



REPUBLIC OF KENYA



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**Chepkwony v Rono & 3 others (Environment & Land Case 46 of 2017)  
[2022] KEELC 14760 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14760 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 46 OF 2017  
MC OUNDO, J  
NOVEMBER 10, 2022**

**BETWEEN**

**JOSEPH KIPYEGON CHEPKWONY ..... PLAINTIFF**

**AND**

**PHILEMON KIPKORIR RONO ..... 1<sup>ST</sup> DEFENDANT**

**RICHARD KIPYEGON RONO ..... 2<sup>ND</sup> DEFENDANT**

**DAVID KIPKIRUI RONO ..... 3<sup>RD</sup> DEFENDANT**

**SAMWEL KIBII LANGAT ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Plaint dated the May 2, 2017 and amended on the April 9, 2018, the Plaintiff herein sought for the following orders;
  - i. An order of permanent injunction restraining the Defendants by themselves, their agents, servants and any other person claiming through them from remaining on, cultivating, planting, putting into use, and/or in any manner whatsoever interfering with exclusive use, ownership, peaceful and quiet possession and occupying of the Plaintiff's land LR No Kericho/Tebesonik/310, measuring 4.45 hectares.
  - ii. An order of eviction to remove the Defendants by themselves, their agents, servants and any other person claiming through them from the suit land parcel LR No Kericho/Tebesonik/310, measuring 4.45 hectares.
  - iii. General and exemplary damages for trespass to be assessed by this Honorable Court.
  - iv. Cost of this suit.
  - v. Any other further relief that deems fit and just for Grant by this Honorable Court.



2. In response to the said Plaintiff, the Defendants herein filed their joint statement of Defence dated the May 19, 2017 on the May 22, 2017, wherein they denied the allegations contained in the Plaintiff's Plaintiff stating that the Plaintiff was not the proprietor of land parcel LR No Kericho/Tebesonik/310 and that they have been in occupation of their late father's land being LR No Kericho/Tebesonik/240. That the Plaintiff's suit did not disclose a reasonable cause of action, the same was frivolous vexatious, fatally defective, incompetent, bad in law and an abuse of court process. That the Plaintiff was not entitled to the reliefs sought and the suit should be dismissed with costs.
3. In their joint statement of defence to the amended plaintiff, the Defendants sought for the following orders as their Counter-claim:
  - i. An order(sic) injunction to permanently restrain the Plaintiff (now Defendant) either (sic) himself, his servants, agents, the employees or anybody else claiming through him from remaining on, cultivating, planting, putting into use, and/or in any manner whatsoever interfering with exclusive use, ownership, peaceful and quiet possession of the Defendants' (now Plaintiffs') land LR No Kericho/Tebesonik/240.
  - ii. An order restraining the Plaintiff (now Defendant) from claiming ownership remaining on, cultivating, planting, putting into use, and/or in any manner whatsoever interfering with exclusive use, ownership, peaceful and quiet possession of the Defendants' (now Plaintiffs') land LR No Kericho/Tebesonik/240.
  - iii. Cost and interest.
  - iv. Such other reliefs this court may deem fit to (sic) and just to Grant.
4. The Plaintiff thereafter filed his reply to the defence and defence to counterclaim on the June 18, 2018 denying the Defendants' assertion and reiterating on the contents of his amended Plaintiff thereby seeking that the Counter-claim be dismissed and judgment entered in his favour as prayed in the amended Plaintiff.
5. Subsequently after both parties complied with the provisions of Order 11 of the Civil Procedure Rules, and the matter was set down for hearing.

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

6. The Plaintiff Joseph Kipyegon Chepkwony testified as PW1 on the July 10, 2019 to the effect that he lived in Tebesonik location in Kericho County. That he was a farmer and that all the Defendants were his maternal cousins. That he had sued them with respect to land parcel no. Kericho/Tebesonik/310 which was registered in his name. He produced the certificate of official search as Pf exh 1.
7. He proceeded to testify that parcel No Kericho/Tebesonik/240 was registered to his latebrother Simon Kipkorir Chepkwony wherein he proceeded to produce the certificate of official search in respect of the same as Pf exh 2.
8. He testified that the 1<sup>st</sup> Defendant was the one in occupation of land parcel No Kericho/Tebesonik/310 wherein he had been in occupation since 2013 together with the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants.
9. He confirmed that he was in occupation of land parcel no. Kericho/Tebesonik/240 and that there had been no agreement between him and the 1<sup>st</sup> Defendant in respect of land parcel No Kericho/Tebesonik/310, land which he had entered without his consent.



10. His evidence was that the Defendants had tried to transfer the suit land into their names without success wherein they had filed a Succession Cause at Sotik Principle Magistrate's court claiming that they were beneficiaries of the estate of Simon Kipkorir now deceased. He produced the Certificate of Confirmation of Grant, issued in Sotik PM Succession Cause No 16 of 2013, as Pf exh 3 wherein he proceeded to testify that the property in issue therein had been parcel No Kericho/Tebesonik/240.
11. He confirmed that although parcel No Kericho/Tebesonik/240 was not registered in his name, yet he had been its in occupation for more than 50 years. That he had never lived on parcel No 310 notwithstanding the fact that it was registered in his name in 1968.
12. He further confirmed that his brother had been registered as the owner of parcel No Kericho/Tebesonik/240 in 1983 but that there had been a mix-up during the registration/adjudication wherein he was supposed to have been registered as the owner of land parcel No Kericho/Tebesonik/310.
13. That before the death of his brother Simon in the year 2012, there had been no dispute regarding the mix-up of their parcel numbers. That prior to the Defendants' acts of trespass on parcel No 310, his brother had been living on the said parcel of land with his family. That his late brother's family now lived on a parcel of land adjacent to parcel No. 310 after having been evicted by the Defendants.
14. That pursuant to the Defendants filing succession proceedings wherein they had posed as beneficiaries of his late brother's estate, they had been arrested, arraigned in court, charged and convicted with the offence of forgery as per the copy of Judgment in Sotik PM CR Case No 488/2014, which he produced as Pf exh 4.
15. He confirmed that the Defendants had constructed 6 temporary houses on parcel No 310 wherein they had even engaged in ploughing the land despite the fact that they had no legitimate claim to the suit property as they had no right to inherit land from his late brother. He sought for the Defendants to be evicted from the suit land and for general damages and costs.
16. In cross examination, the Plaintiff confirmed that the Defendants were his cousins by virtue of the fact that his mother and their father were siblings. That whereas Rael Cheruto Chepkwony Tapnyanguse was his mother, the Defendant's father was called Kiprono Arap Mosonik while their mother was called Rusi Mosonik. That his mother and Rusi did not stay on the suit land at the same time.
17. He confirmed that his mother had been the original owner of the suit land after she had cleared it when it was still a forest. That although he could not confirm it, his testimony was that the Defendant's father had been buried on the suit property.
18. He denied that his mother and the Defendants' father were entitled to equal shares in land parcel No 310 and that parcel No 310 had been a sub-division of parcel No 240. His evidence was that both parcels of land measured 4.5 hectares whereas parcel No 320 which was derived from parcel No 240 measures two acres.
19. That according to the green card for parcel No 240, whose register had been opened on September 17, 1968 to Kipkorir Chepkwony, his late brother, it measured 10.5 acres.
20. His evidence was that he now lay claim to parcel No Kericho/Tebesonik/310. That he was not aware that land parcel No 240 was supposed to be given a new number after its subdivision. That he did not know the parcels of land that bordered parcel No 240. That all that he knew was that he was the proprietor of parcel No 310. That in the year 2010, his brother had showed him the map which indicated that the parcel of land he was living on was parcel No Kericho/Tebesonik/240.



21. That the Defendants took occupation of land parcel No 310 in the year 2013. He confirmed that after he had realized that the land on which he was in occupation of had been wrongly reflected as parcel No 240, he did not apply for rectification. He stated that he had a right to lay claim on the property that was erroneously registered to his brother's name. That the Defendants had falsely claimed that they were beneficiaries of his late brother's estate.
22. His evidence was that in both his plaint and amended plaint, he had alluded to parcel No 310. That he had produced the certificate of confirmation of Grant obtained by the Defendants in respect of his late brother's estate, which Grant he had challenged.
23. He testified that before filing the Succession Cause at Sotik court, they had not had a family meeting. And when he was shown some minutes of a meeting held at the Chief's office on October 25, 2015, he had denied ever signing the same. He was categorical that the Defendants were wrongfully occupying his land and that he wanted them evicted therefrom.
24. He further testified that it had not been true that lightning had struck his land and divided it into two and that his title deed for parcel No 310 had been issued in 1983. His evidence was that he had the receipt which was issued upon payment for the title and which payment had been made by his late mother. His evidence was that parcel No 320 was registered to his mother.
25. That parcel No Kericho/Tebesonik/240 had initially been registered to his brother Kipkorir Chepkwony and he did not know why the entry had been cancelled in the green card. That it was not true that the transaction had been fraudulent but that the green card was not genuine. He confirmed that he did not have the green card for parcel No 310, but that he had the title which he had given to someone to use as security for a loan. He stated that the Case had now enabled them to rectify the error that had been made at the time of registration although he had not sought for the said order.
26. In re- examination, the Plaintiff reiterated that the initial registered owner of parcels No 240 and No 310 had been his late mother who had passed away about 18 years ago. That the green card in respect of parcel No. 310 showed that the first registered owner of parcel No 310 was Kipkorir Chepkwony, who was his brother. That entry No 3 in the green card indicated that Simon Kipkorir Chepkwony who was his brother was the registered owner of the land. That the cancellation therein could have been done in order to correct the names. That Parcel No 310 and No 240 were two distinct parcels of land and that parcel No 310 was not a sub-division of parcel No 240. That he had received his title before 1983. That according to Pf exh 1, the first registered owner of parcel No 310 had been Kipyegon Chepkwony, himself, the registration was done on September 17, 1968. He also confirmed that he did not go to the Land Control Board for verification.
27. Matayo Cheruiyot Korir testified as PW2 to the effect that he lived in Mosonik in Kericho County and was a farmer. He adopted his witness statement recorded on September 10, 2018 as his evidence in chief and proceeded to testify that the Plaintiff, Joseph Chepkwony Kipyegon was paternal uncle and that his father was called Simon Kipkorir Chepkwony.
28. That the Plaintiff had filed a case in respect of land parcel no. Kericho/Tebesonik/310 which was registered in his father's name. His evidence was that whereas parcel No 310 belonged to the Plaintiff, parcel No. 240 belonged to his late father.
29. He further confirmed that the Defendants were in occupation of parcel No 310 and that before they took occupation of the same in the year 2013, they had been living on a different parcel of land. That before then the said parcel of land had been occupied by him and his brother whereas the Plaintiff was using parcel No 240 which was registered to his father. (Simon Chepkwony- deceased).



30. He testified that he had learned that there had been a mix-up in the parcel numbers of the land belonging to his father and his uncle. That after the death of his father, the 1<sup>st</sup> Defendant had applied for letters of administration in Sotik Court purporting to be a beneficiary of his late father's estate. When they had discovered this ploy, they had instituted criminal proceedings against the Defendants for forgery wherein they had been convicted and sentenced to imprisonment. His evidence was that the Defendants are wrongfully occupying the land.
31. When cross-examined, the witness confirmed that whereas he lived in Litein, his children lived in Londiani. That the Defendants obtained a Grant in respect of his late father's estate after procuring a second death certificate. That although he did not apply for revocation of the Grant, yet he had lodged a caution over the suit land. He confirmed that the Defendants were his cousins and not his brothers. That the Defendants had chased him away from the suit land and after a fight he had ran away. That the old houses on the suit property were theirs and that the Defendants had occupied their land in the year 2013. He also confirmed that he had not applied for rectification of the title numbers but if given time, he would do so.
32. PW 3 was one Joshua arap Keino also confirmed that he lived in Tebesonik, was a farmer and was conversant with the matter before court. He then adopted his witness statements dated September 10, 2018.
33. In cross examination the witness confirmed that he had known the Plaintiff since childhood. That they had been circumcised together in 1959. That he also knew that land parcel No 310 was registered in the name of the Plaintiff. That the same had belonged to his late mother Tapyagnusei and that he was not aware that she owned it jointly with her brother. That he also knew parcel No 240 which belongs to the Plaintiff's brother. He confirmed that both these parcels of land had belonged to the Plaintiff's mother who had subdivided them and shared it between her sons. That although she had a title deed to the original land yet he did not know its number. His evidence was that the Defendants were in occupation of parcel No 310 and had houses thereon.
34. In re-examination, the witness confirmed that the Defendants had been living on land parcel 310 for 4 to 5 years now. He confirmed that he could tell where parcels No 310 and 240 are on the ground. That it had been long since he looked at them up but he was sure that these two parcels of land existed on the map. The Plaintiff thus closed its case.

### **Defense Case**

35. The defense case proceeded on the November 24, 2021 with the evidence of Philemon Kipkorir Rono who testified as DW1 to the effect that he lived in Tebesonik village within Bureti Sub-location in Kericho County and was a farmer.
36. He confirmed that he was the 1<sup>st</sup> Defendant herein and a cousin to the Plaintiff their parents having been siblings. He denied having trespassed on the Plaintiffs land and confirmed that he lived on parcel No 240. He produced the green card dated December 17, 2018 as Df Exh 1 to confirm that land parcel No Kericho/Tebeonik/240 was in existence and was registered to himself. That the land was transferred to him on February 20, 2014 and the same measured 10.5 acres.
37. He further testified that the land was previously registered to Simon Chepkwony, who was a brother to Joseph the Plaintiff, and his cousin. That they had filed a Succession Cause in Sotik wherein he had been issued a Grant herein produced as Def exh 2 and dated June 3, 2013 before he got the title. His evidence was that there had been no dispute between them and Joseph Kipyegon as the issues had been between them and Simon Kipkorir since 1985. That when Cheruiyot Arap Mosonik was alive,



- Joseph's mother (Rael Chemuto) had taken the land from them wherein they had taken occupation and had started living there, at a time when they (Defendants) also lived there. That initially before his father died, he had called Raeli to come and live on the land because she did not have anything. At the time, the title was kept by his mother Ruth Chebet Mosonik, although he was not sure.
38. That the title had been in the name of Simeon Kipkorir although initially it had been in his mother's name and Joseph's mother's name. That the two were therefore to share the land which they did. That they were to share the land parcel No 240 with the Plaintiff and the four Defendants.
  39. The land was divided into three and Joseph lived on the other land. That he was not aware and did not know title No 310 but only knew No 240 which was the whole portion of land and which had not been subdivided. That the Plaintiff should not enter their land. That Simeon had transferred the land parcel No 240 illegally to himself and that they had not subdivided the land. That now that the succession cause had ended and they had been given the Grant, that court ought to assist them to subdivide the land.
  40. In cross examination, the 1<sup>st</sup> Defendant reiterated that Parcel No 240 measured 22 acres as a whole. That he did not know parcel No 310 and that the Plaintiff had no share in parcel No 240 and neither did he live on parcel that land but on the land next to it. That Joseph's land did not share a common boundary with parcel No 240. That he knew a land belonging to Mr Ngetich as one which shared a boundary with parcel No 240.
  41. That they had not subdivided the land and the whole portion was still No 240. That the Plaintiff lived on land that he had considered to be No 240 as a whole and that it had been Simon Chepkwony who had illegally registered himself as proprietor of parcel No 240 in 1976.
  42. That his father had interest in parcel No 240 because it had belonged to their grandfather. That his father was now deceased but he did not know the year he had since he could have been 6 years old at the time. That he was now 52 years old. He confirmed that there had been a Succession Cause in relation to parcel No 240 as per the Grant produced in court. That Simon Kipkorir Chepkwony had grabbed their land, wherein after they had negotiated with his children who had asked them to file a Succession Cause.
  43. That it had been on the strength of the Certificate of Grant, that he had been registered as the proprietor of parcel No 240. That he was not aware that the land was reverted back to Simon. He confirmed that he had been charged in court in Sotik Cr Case No 488/2014 for forgery of the Certificate of Grant but he had not been fined. That they had been given a letter from the Chief and he had not represented himself as a son to Simeon.
  44. That he was a son to Arap Mosonik and the Chief knew that Simeon had taken their land. That he did not know that Simon had dependents but that the said Simon Kipkorir referred to his father as uncle, and he also called him uncle. That he did not know Matayo Cheruiyot Korir.
  45. He testified that he went to the lands registry and looked at the RIM of parcel No 240 wherein he had found that it measured 22 acres. He reiterated that the land had not been subdivided and that he and his co-Defendants occupied the whole of it and that the Plaintiffs also resided on the same. He confirmed that there had been a dispute between his father and Simon which dispute had been resolved in 1974 that the land was theirs. That the land had been illegally registered to Simon Kipkorir and he was aware. He also confirmed that there had been a time in 1985 when they had gone to court with Simon, but that he had not been asked to bring the documents to court.
  46. The 2<sup>nd</sup> Defendant testified as DW2 to the effect that he also lived in Tebesonik and was a farmer. He confirmed that he had recorded his statement on December 20, 2018 which he wished to rely on as his



evidence in chief. He confirmed that the Defendants were his brothers and that the Plaintiff's mother was a sister to their father.

47. In cross examination the 2<sup>nd</sup> Defendant confirmed that he knew Simon Arap Chepkwony was the son to his Aunty and a brother to Joseph Chepkwony (the Plaintiff). He confirmed that he lived at Tebesonik on land parcel No 240 whose acreage was 10.5 hectares. That the Plaintiff also lived on the same land although he could not tell how much land he occupied as the elders had subdivided the land into two. That he could not also tell how much land they occupied. That Simon's dependents lived on a different portion of land and he knew that Mathayo was one of his children. That he was not aware of parcel No 310 and that the only document he had seen had been the one that had called for the elders to sit and discuss the matter.
48. He also confirmed that they had not called the surveyor to point out the boundaries of No. 240 but that he knew the parcels of land surrounding no 240 to include 238, 239, 240 and 241 which land shared common boundaries. That apart from confirming from the neighbors, he had also seen parcels No. 310 on the map and that the same bordered parcel No 240, but on the ground, the same did not exist. That he was not aware that parcel No 310 was registered to the Plaintiff, but parcel No 240 had been their land since their father had been buried therein.
49. His evidence was that Joseph's mother had land where she was married and that the suit land was initially in his father's name but Simon had changed it into his name when they were young. That the change had not been effected during the lifetime of his father. That upon learning of the registration, they had gone to the D O's office in 1985. That they also came to Kericho Court where they had been told that our file had been misplaced.
50. The 3<sup>rd</sup> Defendant David Rono, testified that he lived in Tebesonik and was a farmer. That the Defendants were his brothers and the Plaintiff was his cousin. That he had recorded a statement on December 20, 2018 which he wished to adopt as his evidence. At this juncture the court noted that the Defendant had hearing impairment.
51. In cross examination, he confirmed that he had lived on parcel of Land No 240 since 1980 where his parents once lived. That Simon used to live on a different portion of land wherein he cultivated and that the land was far from parcel No 240. He confirmed that they lived together with Joseph Kipyegon.
52. He was adamant that they not negotiating about the land, and that if anybody wanted to be given anything, they ought to talk to them and not vice versa. He however confirmed that the land had not been surveyed and that he did not know the acreage he and his brothers occupied. The defense closed their case and parties filed the written submissions.

### **Plaintiff's Submissions.**

53. Pursuant to summarizing the evidence adduced in court by both the Plaintiff and Defendants, the Plaintiff framed his issues for determination as follows;
  - i. Whether the Plaintiff is the registered proprietor of all the property comprised in LR No Kericho/Tebesonik/310 and whether he holds any proprietary interest over the land comprised in LR No Kericho/Tebesonik/240.
  - ii. Whether the Defendants are trespassers on the Plaintiff's property.
  - iii. What remedies are available to the parties herein.
54. On the first issue for determination, it was the Plaintiff's submission that from the evidence submitted in court, there was no doubt that he was the legal registered proprietor of land comprised in LR No



- Kericho/Tebesonik/310. That this evidence was ascertained by the production of the title deed to the same having been registered as its proprietor on September 17, 1968. That the fact that he held title was prima facie evidence that he was the proprietor of the suit land as provided for under Section 26 of the *Land Registration Act*.
55. The Defendants did not present any evidence to prove that the Plaintiff's title was tainted with fraud illegality and/or irregularity, save for alleging that the title only existed on the map and that they were not in its possession. There was no evidence tendered to counter the Plaintiff's assertion on his title, use and occupation.
  56. On the other hand the Defendants claim over parcel of land LR No Kericho/Tebesonik/240 was premised on fraudulently procured letters of administration over the estate of Simon Kipkorir Chepkwony (deceased), the Plaintiff's brother and a father to PW2. That their claim to be beneficiaries of the estate of the deceased was not only misleading, but bordered on being an insult to the intelligence of any reasonable person.
  57. That it was not in contention that the Defendants had been convicted for forgery in the Sotik PM CR Case No 488/2014, where they had illegally obtained Letters of Administration interstate over the estate of the said Simon Kipkorir Chepkwony (deceased).
  58. That although the Defendants had laid at Counter-claim over LR No Kericho/Tebesonik/240 to the effect that the same was registered fraudulently in the name of Simon Kipkorir Chepkwony (deceased), yet no particulars of fraud were pleaded and no representative of the deceased's estate was sued. The Defendants failed to discharge the burden placed upon them as was held in the case of *Christopher Ndaru Kagina vs Esther Mbandi Kagina & Another* [2016] eKLR. That in the premises, the Defendants' Counter-claim ought to be dismissed.
  59. That as regards the ownership to LR No Kericho/Tebesonik/240, the Plaintiff submitted that they had been residing on the same for over 50 years and it mattered not therefore that there was a mix-up of the parcels during adjudication and registration of the two parcels of land as none of the Defendants lay any *bona fide* beneficial claim to any of the parcels in question. That indeed the evidence on record was that despite the mix-up of the parcels, the two brothers lived peacefully in their respective parcels of land before the Defendants' act of trespass. The Defendants therefore had no locus to interrogate the legality of the arrangements made by the Plaintiff and his brother Simon Kipkorir Chepkwony (deceased).
  60. On the second issue as to whether the Defendants were trespassers on the Plaintiff's property, the Plaintiff relied on the provisions of Section 3 of the *Trespass Act* to submit that indeed they had no bona fide interest and/or claim over the properties to justify their occupation and the mere denial of the Plaintiff's title did not negate their trespass.
  61. The Plaintiff relied on the case of *Park Towers Limited vs John Mithamo Njika & 7 others* [2014] eKLR to submit that trespass on land was actionable per se without proof of any damage. That although the Defendants' claim was that they were not in occupation of either parcel of land, yet from the evidence it was clear that they did not know for a fact on which parcels of land they were in occupation. That indeed the combined acreage of both parcels of land comprised 21.4 acres which was commensurate with the acreage that DW1 had averred to have consisted of what he considered to be parcel No 240 as a whole.
  62. That given the fact that the Defendants admitted that the boundaries of what they considered to be parcel of land No 240 had not be delimited and that the acreage of what they considered to comprise the said title having been larger than the actual the acreage, and combined the Plaintiff's evidence, was



prima facie evidence that the Defendants were in occupation of LR No Kericho/Tebesonik/310 albeit without the Plaintiff's authority. The Plaintiff sought that his amended plaint filed in court on April 10, 2018 be allowed as prayed.

### **Defendants' Submissions.**

63. The Defendants in opposition to the Plaintiffs claim and in support of their counterclaim submitted that the Plaintiff had presented himself as an only witness and confirmed that the Defendants were his cousins wherein he had produced a search certificate for land parcels LR No Kericho/Tebesonik/310 and LR No Kericho/Tebesonik/240 as Pf exh 1 and 2 respectively and had stated that he was proprietor to land parcel LR No Kericho/Tebesonik/310 and that land parcel LR No Kericho/Tebesonik/240 was registered to his brother Simon Kipkorir Chepkwony (deceased) but that this was a mistake as the proprietor's names to the two parcels of land had been interchanged. The Defendants' Submission Therefore was that the Plaintiff had no authority to sue on behalf of his deceased brother.
64. That the Plaintiff had sought for orders that were untenable as it lacked clarity, certainty, was not genuine and did not disclose fully what the Plaintiff was seeking. That the Pf exh 4 were proceedings touching on the succession of LR No Kericho/Tebesonik/240 which had no bearing to the present proceedings where the Plaintiff was seeking redress for claim in LR No Kericho/Tebesonik/310.
65. The Defendants then went on to reproduce the evidence they had adduced in court verbatim before concluding that the Plaintiff had failed to adduce evidence in support of his claim. That the Plaintiff had not come to court with clean hands but to confuse the court in an attempt to use it to achieve an ulterior motive best known to him. That no survey report had been tendered in as evidence that would have assisted the court to know the situation on the ground so as to give the court a chance to weigh the evidence adduced. Further the Plaintiff had not demonstrated how he came into possession and how the Defendants had affected his proprietary rights. That the Plaintiff had presented the case on behalf of another person who was not party to the proceedings and was not called as a witness to testify. Lastly that the Defendants' counterclaim was not challenged. The Defendants sought that the Plaintiffs claim be dismissed and their counterclaim be upheld.

### **Determination.**

66. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. From the summation of the same, the Plaintiff herein seeks for permanent orders of injunction against the Defendants prohibiting them from interfering whatsoever with land LR No Kericho/Tebesonik/310, measuring 4.45 hectares. He also seeks for eviction orders against the said Defendants.
67. In their defence and counterclaim, the Defendants (now Plaintiffs) seek equal orders of permanent injunction against the Plaintiff (now Defendant) in relation to parcel of land known land LR No Kericho/Tebesonik/240, orders restraining the Plaintiff (now Defendant) from claiming ownership remaining on, cultivating, planting, putting into use, and/or in any manner, dealing with the land. They also seek for eviction orders against the Plaintiff (now Defendant) from therein.
68. In support of his case, Plaintiff's case is that he had sued the Defendants, who were his cousins, in respect to land parcel No Kericho/Tebesonik/310 which was registered in his name. He produced the certificate of official search as Pf exh 1.
69. His evidence was that while he was in occupation of parcel No Kericho/Tebesonik/240 registered to his deceased brother's name Simon Kipkorir, the said deceased brother was in occupation of his



land (Plaintiff's) No Kericho/Tebesonik/310 and that the two families had lived peacefully on the said parcels of land which had been mistakenly interchanged the time of registration.

70. That it had been upon the death of his brother Simon in the year 2012, that the Defendants herein trespassed on his land No Kericho/Tebesonik/310 and unlawfully took possession of the same in the year 2013. That the Defendants had then tried to transfer parcel No Kericho/Tebesonik/240 into their names without success to a point that they had filed Succession Cause No 16 of 2013 at Sotik law Court claiming to be beneficiaries of his brother wherein they had been issued with a certificate of confirmation of Grant which was produced as Pf exh 3. That this action led to their arrest wherein they had been, arraigned in court, charged and convicted with the offence of forgery. The copy of the judgment in Sotik PM CR Case No 488/2014 was produced as Pf exh 4.
71. The Defendants counterclaim the other hand was that they had not trespassed onto the Plaintiffs parcel of land but that they were in occupation of parcel No Kericho/Tebesonik/240. 1<sup>st</sup> Defendants had produced the Green Card dated December 17, 2018 as Df Exh 1 to confirm that land parcel No Kericho/Tebesonik/240 was in existence and was registered to himself upon its transfer on February 20, 2014. He had conceded that the land was previously registered to Simon Chepkwony, a brother to the Plaintiff and after his demise they had filed a Succession Cause in Sotik wherein he had been issued a Grant, which he produced as Df exh 2 and dated June 3, 2013, before he got the title. That the said Grant was confirmed on January 9, 2014 as evidenced by Df exh 3, to hold in trust for the other Defendants.
72. The Defendant's case was that in 1976, Simon Chepkwony had illegally registered himself as proprietor of parcel No Kericho/Tebesonik/240 which measured 22 acres land which belonged to their grandfather. That they did not know parcel No 310.
73. Indeed from the narration above what comes out for determination is the following ;
- i. Whether the Plaintiff is entitled to the orders sought in his Plaintiff.
  - ii. Whether the Plaintiffs' in the counterclaim are lawful and legal proprietors of No. Kericho/Tebesonik/240.
  - iii. Whether the Defendants are entitled to the orders sought in their counter claim.
  - iv. Who is entitled to pay the costs of the suit.
74. I note that the above captioned properties were registered under the repealed [Registered Land Act](#) which is now governed by The [Land Act, 2012](#) and The [Land Registration Act, 2012](#). Indeed the law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the [Land Registration Act](#) provides as follows:
- “The Certificate of Title issued by the Registrar upon registration, 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 the 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



- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme"

75. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of the same. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party, and the second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
76. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.
77. I have considered with great anxiety the facts of this matter and indeed it is not in contestation that the suit property herein being No Kericho/Tebesonik/310 measuring 4.45 hectares was registered to the Plaintiff on September 19, 1973. It is further not in dispute that his late brother Simon Chepkwony had been living on the said land and after his demise in 2012, the Defendants herein trespassed thereon in 2013, put up temporal structures and took possession of the land.
78. Based on the evidence adduced above, and in relying on Section 26(1) of the *Land Registration Act*, the Court finds that the Plaintiff has indeed satisfied the legal proviso that he is the proprietor of LR Kericho/Tebesonik/310 measuring 4.45 hectares and hence has absolute ownership including all rights and privileges appurtenant to it.
79. As to whether the Defendants have encroached on the suit land, the uncontroverted evidence adduced by the Plaintiff as well as the production of the Certificate of Lease are proof enough that indeed the Defendants had encroached on the Plaintiff's land.
80. Section 24 (a) of the *Land Registration Act* stipulates as follows:
- ' subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto....'
81. These provisions empower the Plaintiff by virtue of being registered owner of the suit land with vested rights and privileges therein and which no person should interfere with it.
82. I find that the Plaintiff is indeed entitled to protection by the law from the Defendants who have interfered with his rights and privileges over the suit land. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of *Park Towers Ltd v John Mithamo Njika & 7 others* [2014] eKLR where JM Mutungi J, stated:-
- “I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case...’



83. In the case of *Duncan Nderitu Ndegwa v KP&L Company Limited & Another* (2013) eKLR P Nyamweya J (as she then was) held:-

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ trespass”

84. The Defendants’ position in their counterclaim is that although parcel of land No Kericho/ Tebesonik/240 belonged to their grandfather, the deceased Simon Kipkorir Chepkwony had fraudulently caused the same to be registered in his name. Having given evidence that there was fraud and illegality on the part of Simon Kipkorir Chepkwony (deceased) in the manner in which he had obtained the suit land, the onus was on the Defendants (now Plaintiffs) to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In *RG Patel v Lalji Makanji* 1957 EA 314, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

85. The Defendants (now Plaintiffs) neither sued the legal representatives of Simon Kipkorir Chepkwony (deceased), distinctly pleaded the facts on which fraud was alleged against him nor proved those allegations to the required standard. I therefore find that this limb of defence and counterclaim has no legal leg upon which to stand on.

86. The Defendants (now Plaintiffs) sought for adverse orders against the Plaintiff (now Defendant) as herein above stated in relation to land parcel No Kericho/ Tebesonik/240 wherein they exhibited a green card dated December 17, 2018 as Df exh 1 to confirm that land parcel No Kericho/ Tebesonik/240 was in existence and was now registered to the 1<sup>st</sup> Defendant (now Plaintiff) to hold in trust for the rest of the Defendants (now Plaintiffs.) after a successful Succession Cause in Sotik PM Succession Cause 16/2013 wherein he had been issued with a Grant (sic) dated June 3, 2013 and produced as Df exh 2. That the said Grant (sic) had been confirmed on January 9, 2014 as evidenced by Df exh 3 and a title issued pursuant to a transfer that had been effected on February 20, 2014.

87. The Plaintiff (now Defendant) has attacked the Defendants’ (now Plaintiffs’) root of title to the effect that it was obtained illegally after the Defendants (now Plaintiffs) filed Succession proceedings wherein they had posed as beneficiaries of his late brother’s estate. That they had been discovered wherein they had been arrested, arraigned in Sotik PM CR Case No 488/2014. I have looked at the copy of the judgment which was produced as Pf exh 4 and the same confirms that the Defendants (now Plaintiffs) had been charged and convicted on two counts being; the offence of forgery a death certificate No 3371 of the late Simon Chepkwony, count II was the offence of giving information to a person the employed in the public service who was the Sotik Magistrate to the effect that they were the true beneficiaries of the late Simon Chepkwony thus causing the Magistrate to give a Grant of Succession to plot No Kericho/ Tebesonik/240.

88. The Court of Appeal in the case of *Munyuu 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.’

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

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

90. Whereas the law respects and upholds sanctity of title, it also provides for situations when title shall not be absolute and indefeasible as provided under Section 26 (1) of the *Land Registration Act* (supra). I am satisfied that there has been sufficient evidence led and proved that the Defendants’ (now Plaintiffs’) title to parcel No. Kericho/Tebesonik/240 was acquired fraudulently, through misrepresentation, illegally, un-procedurally, and through a corrupt scheme.

91. In the present case, the Defendants (now Plaintiffs) cannot shield themselves with the title that they hold to parcel No Kericho/Tebesonik/240 because it is therefore clear that the said title can be and is hereby impeached under section 26(1) (a) of the Act as they were party to the fraud and/or misrepresentation.

92. The net result is that I hold the Plaintiff in the main suit has proved his case on a balance of probabilities as against the Defendants and accordingly enter judgment in favor of the Plaintiff as follows:

- i. An order of permanent injunction is hereby issued restraining the Defendants by themselves, their agents, servants and any other person claiming through them from remaining on, cultivating, planting, putting into use, and/or in any manner whatsoever interfering with exclusive use, ownership, peaceful and quiet possession and occupying of the Plaintiff’s land LR No Kericho/Tebesonik/310, measuring 4.45 hectares.
- ii. Defendants by themselves, their agents, servants and any other person claiming through them do forthwith vacate land parcel LR No Kericho/Tebesonik/310, measuring 4.45 hectares within 30 days upon delivery of this judgment and if they fail to so vacate, an order of eviction be issued against them.
- iii. The Defendants shall pay to the Plaintiff Kshs 100,000/= as general damages for trespass with interest from the date of this judgment, at Court rates, till payment in full.
- iv. On the other hand, I hold the Plaintiffs’ claim in the counter claim lacks merit and the same is dismissed with orders that the transfer of title LR No Kericho/Tebesonik/240 from the deceased Simon Kipkorir Chepkwony to the Plaintiffs in the counterclaim as well as the issuance of a title deed to the Plaintiffs in the counterclaim on 20<sup>th</sup> February 2014 is hereby canceled and title restored back to Simon Kipkorir Chepkwony.
- v. The County Land Registrar Kericho County or the land Registrar in charge of the area which the suit parcel is situate shall be served with these orders for compliance.
- vi. Cost is herein awarded to the Plaintiff in the main suit.



**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 10TH DAY OF  
NOVEMBER 2022**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

