claiming was contained in parcel No Kericho/Kabianga/1907 which was registered in the name of the 1<sup>st</sup> Defendant. That he had discovered that he had been short changed in the year 1981 soon after the sub-division. That when he collected his title, he knew the land was less than 2.3 hectares.
13. He confirmed that he had already sold 1(one) acre from his portion of land and that their father had died in 1996 after he had given them the land as a gift. That during his father's life time, he had complained to him about his portion being smaller than his brother's share although he had no document confirming the same.
14. He was emphatic that he had not started complaining after the passing away of his father but that he had also complained at the Sosiot (*sic*) Land Disputes Tribunal although he did not have the proceedings.
15. That the surveyor had visited the suit land in 1981 although the report he had written had not been accurate because whereas he had stated that his portion was 2.3 hectares, yet the portion he lay claim to was more than 3 acres.(1.06ha). He confirmed that Land parcel No Kericho/Kabianga/3617 was his and that it had been a resultant sub-division of parcel No Kericho/Kabianga/2638 which was also a resultant sub-division of parcel No 1906. That he had sued his brother because his share had been included in his portion which was supposed to have been divided equally between themselves.
16. Upon being re-examined, the Plaintiff reiterated that his father had subdivided his land into three portions wherein he had taken two acres and balance was to have been divided equally between himself and his brother wherein he had received 5.4 acres instead of 5.7 acres. That his brother had received 8.5 acres. That he was now seeking to have his share topped up to 5.7 acres after which the excess acreage of 1.5 acres was to be shared between him and his brother.
17. When questioned by the court as to whether land parcel no. Kericho/Kabianga/1907 still existed, his response was that he knew it had been sold. That his share in land parcel No 1906 had been sub-divided resulting into land parcels No 2638, 2639 and 2640. That later, parcels No 2638 and 2639 had been merged to create parcel No 3617 which was then registered to him. That land parcel No 1907 was sub-divided into parcel No 4274 and 4275 wherein land parcel No 4274 was registered in the name of Joshua Marambe Rono the 1<sup>st</sup> Defendant and parcel No 4275 was registered in the name of John Kikwai Bett (2<sup>nd</sup> Defendant)
18. PW2, Mr Isaac Kibet the District Surveyor Kericho confirmed that he had prepared a report dated 5<sup>th</sup> February 2018 which had touched on the parcels of land as follows:
  - i. No Kericho/Kabianga /3617- 4.436 acres
  - ii. No Kericho/Kabianga /2640- 1.034 acres
  - iii. No Kericho/Kabianga /4274- 5.9 acres
  - iv. No Kericho/Kabianga /4275- 2.57 acres



19. He then proceeded to testify that it had been the surveyors from his office who had visited the site on 22<sup>nd</sup> January 2018 wherein they had carried out the survey on the above parcels of land. That they had thereafter computed the acres of the above parcels of land as tabulated in the report as indicated above. The report was then prepared by C.K.Kirui and Raphael Letyo and duly filed in court. That he was aware that the above parcels of land were surveyed on 20<sup>th</sup> November 2012 wherein the report had only been in relation to the acreage of the above parcels of land wherein it had also indicated that parcel No Kericho/Kabianga/1907 was 3.36 hectares and not 2.3 hectares as indicated in the title. There was therefore a variance of 1 hectare. His testimony was that in cases where there was variance between what was on the title and what was on the ground, they would normally write to the Land Registrar to effect the change on the title. He confirmed that according to their letter dated the 20<sup>th</sup> November 2012, there was variance between the title and the ground measurements.
20. In cross examination by Counsel for the 1<sup>st</sup> Defendant, the surveyor confirmed that he was not present when the surveyors visited the suit property and had never been to the suit land. That he was merely relying on the reports done by his colleagues. That he did not know whether the owners of the land were present but could avail the surveyors who went to the ground. That although the summons had been issued to him, he had delegated the same to the surveyors.
21. Counsel then made an application to have the surveyors who had visited the suit land summoned to testify.
22. Mr Christopher Kipngetch Kirui testified as PW3 to the effect that he worked with the Ministry of Lands. That according to the report dated 5<sup>th</sup> February 2018, they were supposed to establish the acreage of several parcels of land wherein on the 22<sup>nd</sup> January 2018 they had visited the site to establish the size of LR No Kericho/Kabianga /3617, 2640, 4274 and 4275. That they had found as follows;
  - i. Parcel No 3617 was 4.436 acres
  - ii. Parcel No 2640 was 1.034 acres
  - iii. Parcel No 4274 was 5.9 acres
  - iv. Parcel No 4275 was 2.57 acres
23. That the official records in the lands office showed the sizes as follows:
  - i. Parcel No 3617 = 4.695 acres
  - ii. Parcel No 2640 = 1.0 acres
  - iii. Parcel No 4274 = 5.708 acres
  - iv. Parcel No 4275 = 2.594 acres
24. That he had visited the site with his colleague Mr Raphael Letyo where present were also elders, the Plaintiff, and the 2<sup>nd</sup> Defendant. He confirmed that the actual size on the ground differed with the size on record a little bit but that that was normal although the records could be amended.
25. In cross examination by Counsel for the 1<sup>st</sup> Defendant, the witness confirmed that it had been him and his colleague who had carried out the survey. That indeed he had seen both the Plaintiff and the 2<sup>nd</sup> Defendant on site. That there were fences as boundaries on all the parcels. That they had sent letter to the parties through the local chief. He confirmed that he did not do a sketch plan of the parcels of land and neither did he indicate the official size of the parcels of land in his report. It was his testimony that the 1<sup>st</sup> Defendant was not present.



26. When cross examined by Counsel for the 2<sup>nd</sup> Defendant, the surveyor confirmed that, parcel No 3617 and 2640 had originated from parcel No Kericho/Kabianga/1906. That parcel No 4274 and 4275 had originated from No Kericho/Kabianga/1907. He also confirmed that the 1<sup>st</sup> Defendant was present when they started the exercise and during the exercise. He confirmed that they had sent a letter (which he showed) to the parties to attend the exercise wherein they had visited the site on 22<sup>nd</sup> January 2018 and not on 18<sup>th</sup> January 2018 as indicated in the letter, which was a typing error.
27. In re- examination the witness reiterated that before visiting the site, they did not know the parcels of land and neither was he aware of any previous survey. He confirmed that where a party did not appear, they would sometimes proceed with the survey and sometimes would not do so depending on the circumstance at the time. The Plaintiff closed its case.
28. The defense case was opened by the 1<sup>st</sup> Defendant Joshua Welsey Marambe Rono who testified as DW1 to the effect that he knew both the Plaintiff and the 2<sup>nd</sup> Defendant who were not related to him. That he also knew land parcels No Kericho/Kabianga /1907 and Kericho/Kabianga /1906. That Parcel No 1907 belonged to 2<sup>nd</sup> Defendant who had sold it to him between the year 1980 and 1982 wherein the land had been transferred to him. That it was supposed to be have been 5.7 acres or 2.31 Hectares.
29. That after the 2<sup>nd</sup> Defendant had sold him the land, he had gone back to him in 1985 complaining that what he had sold to him was too big. Subsequently various disputes at the local level regarding the same parcel had been heard wherein in 1984, he had called a surveyor to do measurements and it had been discovered that the land was in excess by 22 acres. That since he had another parcel of land next to that one, being parcel No 1905 which had been sold to him by the 2<sup>nd</sup> Defendant's father, he had transferred the 2.79 acres to the 2<sup>nd</sup> Defendant because a second survey had confirmed that the excess land was 2.79 acres.
30. That subsequently, the land had been subdivided so that the 2<sup>nd</sup> Defendant could get 2.79 acres. Parcel No 1907 then ceased to exist after the resultant parcels No 4274 and 4275. That Parcel No 4274 was registered to him while parcel No 4275 became owned by 2<sup>nd</sup> Defendant. That he had since disposed of parcel No 4274.
31. He confirmed that the 2<sup>nd</sup> Defendant had instituted a dispute against him to the area Land Disputes Tribunal wherein he did not appeal the decision. That indeed the Plaintiff had been aware of the tribunal proceedings. He denied having encroached on the Plaintiff's parcel stating that he was wrongly joined to the suit. He sought that the case against him be dismissed with costs.
32. He produced the Land Dispute Tribunal proceedings as Df exh 1 and sought to rely on his statements recorded on 21<sup>st</sup> July 2015 and 23<sup>rd</sup> July 2015 respectively as his evidence in chief. He also produced an official search for parcel No 4274 as Df exh 2 and a copy of title deed for parcel No 4274 as Df exh 3.
33. When cross-examined by Counsel for the Plaintiff, the 1<sup>st</sup> Defendant confirmed that he could not recall the exact date he had bought the land from 2<sup>nd</sup> Defendant, but that he had transferred the excess land to 2<sup>nd</sup> Defendant in the year 2009 and that he had not been the one who had made the error of creating excess land. That the first survey had shown the excess land to be 2.2 acres wherein the second survey had put the excess land at 2.79 acres.
34. In the response to cross examination by Counsel for the 1<sup>st</sup> Defendant, the witness had confirmed that at the Tribunal, the dispute had been between him and 2<sup>nd</sup> Defendant and that although the Plaintiff was aware of the dispute, he had not complained at the time. That he had been satisfied with the decision of the Tribunal wherein he had complied with its decision and had got title for parcel No 4274 in 2013. That he was not aware that the register for parcel No 1907 had been amended, information



- which he was now receiving during the trial. He also confirmed that parcels No 1905, 1906 and 1907 all originated from parcel No 995 and that the subdivision had been done by the Plaintiff and 2<sup>nd</sup> Defendant's father during in his lifetime from whom he had also purchased parcel No 1905. That whereas parcel No 1906 was given to the Plaintiff, parcel No 1907 became owned by 2<sup>nd</sup> Defendant.
35. He also stated that the Plaintiff was not in occupation of the portion of that land given to him by his father although he had him complain that the 2<sup>nd</sup> Defendant had been given bigger land. That later when parcel No 1907 was sold to him by 2<sup>nd</sup> Defendant and was subsequently found to be excess on the ground, he had agreed to part with the excess land. No 1907 was subdivided, the excess land of 2.79 acres became No 4275 while his rightful share remained now as parcel No 4274.
  36. His evidence was that the Plaintiff had also subdivided his share of land on parcel No 1906 which resulted into parcels No 2638, 2639 and 2640 wherein he had sold parcel No 2640 to a neighbor. That he had later merged parcel No 2638 with 2639 which now became parcel No 3617. The 1<sup>st</sup> Defendant thus closed his case.
  37. It was upon the closure of the 1<sup>st</sup> Defendant's case that the Plaintiff's Counsel sought to further amend his Plaintiff with regard the position of the current numbers of the original parcel No 995 so as to capture the current situation as reflected in the Land Register. The court obliged him.
  38. The 2<sup>nd</sup> Defendant's case was through DW2, John Kikwai Bett the 2<sup>nd</sup> Defendant herein who confirmed that Plaintiff was his brother. He adopted his statement as his evidence in chief and proceeded to testify that their father had sub-divided plot No 995 which resulted into 1907 and 1908 wherein he had been given No 1907 as per a green card herein produced as Df exh 4 and Title as Df exh 5. That it had been after he had been given title to parcel No 1907, that he had sold the whole land measuring 5.7 acres to Joshua Wesley Rono the 1<sup>st</sup> Defendant. That after he had sold the land the 1<sup>st</sup> Defendant the 1<sup>st</sup> Defendant had then returned another portion of the land he had earlier taken and gave him its title.
  39. He confirmed to having had a land dispute with the 1<sup>st</sup> Defendant which was conducted at Sosiot in the District Officer's office as per the minutes which had been produced in court as Df Exh 1.
  40. He confirmed that during the lifetime of his deceased father, Kibet Arap Menjo, they had had no dispute with his brother. He also confirmed that both he and his brother had signed the transfer documents after his father gave them the property. He produced the mutation form for land No 955 as Df exh 6 and asked the court to dismiss the Plaintiffs suit.
  41. In cross examination by Counsel for the Plaintiff, the witness responded that the land he had been gifted resulted from land parcel No 995 wherein each of them had received 5.7 acres and their father had taken 2 acres. That initially the original land was 13.4 acres. That on the ground, his land measured 5.7 acres and the same case applied to his brother's land. He also stated that he had two other acres on a different portion of land which he land he had been given by somebody else. He also confirmed that he had not seen the surveyor's report and that he had just sold the whole portion of parcel No 1907, without the knowledge of how it had been subdivided.
  42. When cross examined by Counsel for the 1<sup>st</sup> Defendant, the witness reiterated that he had sold his land No 1907 to the 1<sup>st</sup> Defendant and had transferred the title to his name. That later when he had discovered that the 1<sup>st</sup> Defendant had taken his other parcel of land which was sharing a common boundary and whose number he could not remember, he had filed a complaint against the 1<sup>st</sup> Defendant at Belgut Tribunal wherein the Tribunal had directed him to survey the land and that was when he got a different portion. He confirmed that parcel No 4275 was registered in his name and



that he had no pending issues with the 1<sup>st</sup> Defendant as they had settled everything. That he did not know whether his brother the Plaintiff had a claim against the 1<sup>st</sup> Defendant.

43. His evidence was that before their father passed on, the Plaintiff had not laid any claim of an extra parcel of land from him. That land parcel No 4275 was his and the Plaintiff was not entitled to half a share of the same. The 2<sup>nd</sup> Defendant closed his case and parties were directed to file their written submissions to which only the Plaintiff and the 1<sup>st</sup> Defendant complied. I shall summarize the submissions as herein under,

#### **The Plaintiff's submissions'**

44. The Plaintiff submitted that the issues arising out of the proceedings that needed to be determined were as follows;
- i. Whether the actual acreage of No Kericho/Kabianga /995 was more than what was initially recorded on the title.
  - ii. Whether the Plaintiff is entitled to half share of the excess land discovered in No Kericho/Kabianga /1907 which is now situate on No Kericho/Kabianga /4275.
  - iii. Whether the Plaintiff is entitled to mesne profits for the period the Defendants have been in actual possession of the suit premises.
45. On the first issue for determination, the Plaintiff submitted that the evidence before court clearly indicated that the actual the acreage of No Kericho/Kabianga /995 was more than what was initially recorded in the title. That its proprietor one Kibet Arap Menjo who was both the Plaintiff and the 2<sup>nd</sup> Defendant's father had subsequently subdivided the said parcel of land into three portions resulting into No Kericho/Kabianga /1905, 1906 and 1907 wherein he had kept No Kericho/Kabianga /1905 measuring 0.8 hectares for himself.
46. The Plaintiffs submission therefore was that the intention of their father was to have No Kericho/Kabianga /1906 and No Kericho/Kabianga /1907 shared equally to his sons. That the total acreage of the original parcel of land No Kericho/Kabianga /995 having measured 5.4 hectares wherein the deceased had kept 0.8 hectares for himself, then parcels No Kericho/Kabianga /1906 and No Kericho/Kabianga /1907 ought to have measured 2.3 hectares each, as was depicted in the mutation herein produced in court as an exhibit.
47. That indeed the evidence on record was to the effect that after the 2<sup>nd</sup> Defendant had sold his parcel of land No Kericho/Kabianga /1907 to the 1<sup>st</sup> Defendant, that it had been discovered that the said parcel of land was in excess wherein the 2<sup>nd</sup> Defendant had lodged a complaint in the Belgut Land Disputes Tribunal, which returned an award that indeed after re-survey, the said parcel of land was found to be in excess by 2.2 acres which excess acreage was to be registered to the complainant, the 2<sup>nd</sup> Defendant herein.
48. Following the pronouncement of the award, land parcel No Kericho/Kabianga /1907 was subdivided giving rise to No Kericho/Kabianga /4274 and No Kericho/Kabianga /4275. That the total acreage of these two parcels of land was 8.47 acres an equivalent of 3.43 hectares which confirmed the contents of the surveyor's report dated 5<sup>th</sup> February 2018. This then confirmed that the original parcel of land No Kericho/Kabianga /995 was in excess of what was recorded in its title.
49. On the second issue for determination the Plaintiff submitted that having established that the original parcel of land No Kericho/Kabianga /995 was more than what was initially recorded and keeping in mind of the intentions of the original proprietor of the land, which was to sub-divide the land equally



between his two sons, and which intention was not rebutted by the 2<sup>nd</sup> Defendant, then it went with saying that the Plaintiff was entitled to half the share of the excess land. That despite this being the position, the Defendants had jointly caused the excess land being LR No Kericho/Kabianga/4275 to be registered in the name of the 2<sup>nd</sup> Defendant.

50. That the root to LR No Kericho/Kabianga/4275 having been challenged the 2<sup>nd</sup> Defendant did not discharged the burden of proof that he was the legally registered proprietor and therefore it was only fair and just that the Plaintiff be declared as entitled to half share of the parcel of land LR No Kericho/Kabianga/4275.
51. When submitting on the third issue for determination, the Plaintiff submitted that there having been an admission by the Defendants that they had been in possession of the excess 2.2 acres comprised in LR No Kericho/Kabianga/1907, it was fair and just that the court finds them having trespassed to the Plaintiffs share of the land to his detriment and therefore he was entitled to mesne profits for the Trespass Act so committed as the Defendants had deprived the Plaintiff of his property.
52. In conclusion the Plaintiff submitted that the facts in this matter spoke for themselves and that the court grants the orders so sought in his favour.

### **1<sup>st</sup> Defendant's submissions**

53. The 1<sup>st</sup> Defendant confirmed that the Plaintiff and the 2<sup>nd</sup> Defendant being siblings, the 1<sup>st</sup> Defendant was a purchaser of land for value. The 1<sup>st</sup> Defendant also confirmed that the original parcel of land LR No Kericho/Kabianga/995 measuring 5.4 hectares was initially registered to Kibet Arap Menjo who was the father to both the Plaintiff and the 2<sup>nd</sup> Defendant and who was now deceased.
54. The 1<sup>st</sup> Defendant further confirmed that LR No Kericho/Kabianga/995 was subdivided into three resulting into LR No Kericho/Kabianga/1905, 1906 and 1907 and that parcel LR No Kericho/Kabianga/1905 was sold to him by Kibet Arap Menjo. That further the 2<sup>nd</sup> Defendant had also sold parcel LR No Kericho/Kabianga/1907 to him after which it had been discovered that the acreage on the ground to the said parcel of land had exceeded what was indicated in the title and after an award by the Belgut Land Dispute Tribunal was delivered, LR No Kericho/Kabianga/1907 was subdivided resulting into LR No Kericho/Kabianga/4274 and 4275 wherein the 1<sup>st</sup> Defendant had surrendered LR No Kericho/Kabianga/4275, which was the excess land, to the 2<sup>nd</sup> Defendant and the same was registered to his name.
55. That it was therefore clear that the 1<sup>st</sup> Defendant was wrongly and maliciously joined to the suit, the Plaintiff having been aware of the award by the Belgut Land Dispute Tribunal. The 1<sup>st</sup> Defendant sought for the suit against him to be dismissed with costs.

### **Determination.**

56. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law with a lot of anxiety. I have also considered the prayers sought by the Plaintiff and I have reminded myself that parties shall be bound by their pleadings. I have also considered the fact that the Plaintiff and the 2<sup>nd</sup> Defendant are siblings and that the Plaintiff herein seeks for orders against the Defendants on the parcel of land which he alleges to have been in excess of what was originally intended to be shared to them by their deceased father one Mr Kibet Arap Menjo.
57. To begin with, it is not in dispute that LR No Kericho/Kabianga/995 which measured 5.4 hectares was registered to one Mr Kibet Arap Menjo now deceased and who was the father of both the Plaintiff and the 2<sup>nd</sup> Defendant. It is further not in contention that during his life, the said Mr Kibet Arap Menjo



subdivided his land LR No Kericho/Kabianga/995 into three which resulted into LR No Kericho/Kabianga/1905, 1906 and 1907. That he had then gifted his two sons herein the Plaintiff with parcel LR No Kericho/Kabianga/1906 and the 2<sup>nd</sup> Defendant with parcel LR No Kericho/Kabianga/1907 wherein he had kept for himself LR No Kericho/Kabianga/1905. That it therefore goes without saying that pursuant to the subdivision of LR No Kericho/Kabianga/995, which was done legally by its original proprietor, the said title was closed and the land ceased to exist.

58. Evidence on record that is not disputed is that during his lifetime Kibet Arap Menjo had subsequently sold LR No Kericho/Kabianga/1905 to the 1<sup>st</sup> Defendant. That subsequently the 2<sup>nd</sup> Defendant had also sold parcel LR No Kericho/Kabianga/1907 to the 1<sup>st</sup> Defendant.
59. It is further on record that pursuant to the sale agreement in regard to parcel LR No Kericho/Kabianga/1907, between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant had discovered that the said parcel of land was in excess of what was contained to his title and of what he had intended to sell. He had therefore instituted a dispute before the Belgut Land Dispute Tribunal (Df exh 1) on the 6<sup>th</sup> October 2008 wherein a ruling had been delivered to this effect;

‘The land in dispute Kericho/Kabianga/1907 registered under the name of Joshua Rono (Defendant) measuring approximately 2.3 HA (5.7 acres) was surveyed and found out that the said farm was more by 2.2 acres i.e the land was with the 7.9 acres instead of 5.7 acres more by 2.2 acres.

That the said 2.2 acres of the land should now be registered under the name of John Kikwai Bett (complainant) under a new number.’

60. Pursuant to the delivery of the above captioned ruling, it is not disputed that the 1<sup>st</sup> Defendant caused the subdivision of LR No Kericho/Kabianga/1907 which thus resulted into LR No Kericho/Kabianga/4274 measuring 2.31 hectares and No 4275 measuring 1.05 hectares respectively wherein title to LR No Kericho/Kabianga/1907 was closed on 19<sup>th</sup> December 2013 and the land ceased to exist.
61. The 1<sup>st</sup> Defendant was registered as proprietor to LR No Kericho/Kabianga/4274 on 29<sup>th</sup> January 2013 wherein he surrendered title to LR No Kericho/Kabianga/4275, which was the excess land, to the 2<sup>nd</sup> Defendant and the same was registered to his name on the 7<sup>th</sup> September 2017.
62. The Plaintiff has now sued both the Defendants seeking orders as herein above stated. I find the matter to be determined by this court as follows;
- i. Whether the 1<sup>st</sup> Defendant is properly joined as party to the suit.
  - ii. Whether the Plaintiff is deserving of the orders so sought.
  - iii. Who should pay the costs.
63. On the first issue for determination, it is clear that pursuant to the ruling by the Belgut Land Dispute Tribunal, as herein above captioned which ruling was not set aside on appealed from, the 1<sup>st</sup> Defendant had caused the sub division of LR No Kericho/Kabianga/1907, land he had bought from the 2<sup>nd</sup> Defendant, wherein he had retained LR No Kericho/Kabianga/4274 and returned the excess parcel of land being LR No Kericho/Kabianga/4275 to the 2<sup>nd</sup> Defendant. This is the land which the Plaintiff now seeks half a share



64. Order 1, Rule 3 of the *Civil Procedure Rules* is clear as to who may be joined as a Defendant to the suit the provisions of the law provides as follows;
- “All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
65. Indeed in joining a Defendant to a suit a Plaintiff must be able to show that they have a cause of action which is a technical legal name for the set of facts which give rise to a claim enforceable in court. In other words the Plaintiff must show that there exists a legally recognized wrong that creates the right to sue. The Plaintiff must adduce the said facts or the elements thereto to the satisfaction of the court for the court to take action. Indeed a cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.
66. The Plaintiff in this case has sought for a declaration that he was entitled to half a share of the excess land and that there be alienation of 0.3 acres from land parcel No LR No Kericho/Kabianga/4275. He has also sought for mesne profits and interest therein for the entire period the Defendants were in occupation of half his share of land and for general damages to trespass. He also sought that there be issued permanent injunction orders against the Defendants barring them from entering into or occupying his share of land in No LR No Kericho/Kabianga/4275.
67. I appreciate that under Section 107(1) of the *Evidence Act*, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which (s)he asserts, must prove that those facts exist.
68. The evidence on record is clear and not contravened to the effect that that as soon as the 1<sup>st</sup> Defendant was directed by the Disputes Tribunal to refund the excess land he had purchased from the 2<sup>nd</sup> Defendant, he had expeditiously obliged, subdivided No LR No Kericho/Kabianga/1907 and returned the excess land to the 2<sup>nd</sup> Defendant. He had thus retained his parcel of land in No LR No Kericho/Kabianga/4274 which is protected under the provisions of Section 26(1) of the *Land Registration Act* unless it is proved to have been acquired through fraud or misrepresentation, illegally, un-procedurally or through a corrupt scheme, which evidence is lacking in the circumstance. I therefore find that the Plaintiff having not laid any claim to LR No Kericho/Kabianga/4274, has not proved any cause of action as against the 1<sup>st</sup> Defendant.
69. On the second issue for determination as to whether the Plaintiff is deserving of the orders so sought, again I shall revert to the origin of the title to parcel of land No LR No Kericho/Kabianga/4275 upon which the Plaintiff claims half a share on a claim that it was in excess of the land given to him and his brother the 2<sup>nd</sup> Defendant by their deceased father when he had subdivided No LR No Kericho/Kabianga/995 amongst them.
70. It is not in contention that the suit land parcel herein was originally part of land parcel No LR No Kericho/Kabianga/995 which was registered to the Plaintiff's late father Kibet Menjo on 16<sup>th</sup> February 1970. It is further not in dispute that No LR No Kericho/Kabianga/995 was legally subdivided by its proprietor during his lifetime into No LR No Kericho/Kabianga/1905, 1906 and 1907 on 24<sup>th</sup> February 1981 wherein the title was closed. That the resultant subdivisions were gifted to the Plaintiff who received No LR No Kericho/Kabianga/1906 and to the 2<sup>nd</sup> Defendant who received No LR No Kericho/Kabianga/1907.



71. The Plaintiff has challenged the 2<sup>nd</sup> Defendants root to parcel of land LR No Kericho/Kabianga/4275 claiming half of it. Indeed the Court of Appeal in the case of *Munyu Maina v Hiram Gathiba 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.’

72. It is in evidence and indeed in the Plaintiffs pleadings that pursuant to the subdivision of No LR No Kericho/Kabianga/995 and the distribution therein as above mentioned, he had discovered that the 2<sup>nd</sup> Defendant got a bigger share of land parcel of land in No LR No Kericho/Kabianga/1907. Indeed in his evidence the Plaintiff stated as follows:

‘After the subdivision I realized that my portion was smaller than my brothers. I lodged a complaint at the D.O’s Office’

73. In cross examination, the Plaintiff had reiterated that he was claiming his share from the 1<sup>st</sup> Defendant who had sold it in the year 1981 soon after the sub-division. That he had discovered that he had been short changed soon after the sub-division. Indeed the mutation form for land parcel No LR No Kericho/Kabianga/995 was produced as Pf exh 2 which clearly indicated that its subdivision was done on 7<sup>th</sup> September 1979 wherein the mutation was registered on 23<sup>rd</sup> February 1981. No evidence was adduced to the effect that the subdivision of No LR No Kericho/Kabianga/995 was fraudulent. The 2<sup>nd</sup> Defendant was registered as proprietor of the resultant land being LR No Kericho/Kabianga/1907 on the 9<sup>th</sup> March 1981 wherein he had become the absolute and indefeasible owner and was therefore entitled to its exclusive use, occupation and possession, and to also deal with it as he pleased the same having been obtained free of any fraud, encumbrances, easements, restrictions and conditions.

74. I further note, which is not in contention, that from both the oral and documentary evidence that the cause of action complained of by the Plaintiff occurred in 1981

75. Section 7 of the *Limitation of Actions Act* provides;

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

76. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve (12) years from the date on which the right accrued. The present suit was instituted on the 9<sup>th</sup> June 2015 which was a period of over 34 years after the legal subdivision and transfer of LR No Kericho/Kabianga/1907 which gave rise to LR No Kericho/Kabianga/4275 land which the Plaintiff now lays claim to half its portion.

77. This means that No Kericho/Kabianga/995 having had been subdivided on 7<sup>th</sup> September 1979 (cause of action) wherein the 2<sup>nd</sup> Defendant was registered as the proprietor of one of the resultant parcels of land in the year 2004 (as per his evidence and paragraph 3 of his amended plaint) and the fact that the Plaintiff had discovered that the 2<sup>nd</sup> Defendant’s land was bigger than his upon the said subdivision way back in 1979, thereby claiming ownership of half a portion of the excess land, he could seek to



recover the land from the 2<sup>nd</sup> Defendant, but only if he did so within twelve years after the discovery (cause of action). The present suit having been filed outside the 12 years period as prescribed under Section 7 of the *Limitation of Act* should fail.

78. Before I pen off, I must state that this suit was a nonstarter having been motivated by greed and malice where the Plaintiff sought to unjustly enrich himself by challenging the free gift given to him by their deceased father, even without sweating for it, so as to undeservedly take away 0.3 acres of land gifted to his brother on allegations that by gifting them, their father's intention had been for them to get equal portions of his land. If this were to be the situation, which I do not agree, there was nothing stopping Plaintiff from seeking redress from his father during his lifetime. The original land having been registered to their father as an absolute proprietor he could deal with it in whichever way he so desired. He could either subdivide it amongst his children as he did in the present situation, or even dispose of the land at his pleasure. The Plaintiff herein had no right to claim unfretted entitlement to the land their father gave them freely, but rather to respect and heed to his wishes.

79. In the end I find that the Plaintiff's case has no merit and is hereby dismissed with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 13<sup>TH</sup> DAY OF OCTOBER 2022**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

