



**Kimaiyo & 3 others v Biwott & 5 others (Environment & Land Case  
102 of 2016) [2022] KEELC 14740 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14740 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 102 OF 2016  
SM KIBUNJA, J  
OCTOBER 12, 2022**

**BETWEEN**

**WILLIAM KIPTOO KIMAIYO ..... 1<sup>ST</sup> PLAINTIFF  
DANIEL KIPROP KIPTANUI ..... 2<sup>ND</sup> PLAINTIFF  
SIMION KIPKOSGEI RUTO ..... 3<sup>RD</sup> PLAINTIFF  
SANIAKO CHEBO ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**NICHOLAS BIWOTT ..... 1<sup>ST</sup> DEFENDANT  
THOMAS CHEBII CHANGACH ..... 2<sup>ND</sup> DEFENDANT  
MICHAEL KIPKOSGEI KWAMBAI KINIGA ..... 3<sup>RD</sup> DEFENDANT  
ANDREW KIBIEGO BIWOTT ..... 4<sup>TH</sup> DEFENDANT  
LAND REGISTRAR-UASIN GISHU ..... 5<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Complaint filed on April 28, 2016, the Plaintiffs jointly and severally prayed for judgement against the defendants for;
  - a. A declaratory order that the registration of No Sergoit/Koiwoptai Block 10 (KARO) 47 into the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants was fraudulently obtained and the same should be cancelled.
  - b. A permanent injunction restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants from entering erecting structures, fencing, dealing in, or using parcel No Sergoit/Koiwoptai Block 10 (KARO) 47.



- c. Cancellation of the register in favor of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.
  - d. An order rectifying the register to reflect the legal ownership of the plaintiffs.
  - e. Costs of the suit.
  - f. Any other relief that this Honourable Court shall deem fit to grant.
2. The Plaintiff was amended on June 21, 2017 among others adding the 6<sup>th</sup> Defendant as a party. The Plaintiffs averred that sometimes in 2001 they surrendered their ancestral Land reference number Upper Cheptebo 'A' Plot No 1 in Elgeyo Marakwet to the 1<sup>st</sup> Defendant, in exchange for Land No Sergoit/Koiwoptaoi Block 10 (KARO) 47, measuring 8.1 hectares, in Uasin Gishu County. That they took possession and developed the said property and have been in occupation of over 26 years, but the title to the said property has been fraudulently issued to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. It was further averred that despite various efforts to protect the property, various agencies have ignored the plaintiffs and the defendants have continued to use force to threaten and/or coerce the plaintiffs not to do anything on the said property. The particulars of fraud on the part of the defendants were contended to be that they illegally presented themselves as the lawful owners of the suit property and presenting a wrong list of beneficiaries. Further, it was averred that the defendants misled the 1<sup>st</sup> defendant that the original owners of the plaintiffs ancestral had been compensated and finally misleading the 5<sup>th</sup> defendant to register them without proper verification of KARO farm register. It was averred that on or about the May 19, 2015, during and in the course of the 5<sup>th</sup> defendant's scope of employment the Defendants jointly and severally, without any color of right colluded and executed documents leading to the issue and transfer of title of the suit land to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. That for the foregoing reasons, the suit property was fraudulently acquired by the said defendants and their title should be cancelled and registered in favor of the plaintiffs. That the defendants should also be perpetually barred from entering or in any way dealing with the suit property. In support of their case, the Plaintiffs filed written statements dated June 21, 2017 wherein they re-iterated the contents of the Amended Plaintiff. The Plaintiffs further filed a list of documents of even date, and attached a total of 13 documents in support of their case, among them being letters of various dates, list of allottees, demand letters, official search in respect to the suit property.
  3. In response to the original Plaintiff, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed a statement of defence and counter claim on June 17, 2016. There was no other defence save that the parties filed a consent to have the defendants granted leave to amend their defence to include a claim of loss of user for the 20-acre suit land, and corresponding leave to the plaintiffs. In their defence, the defendants denied that the plaintiffs surrendered their parcel of land known as Upper Cheptebo 'A' Plot No 1 in exchange for Land No Sergoit/Koiwoptaoi Block 10 (KARO) 47, and that the 1<sup>st</sup> defendant had promised the Plaintiffs the suit parcel of land as exchange. The averments that the plaintiffs have been in occupation for over 26 years was also denied. The averments of fraud was denied too. It was further contended by the defendants that the plaintiffs are not owners of the suit property known as Land No Sergoit/Koiwoptaoi Block 10 (KARO) 47 and thus have no *locus standi* to institute the present suit. The defendants contended that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are the legally registered owners of the parcel of land known as Land No Sergoit/Koiwoptaoi Block 10 (KARO) 47 and the plaintiffs are not entitled to the prayers sought.
  4. In the Counter Claim, the defendants averred that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are the rightful owners of the said property known as Land No Sergoit/Koiwoptaoi Block 10 (KARO) 47 that was acquired by way of exchange when members of the various clans namely, Kapkiagut, Kakibit, Kapmosi that agreed to surrender the parcels of land, measured in "stones" in exchange of the KARO farm.



That it was agreed that each portion of “stone” would be compensated with 1.5 acres of land in the KARO FARM. Kapkiagut Clan was found to have 1 (one) “stone” and was therefore entitled to 1.5 acres, but was allocated 4.5 acres at the request of their representative. The 4<sup>th</sup> Plaintiff in the Counter claim was given 1 acre at her request and she is the auntie to the other Plaintiffs. It was averred that the defendants in the Counter Claim are not entitled to parcel number Land No Sergoit/Koiwoptaoi Block 10 (KARO) 47, but are entitled to parcel number 21 and 22, comprising the KARO Farm and measuring 2.02 acres each. The Plaintiffs further claimed for special damages arising from harassment and illegal arrests at the behest of the defendants and capped the same at Kshs 230,000.00. The Plaintiffs, thus prayed that the Court issues a declaration that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs in the Counter Claim are the legal owners of the Land No Sergoit/Koiwoptaoi Block 10 (KARO) 47, as the duly registered trustees for themselves and the 6 (six) others, namely;

- a. William Cheboi.
- b. Chirchir Cherutich.
- c. Amos Kwambai.
- d. Alfred Chirchir.
- e. Christopher Mengich.
- F. John Chuma.

The Plaintiffs further prayed for an order of permanent injunction restraining the defendants by themselves, their agents or servants from accessing, ploughing, planting, fencing, developing or interfering with the plaintiff's use and beneficial enjoyment of the land known as Land No Sergoit/Koiwoptaoi Block 10 (KARO) 47 as well as general damages. They filed a list of documents attaching the following among others;

- a. Copy of Title Sergoit/Koiwoptaoi Block 10 (KARO) 47.
- b. Copy of Map.
- c. Copy of List of parcels and their acreages at KARO Farm.
- d. Letter from the Chief, William K Chemwok dated September 11, 2015.
- e. Letter dated June 15, 2015 from KARO Farm Manager.
- f. List of beneficiaries of Parcel no 47.
- g. Letter dated July 11, 2012 and March 21, 2012 by Chief Mathew Kosgei.
- h. Copy of List of distribution of parcels.

The defendants also filed their witness statements in which the inter alia re-iterated the averments as contained in the defence and counter claim. They made a case for the defendant's Counter claim to be allowed as prayed and for the plaintiff's suit to be dismissed.

5. The Plaintiffs filed a Reply to Defence and Counter Claim on July 12, 2016 wherein they re-iterated the contents of the Plaint and stated that they are the children of the 4<sup>th</sup> Plaintiff, members of the Kapkiagut Clan, and currently are in use and occupation of Land No Sergoit/Koiwoptaoi Block 10 (KARO) 47, the suit land, and therefore have locus standi. They denied the contents of paragraphs, 8,9,10,11,12,13 and 14 of the defence and counter claim and stated that as members of Kapkiagut Clan, they are entitled to 26 acres in Land No Sergoit/Koiwoptaoi Block 10 (KARO) 47 having surrendered their land in Cheptebo. They further averred that they have been robbed of the land by the illegal



issuance of title, though they have continued to live and develop the said property to date. Further, regarding the costs/damages sought in regard to the pending criminal case, the plaintiffs averred that the criminal case is a matter of public interest and a defence of the cause of justice, and they cannot be faulted for reporting the matter to the police. They re-iterated the particulars of fraud as pleaded in the plaint and urged that the Counter Claim be dismissed with costs.

6. The matter proceeded for hearing wherein the Plaintiffs called 4 witnesses in support of their case. They were, William Kiptoo Kimaiyo, Saniako Cheboi, Daniel Kiprof Kitanui and Simion Kipkosgei Ruto. PW 1 testified on September 18, 2018 and he adopted his statement of June 21, 2017 wherein he indicated that the 1<sup>st</sup> defendant allocated them the suit parcel of land and they are therefore the legitimate owners having been on the said property for more than 26 years. In cross examination he admitted not seeing his name on the list of beneficiaries and agreed that whoever's name is not on the list is not entitled to the land. PW 2 also testified on the same day and adopted the contents of his statement as evidence in chief. In his testimony, he testified that the 1<sup>st</sup> defendant gave them land, but other people have since taken over the same. PW 3 equally adopted his statement and testified that the defendants illegally processed titles to suit property that is not theirs, and therefore the said title is not genuine. He stated that he deserved to be given 8 acres because he originally surrendered 4 stones (portions). In cross examination he also confirmed that his name was not on the list and neither was his father's. He indicated that he had no documents of ownership of the land and that one portion (stone) equaled 2 acres. He stated that they were allocated land reference number Sergoit/Koiwoptaoi Block 10 (KARO) 47 and his house is on the aforesaid property. He stated that the 1<sup>st</sup> defendant took their land in Cheptebo, and never gave them the land at KARO farm as agreed in the exchange negotiations. He stated that the land was exchanged in 1999 and is not aware how the green card opened on the December 21, 2001, has the names of Thomas Chebii. PW 4's testimony was that the plaintiffs gave out land to the 1<sup>st</sup> defendant and in exchange they were to be given land numbers 21, 22 and 27, KARO farm. In cross examination he stated that the land they gave up belonged to his father, and the three parcel of land they were shown in exchange being Sergoit/Koiwoptaoi Block 10 (KARO) 47, measured 20 acres. He stated that they have been in occupation of the said land for a very long time and have since developed it.
7. The defence called a total of 8 witnesses. DW 1 was Thomas Chebii who adopted his statement of June 15, 2016 as evidence in chief. He stated that the land was given to three clans namely, Kamosi, Kapkiyagut and Kakibit and that the right procedure was followed in obtaining titles to the said properties and therefore the plaintiffs' suit should be dismissed. He stated that plot Sergoit/Koiwoptaoi Block 10 (KARO) 47 belongs to him, Andrew Chebii and other members, while Plot Number 22 belongs to Kibosia Ruto, Clement, Toroitich and Saniego Kibor and the Kapkiyagut Clan. He testified that the reference of land as stones was because the land was rocky and giving stones meant they were giving land. He detailed how the stones in exchange of Plot 47 and the allocations of land to various families and/or clans was done. He also explained how the land measured in stones was converted into various portions of suit property. DW 2 testified on November 4, 2020 and he stated that the suit property is in the names of himself, the 2<sup>nd</sup> and 4<sup>th</sup> defendants and he produced the original title in respect of the same. The defendants 3<sup>rd</sup> witness was Andrew Kibiego Biwott who adopted the contents of his statement. In cross examination, he stated that Nicholas Biwott was his uncle and Cheserem was his grandfather. That his grandfather gave him 2 acres from Kapkit Clan, who had a large portion. He stated that there was no document from Cheserem giving him the two acres. He said he managed Biwott's properties and it is not true that he colluded with the other defendants to illegally acquire the land. DW 4, William Kurui, adopted the contents of his statement dated June 15, 2016 and in cross examination he confirmed having been a member of the committee that dealt with the compensation and surrender of the property. He stated that Cheserem was allocated the land



being Sergoit/Koiwoptaoi Block 10 (KARO) 47 by Kakibit Clan, and it was upon him to share the same as we wished. He stated that the land was allocated to them in 2000 and the disputes between the plaintiffs and the defendants over the suit property is fairly recent. DW 5 adopted his statement recorded on June 15, 2016 where he stated that the contested property herein does not belong to the plaintiffs. DW 6 was the area chief and adopted the contents of the statement as his evidence in chief. DW 7 equally adopted his statement as evidence in chief. Both DW 6 and DW 7 re-iterated that the Plaintiffs are not entitled to the suit property. That the transfer of the land was properly done and that the defendants whose names were on the title are the legitimate owners of the suit property. DW 8 was the Land Registrar Uasin Gishu, Sheila Mui, and she took the Court through her roles as the Registrar, and further indicated that the register of the land in question, Sergoit/Koiwoptaoi Block 10 (KARO) 47, was opened on the December 21, 2001. On October 19, 2015, the land was registered in the names of Thomas Chebii Changach, Michael Kipkoske Kwambai and Andrew Kibiego Biwott and the title deed issued. She produced copies of the green card and transfer forms used to effect the transaction. The witness notified the court that before the transfer, the Land Registrar had received a letter dated June 15, 2015 from KARO Farm instructing the office to transfer the land to the three named persons, to hold in trust for nine other persons. DW 8 also confirmed having received a letter from the chief dated September 11, 2015 with similar instructions as those from KARO, as well as another letter from KARO dated September 15, 2015, which contained the beneficiaries to the suit property. She confirmed that the three registered proprietors were to be trustees for the nine others, but that fact was not captured in the title. She stated she was not aware of the exchange of the property between Hon. Biwott and the Plaintiffs herein. She further testified that the land was agricultural and the receipt dated September 28, 2015 showed that the transfer fees was paid, and that the Land Registrar was no aware of the dispute between the parties herein, and therefore the transfer was effected on the basis of the documents presented.

8. Upon close of the defence case, the parties were directed to file written submissions. The 1<sup>st</sup> to 4<sup>th</sup> Defendants filed theirs on March 3, 2022 while the 5<sup>th</sup> and 6<sup>th</sup> Defendants filed theirs on May 17, 2022. There are no submissions by the Plaintiffs on record even though the court gave them ample opportunity to file. The filed submissions are as summarized herein below;
  - a. In their submissions, the 1<sup>st</sup> - 4<sup>th</sup> Defendants submitted that the suit property belongs to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as evidenced by the documents placed on record, as well as the fact that they have title over the said property, and also that they hold the title in trust for the other nine as authorized by the letter from the original owner KARO Farm, vide their letter in support of their registration. It was submitted that various clans namely Kapkiagut, Kakibiit and Kamosi Clans occupying some portions of land at Cheptebo in Kerio Valley had approached the 1<sup>st</sup> defendant to accept to take their “stones” which were not useful to them, and in exchange to give them portions of his parcel of land situate at KARO farm. According to the agreements each stone was to be compensated by 1.5 acres of land in exchange. Each clan surrendered their stones and were to get equivalent portions as follows;
    - i. Kapkiagut Clan 1 stone- 1.5 acres. At their request, the portion was added to 6 acres. Parcel Number 21 measuring 5 acres and Parcel Number 22 measuring 1 acre.
    - ii. Kakibiit Clan-66 Acres. (Parcel Number 48,49,50,51 and 52).
    - iii. Kamosi Clan-45 acres (Parcel 53).

It was submitted that there is no dispute regarding the stones surrendered by each clan. The only borne of contention is over the 20-acre portion (Parcel 47) surrendered by Kakibiit Clan at the request of the 1<sup>st</sup> defendant’s father. The defendants went ahead to submit that the



plaintiffs have not proved their claim and accordingly, the suit should be dismissed and their counter claim allowed. Reliance was placed on Migori Civil Appeal No 52 of 2017 *Daniel Otieno Migore v South Nyanza Sugar Co Ltd*. It was the defendants' submissions that the plaintiffs had failed to prove the allegations contained in the Plaint in so far as the particulars of fraud had not been sufficiently proven as required. It was further submitted that the Plaintiffs have not demonstrated that they surrendered any of their land parcels to be entitled to any portion of the suit property. It was submitted that in view of the failure by the Plaintiffs to prove the allegations made as provided for under Order 2 Rule 10 of the *Civil Procedure Rules, 2010* against the defendants, then the suit must be dismissed. The defendants cited the case of *RG Patel –vs- Lalji Mkanji* (1957) EA 314 in support of this proposition. The defendants submitted that they had led evidence to show that they are the rightful owners of the property since title is in the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, and that subject to the provisions of sections 24 and 26 of the *Land Registration Act, 2012*, the said property properly vests in the defendants and not the plaintiffs. It was finally submitted by the defendants that the stones were fully compensated and settled since there was no complaint ever lodged by the other parties against the defendants. They submitted that the plaintiffs' suit ought to be dismissed with costs.

- b. The 5<sup>th</sup> and 6<sup>th</sup> defendants submitted that there can never be a probable cause of action against them since the dispute is between the Plaintiffs and the 2<sup>nd</sup> to 4<sup>th</sup> defendants. That they would only come in to implement what the Court orders. They thus urged that their inclusion to these proceedings was unnecessary. They however went ahead to submit that there is no wrong doing on the part of the 5<sup>th</sup> and 6<sup>th</sup> defendants from the evidence presented before this Court, to demonstrate any wrong doing on their part, and therefore no case against them has been proved by the plaintiffs on a balance of probabilities. There was no collusion involving the 5<sup>th</sup> defendant as alleged by the plaintiffs, and accordingly there cannot be a valid claim against them. Further, the defendants pointed out that, it was not contested that before the transfer of the property to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, the land belonged to KARO Limited, who surrendered the same to the Government for conversion of the same from RTA to RLA, and thereafter its subdivision and transfer. That no encumbrances had been noted on the register prior to the transfer. The 5<sup>th</sup> and 6<sup>th</sup> defendants submitted that the 5<sup>th</sup> defendant followed due procedure, and acted on documents presented to the office, and the process leading to the issuance of title to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants was proper and without any illegality. Indeed, the defendants submitted there was no proof of any malice or fraud attributable to the 5<sup>th</sup> defendant to warrant the cancellation of the title as prayed by the plaintiffs. Reliance was placed in the authority of *Vijay Morjaria –v- Nansingh Madhusingh Darbar & Another* (2000) eKLR where it was held that fraud must be specifically pleaded and particulars of the fraud must be stated on the face of the pleading. It was thus the defendants' submission that the standard of proof of allegations of fraud as espoused in *Ndolo –v- Ndolo* (2008)1KLR (G&F)742 had not been met. In view of that, the 5<sup>th</sup> and 6<sup>th</sup> defendants urged that the suit ought to be dismissed with costs.

9. The following are the issues for the court's determinations;
- a. Whether the suit property belongs to the Plaintiffs and whether they have proved their case.
  - b. Whether the Defendant acquired title to the suit properties by fraudulent means.
  - c. Who is to bear the costs of the suit and counter claim?



10. The court has carefully considered the pleadings by the parties, evidence tendered, the submissions filed by the learned counsel, superior courts decisions cited thereon, and come to the following determinations;

- a. On the first issue, both parties contest that they are entitled to the suit property. Whereas the plaintiffs insist that they were granted the suit property vide an exchange with the 1<sup>st</sup> defendant, the 2<sup>nd</sup> to 4<sup>th</sup> defendants aver that no such exchange happened. Evidence was led by both parties in support of their respective arguments. From the evidence on record, it is clear that there was an exchange of land between the 1<sup>st</sup> defendant and persons living in Cheptebo belonging to the Kapkiagut, Kakibiit and Kamosi clans. The Plaintiffs and some of the defendants are members of the said clans. The 1<sup>st</sup> defendant offered the members of the three (3) clans alternative property in Sergoit in exchange of their defined Cheptebo land in Kerio Valley. Several lists of beneficiaries were tabled before this Court to demonstrate that the said property was divided and/or shared among the members of the respective clans according to the portion(s) measured in “stones”, surrendered in Cheptebo. According to the evidence tendered before this Court, upon the surrender of the Cheptebo properties, the three clans were allocated property in KARO Farm as follows; Kapkiagut, 6 acres, Kakibit, 66 acres and Kapmosi, 45 acres. The main issue therefore is whether the Plaintiffs are entitled to the entire parcel of land measuring 20 acres comprised of Sergoit/Koiwoptaoi Block 10 (KARO) 47, wherein they allege to have been in actual possession and cultivation over the last 26 years.
- b. It is not in doubt that there is consistent evidence that indeed the 1<sup>st</sup> defendant’s father, Mzee Cheserem, was allocated 20 acres of the said property in KARO farm, alongside the three named clans by the 1<sup>st</sup> defendant. It is also clear from the evidence on record that the late 1<sup>st</sup> defendant’s father went ahead later to allocate the said property known as Sergoit/Koiwoptaoi Block 10 (KARO) 47 to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and another nine (9) persons, whose names are not noted on the title document. The Plaintiffs were not therefore originally allocated the suit property as alleged. On the first issue, therefore the Plaintiffs have not proved ownership of the said property or led any evidence to prove that indeed the said property was allocated to them directly by the 1<sup>st</sup> defendant as alleged.
- c. On the second issue, the plaintiffs have alleged that the property was fraudulently transferred to the defendants without following due process as provided by law. ‘Fraud’ is defined in Blacks Laws Dictionary as;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

The Plaintiffs allege that due process and ascertainment of the rightful owners of the property was not adhered to by the defendants, prior to the transfer being effected. Further it was alleged that the documents used to effect the transfer were forgeries. It is settled law that any allegations of fraud must be pleaded and strictly proved. The Court of Appeal in case of *Kuria Kiarie & 2 Others -vs- Sammy Magera* [2018] eKLR held as follows:

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to



be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

In the case of *Munyu Maina –Vs- Hiram Gathiba Maina*, Civil Appeal No239 of 2009, the Appeal Court held that:

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

In this matter, it is clear that at the time the register to the suit property was opened on the December 2, 2001, as confirmed by the testimony of the Land Registrar, there was no encumbrances noted. The title was clean as at the time the Registrar received instructions to effect the transfer in favour of the defendants. It is not contested that there was a letter dated June 15, 2015 written by the Manager of KARO Farm to the District Land Registrar, Uasin Gishu County, directing the Registrar to effect transfer of the suit property to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. Further another letter dated 11<sup>th</sup> September 2015 was written by the Chief of Kibargoi Location, also directed to the County Land Registrar to effect transfer of the suit property to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, on the basis that the said transfer was in exchange of surrender of the property of the said defendants situated in Cheptebo Sub-Location. The foregoing documents and the Land Registrar’s evidence supports the defence and counterclaim of the 2<sup>nd</sup> to 4<sup>th</sup> defendants that they acquired title to the suit land lawfully and regularly. It was therefore incumbent upon the plaintiffs to lead appropriate and credible evidence to demonstrate that the transfer of the suit land in favour of the defendants, was as a result of a fraudulent scheme, so as to succeed in their claim. The Court in the case of *Kinyanjui Kamau –vs George Kamau* [2015] eKLR expressed itself as follows;

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo –vs- Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

This Court is of the view that the plaintiffs have not discharged their obligation as required by Order 2 Rule 4 of the *Civil Procedure Rules*, and section 107 of the *Evidence Act*, chapter 80 of Laws of Kenya, as regards the required standard of proof. Where fraud is alleged, it is not enough to simply infer fraud from the facts.



- d. The registration of a person as proprietor of a parcel of land, confirmed through the Certificate of title issued thereof, is conclusive proof that such person is the owner of the property under Section 26 (1) of the *Land Registration Act* No 3 of 2012 that provides as follows;

“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.”

In the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others* [2015] eKLR the court held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation.”

It is trite law that the certificate of title in the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is to be taken as *prima facie* evidence that the persons named as proprietor thereon are the absolute and indefeasible owners as per section 26 of the *Land Registration Act*. As confirmed by the Land Registrar in her testimony before the court, the title document was prepared and issued procedurally by the Land Registry, and in the absence of evidence to the contrary, the Court has no basis or reasons to find otherwise. It goes without saying that the Plaintiffs have failed to prove the alleged fraud against the defendants, and the evidence on record as led by the Plaintiffs is not sufficient to prove the particulars of fraud against the Defendants to the satisfaction of the court.

- e. That though the Defendants have established their entitlement to the suit land, they have failed to prove the claim of damages. The court does not wish to comment more on the issue as the related criminal proceedings was reported to be pending before the court.
  - f. That under Section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, it is provided that costs follow the events, and the successful party is ordinarily entitled to costs, except in exceptional circumstances, where the court may exercise its discretion. That in the instant matter the court finds no exceptional circumstance, and is of the view that the defendants are entitled to the costs of the suit.
11. The upshot of the foregoing is that this Court finds that the Plaintiffs have failed to prove their case to the standard required of a balance of probabilities against the defendants. On the other hand, the defendants have partly succeeded in their counterclaim against the plaintiffs. The court therefore orders as follows;



- a. That the Plaintiffs claim against the defendants be and is hereby dismissed.
- b. That the 2<sup>nd</sup> to 4<sup>th</sup> Defendants have partly proved their counterclaim to the standard required by the law and prayers (a) and (b) of the counterclaim dated the June 15, 2016 of declaratory and injunction orders sought thereon are hereby granted.
- c. That the Plaintiffs will pay the Defendants costs in both their suit and defendants' counterclaim.

It is so ordered.

**S. M. KIBUNJA, J.**

**DATED AND VIRTUALLY DELIVERED THIS 12<sup>th</sup> DAY OF OCTOBER 2022, IN THE PRESENCE OF;**

PLAINTIFFS .....

DEFENDANTS .....

COUNSEL .....

.....

.....

WILSON .. COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

