



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Waweru v Owuor (Environment & Land Case 258 of 2017)  
[2025] KEELC 417 (KLR) (5 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 417 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 258 OF 2017**

**JM ONYANGO, J**

**FEBRUARY 5, 2025**

**BETWEEN**

**IRENE WANJIKU WAWERU ..... PLAINTIFF**

**AND**

**PATRICK OWUOR ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 17<sup>th</sup> July, 2017 and amended on 22<sup>nd</sup> June, 2018 the Plaintiff filed suit against the Defendant seeking the following reliefs:-
  - a. An order of permanent eviction from parcel of land number Eldoret Municipality Block 20 (Kapyemit)/124 measuring 0.26 HA.
  - b. An order that the defendant is a trespasser to the subject suit land and all developments on the said parcel erected by the defendant be demolished.
  - c. An order of permanent injunction against the defendant his servant and or agent from encroaching upon, trespassing or developing on or from any other way utilizing the plaintiffs parcel of land known as Eldoret Municipality Block 20 (Kapyemit)/124 measuring 0.26 HA.
  - d. An order that the county surveyor and land registrar Uasin Gishu County to visit the site and measure the said parcel of land being Eldoret Municipality Block 20 (Kapyemit)/124 measuring 0.26 HA and ascertain its true position and acreage
  - e. Costs incidental to this suit.
  - f. Any other relief that this Honourable court deems fit and just to award.
2. The Plaintiff avers that she purchased the parcel of land known as Eldoret Municipality Block 20 (Kapyemit)/124 (the suit property) in 2007 from Cecilia Gathoni. The land was transferred to her by



the Administrators of the estate of the initial registered owner, Samuel Gichuki Kanithi, on 4<sup>th</sup> May, 2016. She alleges that in 2007 she realised that the land only measured half of what she purchased, she informed the Defendant about it, but he dismissed her claim. The Defendant allegedly occupies Eldoret Municipality Block 20 (Kapyemit)/231 and they share a common boundary. As she did not have the documents to prove the encroachment, the Plaintiff waited until the succession cause ended and the land was transferred to her. The Plaintiff avers that after she obtained the relevant documents, she asked the Defendant to vacate the land but he refused necessitating this suit.

3. In his Amended Defence dated 16<sup>th</sup> July, 2018 the Defendant denied the allegations set out in the Plaint. He averred that the Plaintiff's title was acquired fraudulently, with the particulars of the alleged fraud being that: there was no agreement for sale between Samuel Gichuki and the Plaintiff; No consent of the Land Control Board was obtained prior to the transfer; the Plaintiff never purchased 0.5 acres as alleged or at all; and that the Plaintiff purchased only 0.2 acres from one Gathoni and not the late Samuel Gichuki. The Defendant averred that the prayers sought in the Plaint are not available to the Plaintiff as she has no proprietary interest over the suit property. He prayed that the Plaintiff's suit be dismissed with costs.
4. In response to the Amended Defence, the Plaintiff filed a Reply to Defence dated 18<sup>th</sup> July, 2018. She reiterated the contents and averments in her Amended Plaint and denied entirely the allegations in the Amended Defence. She also denied in toto the allegations of fraud particularised therein and prayed that the Defence be struck out and for judgment in her favour.

### **The Evidence**

5. Hearing of the suit commenced on 24<sup>th</sup> February, 2020 with the Plaintiff herein testifying as PW1. Shee gave a sworn testimony and adopted her two witness statements dated 17<sup>th</sup> July, 2017 and 16<sup>th</sup> March, 2018. She testified that she bought the land from Cecilia Gathoni on 16<sup>th</sup> November, 2007 and has known the Defendant since then. She produced the Agreement for sale as PEXb1. She confirmed that the land was in the name of Samuel Gichuki Kabithi as shown in the search dated 19<sup>th</sup> March, 2013. The Plaintiff testified that she initiated succession proceedings over the estate of Samuel Gichuki and a grant was issued to Hannah Wambui Gichuki and Diana Nyambura (PEX2) and confirmed on 15<sup>th</sup> February, 2016 (PEX3).
6. It was PW1's testimony that the parcel in dispute was given to Hannah Wambui per the search dated 19<sup>th</sup> September, 2013 (PEX4). PW1 explained that Samuel Gichuki had purchased the land from one Solomon as evidenced by the Agreement dated 6<sup>th</sup> December, 1983 (PEX5). Samuel Gichuki then sold ½ an Acre to Clement Mambo vide an Agreement dated 22<sup>nd</sup> October, 1994 which she had obtained from Hannah. The Plaintiff produced the Green card showing that the land was transferred to her on 4<sup>th</sup> May, 2016 as PEX6, the Land Control Board (LCB) Consent for the transfer and the application thereto as PEX7-a and PEX7-b respectively. PW1 asserted that she bought 0.26 Ha and that is what was transferred to her. She later found that part of her land had been sold to the Defendant by one Mama Mghosi who lived in the neighbourhood and used to farm on the suit land. The Defendant's encroachment into the land was reported to the Chief who held several meetings to resolve the dispute to no avail.
7. PW1 testified that she engaged a surveyor who made a report dated 1<sup>st</sup> September, 2016 (PMFI8) and she also presented the extract of the lands map (PMFI9). She testified that the piece of land is less on the ground because the Defendant has the rest. PW1 produced a Search (PEX 10) and a copy of the title deed for the suit property in her name (PEX11). She testified that the agreement she got from Hannah showed that one Clement Mambo had bought land from Samuel Gichuki. She added that



- the said Clement Mambo died in 1998 and could not have sold the land to the Defendant in 2007. She denied obtaining the land through fraud, and stated that she had availed the sale agreement with Cecilia and the LCB Consent for the transaction.
8. On cross-examination, PW1 testified that when she visited the land she found someone tilling it, however, Cecilia told PW1 that she had allowed that person to till the land. She admitted that she had not been given possession of part of the land by the time the succession cause was filed. Further, that she did not have the agreement between Cecilia and Gichuki to know the acreage and purchase price. She testified that although Cecilia gave the advocates that agreement to use when drafting the agreement between her and Cecilia, PW1 said that she could not get a copy of it. She however insisted that Cecilia had bought 0.26 Ha. She testified that what the Defendant is occupying is part of what Mama Mghosi was occupying, while PW1 was occupying the rest. She indicated that she had engaged a surveyor but he could not show her the boundaries, so she just erected a fence. That the Defendant also brought a surveyor called Shadrack, but he also did not mark the boundary. She was not aware whether Clement and the Defendant had any issues over the boundary.
  9. When she was re-examined, PW1 testified that she found Mama Mghosi tilling without a fence, but on her second visit the Defendant had erected one. PW1 told the court that she had planted trees along the fence for privacy, but that is not where the boundary is. She also testified that Cecilia had pointed out the land to her but the beacons were removed. Further, that she did not know Shadrack the village elder was a surveyor.
  10. The Plaintiff called Diana Nyambura, who testified as PW2 and adopted her statement dated 19<sup>th</sup> March, 2018. PW2 stated that she knew the Plaintiff as they sold her a piece of land that belonged to her late father. Her father had bought the land in 1983 from Ngelichei, then sold 0.22Ha thereof to Clement Mambo and 0.26Ha to Cecilia Gathoni. PW2 testified that she was a witness to this later agreement to Cecilia at an advocates office. She has visited the land that the Plaintiff got, but it is less than what her father sold to Cecilia as part of it is occupied by the Defendant. PW2 also said that she had informed Shadrack that the Defendant was occupying part of the Plaintiff's land. She admitted that they filed a succession cause and transferred the suit land to the Plaintiff.
  11. PW2 testified that she was called to the Defendant's Advocate's office and signed a document. She later realised that the document indicated the land sold as 0.2 Acres, which was a mistake. She told this court that she went back to the said Advocate's office and pointed out the mistake and was assured it would be changed, but the same was never changed. She produced an affidavit clarifying this issue dated 22<sup>nd</sup> January, 2018 as PEX12. She went on to say that the dispute was heard by the village elders and the Plaintiff was asked to vacate the land. She denied knowing the Defendant.
  12. PW2 was cross-examined by the court and she testified that she was born in 1977 and got her first ID card in 1994. On cross-examination by Mr. Tororei for the Defendant, PW2 testified that she dropped out of school in Form 2 and could not understand English. She testified that she signed the witness statement in his office willingly but did understand the place written 0.2 Acres, although she understood all the other areas. According to her, she got to know the Defendant in 2016 when she went to the land and found him encroaching on the Plaintiff's land. That at the time, the Plaintiff was on the land and it had already been transferred to her. She was re-examined and she testified that she knew the boundaries between the land sold to Cecilia and that sold to Clement Mambo.
  13. Mr. Muhoro Muriuki, an advocate of the High Court of Kenya in Eldoret testified under oath as PW3. His testimony is that on 16<sup>th</sup> November, 2007 one Lucy Nderitu informed him that Cecilia Gathoni Kiarie was selling land, being the suit property herein, to Irene Wanjiku Waweru for KShs. 280,000/, which amount was paid at that time. He drew the agreement, the parties signed it and it was



- witnessed by the said Lucy Nderitu, who was known to PW3, and one Ann Wambui, the widow of the then registered owner, late Samuel Gichuki. PW3 explained that the Agreement for sale dated 16<sup>th</sup> November, 2007 indicating that the portion sold was 0.26 Ha had already been produced as PEXB1.
14. When cross-examined, PW3's testimony was that the land the seller was selling is the land that she had bought. He said that he was shown the previous agreement between Cecilia Gathoni and Samuel Gichuki but he did not refer to it. He testified that the agreement was stamped by him but did not bear his signature. On re-examination, he confirmed that although the agreement did not have his signature, he is the one who stamped it and the parties signed it in his presence.
  15. PW4, Boniface Olwochi Wanyama, is a Surveyor whose license Number is 228 (PEX13). His testimony is that he was engaged by the Plaintiff in May, 2016 to demarcate the suit property. He visited the land on 28<sup>th</sup> May, 2018 accompanied by the Plaintiff, her Advocate Mr. Odour, the Defendant and security officers. He demarcated the 0.26 Ha and put beacons which were disputed by the Defendant, hence he wrote to the County Land Registrar, Uasin Gishu county to intervene. He produced his report as PEX8 as well as an extract of the map and the RIM as PEX 9. He told this court that the Defendant claimed to occupy plot no. Eldoret Municipality Block 20 (Kapyemit)/231. Further, he established that the Plaintiff was only occupying half of what is contained in her title, yet the Defendant had the remaining half, and there was a structure belonging to the Defendant inside the suit property.
  16. PW4 was cross-examined by the Defendant and he testified that he measured the size of the land vis-a-vis the title. He also testified that when he went to the land there was a hedge, but it was not in line with the title, he thus used the Plaintiff's title to get the correct size of the land.
  17. The Plaintiff's final witness was Emma Sitienei, a Land Registrar in Uasin Gishu County who also testified under oath as PW5. She produced a certified copy of the green card (PEXb6). She explained the history of the land from opening of the register on 26<sup>th</sup> August, 2013 to its transfer to the Plaintiff on 4<sup>th</sup> May, 2016, as well as the restriction placed by the Plaintiff on 9<sup>th</sup> April, 2014. She testified that the names of Clement Mambo, Rose Khavere Mambo and Patrick Owuor do not appear on the register. In support of her testimony, PW5 produced the transfer between Hannah and Irene dated 11<sup>th</sup> March, 2016 (PEX14), the application for LCB Consent and letter of consent issued on 24<sup>th</sup> March, 2016 already produced as PEXb7(a) and (b) respectively, as well as the title deed. She testified that her records showed no fraud as due process was followed, and that the Plaintiff is the owner of the land.
  18. PW5 was also cross-examined by the Plaintiff, to which she testified that no dispute was reported to their office, not even from the surveyor. That according to their records, the title was surrendered for purposes of transfer not subdivision. On being re-examined, PW5 told the court that the land has never been subdivided since 1993. That the suit land was first transmitted then transferred, and that consent was obtained before the transfer in this instance. After PW5's testimony, the Plaintiff closed her case.
  19. The Defence case commenced on 25<sup>th</sup> September, 2023 when the Defendant took the stand to testify under oath in support of his case as DW1, and adopted his witness statement dated 27<sup>th</sup> February, 2018. His testimony is that he purchased a portion of land measuring 100ft by 200ft from Rosemary Khavere Mambo vide an agreement dated 5<sup>th</sup> September, 2007 (DMFI1) at KShs. 250,000/- which he paid on signing. Shadrack Ruto, the secretary of the farm, demarcated the portion, showed him his land and he fenced it while the remainder was occupied by the vendor. DW1 explained that in 2007, he had a boundary dispute with his neighbour called Prof. Odhiambo but they resolved it and agreed on the position of the fence. DW1 stated that when he bought the land, it was registered in the name of Samuel Kabithi Gichuki, and that Rosemary took him to see the widow of Samuel Kabithi, who told him that the land would be transferred to him after succession.



20. It is DW1's testimony that after Prof. Odhiambo died, his widow Irene Wanjiku Waweru, the Plaintiff herein, obtained a title deed over DW1's land in her name. The matter was referred to the Chief who resolved that they should each stay on their reference portions. DW1 further testified that he called a surveyor to establish the boundary but the Plaintiff refused to cooperate, and later filed the suit herein. He acknowledged that he never obtained title as Rosemary Mambo who sold the land to him passed away, but added that Prof. Odhiambo only bought  $\frac{1}{4}$  an acre but his widow was wrongfully claiming a bigger share which includes his portion. He produced the documents in his list of documents as DEX 1, 2 and 3; and the Chief's letter as DMFI4.
21. When he was cross-examined, DW1 testified that he did not know the size of Samuel Kabithi Gichuki's land, but he was aware that Clement Mambo bought 0.5 of an acre in 1984 and Samuel remained with  $\frac{1}{2}$  an acre. He also testified that to his knowledge, Clement Mambo bought an additional portion in 1986 whose size he did not know. DW1 further told this court that Clement Mambo was issued a title deed on 16<sup>th</sup> September, 1996 for 0.22 acres, but he did not know if the additional portion was included in the title. He told the court that he bought the land from Rosemary Khavere Mambo, the widow of Clement Mambo and admitted that at the time of purchase, he was not shown a grant of letters of administration. He also admitted that Clement did not finish paying for the additional portion. DW1 testified that per the agreement, he bought 100ft by 200ft although he actually bought  $\frac{1}{4}$  of an acre and that he got the parcel No. from Hannah Kabithi. He however admits he never saw the title deed in the name of Samuel, but that his widow told him she had it.
22. DW1 accepted that he had nothing to show that Prof. Odhiambo bought land. He admitted knowing Cecilia but that he was unaware she had sold land to the Plaintiff. He was shown PEX1 and confirmed that Prof. Odhiambo signed the agreement as a witness. DW1 also confirmed that the Plaintiff's name does not appear in the minutes of the Chief's meeting held in 2016, and neither did anyone from Kabithi's family attend. DW1 acknowledged that the suit property has never been in Clement Mambo's name. DW1 was not re-examined.
23. DW2, Shadrack Kipkemboi Ruto, testified under oath and adopted his witness statement filed in court on 22<sup>nd</sup> August, 2023. His testimony is that he was the secretary of Kapyemit Farm from 1963-1993. He is thus familiar with the suit land and is aware of the dispute between the parties herein. He explained that the suit property measuring 1 acre belonged to Samuel Gichuki Kabithi, who sold 0.5 Acres to Clement Mambo in 1984, and who in turn sold 0.3 Acres to the Defendant in 1993. Clement Mambo later bought an additional 0.3 Acres from Samuel and according to DW2 Samuel was left with 0.3 of an Acre while Clement remained with 0.2 of an Acre. DW2 testified that after the Defendant bought the land, he took possession immediately and has been living thereon since 2007. He denied knowing the Plaintiff herein.
24. DW2 was examined by Mr. Oduor for the Plaintiff and he reiterated that he was the Secretary of Kapyemit Farm form 1963-1993 but he had no document to confirm this. He admitted that he had indicated in his witness statement that Samuel Gichuki was a member of Kapyemit Farm and had purchased the land from the farm. DW2 was shown the agreement between Samuel Gichuki and Solomon Ngelechei Kimaiyo and he confirmed that Samuel had bought the land measuring 1.15 Acres from Kimaiyo. DW2 reiterated that Samuel sold  $\frac{1}{2}$  an acre to Clement Mambo, but he could not remember when Clement bought the additional 0.3 acres. DW2 told this court that Clement died in 1998, and explained that it is his family that sold the land to the Defendant in 2007
25. DW2 asserted that he was present when the Defendant bought the land and clarified that even though the Defendant's agreement says he bought 50ft by 100ft, the Defendant actually purchased 0.3 of an acre. DW2 further testified that the Clement ought to have obtained a title for 0.8 Acres in 1996. In



- contrast, he also testified that he did not know the acreage of the land belonging to Clement according to the title. He then went on to testify that Clement received a title for the 0.5 Acres (0.22 Ha) on 16<sup>th</sup> September, 1996, and bought the additional 0.3 Acres thereafter. He conceded that the Defendant ought to get his title from Clement's family. DW2 was also not re-examined.
26. The Defendant then called Alex Mambo (DW3) who was sworn and adopted his witness statement filed in court on 22<sup>nd</sup> August, 2023 as his evidence-in-chief. He testified that he was the second born of Clement Mambo, and that Samuel Gichuki was their neighbour.
  27. On cross-examination, DW3 stated that his late father bought land from the late Samuel Gichuki measuring  $\frac{1}{2}$  an acre which was registered as Eldoret Municipality Block 20 (Kapyemit)/231 in a title obtained in 1996. He testified that in 1986, his father bought an additional  $\frac{1}{2}$  an acre and paid KShs. 5,100/- leaving a balance of KShs. 1,500/-. He testified that the transaction is evidenced by a document dated 9<sup>th</sup> September, 1986 although the same was not drafted like a sale agreement. He acknowledged that he was not a witness to this sale agreement. Further, that since his father was not able to complete payment for the  $\frac{1}{2}$  Acres, he was given 0.3 Acres instead. He confirmed that his father's title reflects 0.4 of an acre and not 0.8 Acres, but that his father never claimed more land from Samuel.
  28. DW3 testified that Samuel sold the remaining portion to Cecilia Gathoni, and she in turn sold to Prof. Odhiambo, the Plaintiff's husband. DW3 testified that the Plaintiff stays on the suit property, and it is the same parcel where the Defendant stays. He conceded that he has no sale agreement to show that his father purchased the additional 0.3 Acres. DW3 added that his mother sold 0.3 Acres, and at the time, she had not yet obtained a grant of Letters of administration. He told the court that he witnessed the sale of land to the Defendant, but his name does not appear on the Agreement. He concluded by stating that before her demise, his mother had claimed 0.2 Acres from Gichuki's family. This witness was also not re-examined and the Defendant thereafter closed his case.
  29. At the close of the hearing, the court directed the parties to file and exchange written submissions. The parties complied, with the Defendant filing his submissions dated 8<sup>th</sup> August, 2024 while the Plaintiff's submissions are dated 16<sup>th</sup> October, 2024.

### **Plaintiff's Submissions**

30. In the Plaintiff's submissions, Counsel argued the case on four issues. On ownership of the suit property, counsel cited Section 24 of the [Land Registration Act](#) (LRA) on the interests conferred by registration and the rights and privileges of a registered proprietor. He submitted that the suit land was transferred to the Plaintiff by the administrators of the estate of the previous registered owner. That consequently, the registration of the Plaintiff as proprietor vests in her absolute ownership, as well as such rights and privileges as are appurtenant thereto. On whether the Plaintiff acquired the suit land fraudulently, Counsel cited Section 26 of the LRA, and submitted that the Defendant had failed to strictly prove the allegations of fraud pleaded and particularised in his Statement of Defence. Counsel relied on *Elijah Makeri Nyangwara v Stephen Mungai Njuguna* (2013) eKLR.
31. Counsel also submitted that the Defendant has no claim over the suit property, since the person who sold the land to him did not have title in her name or capacity to transact over the land in question. Counsel thus argued that the Defendant has no claim against the Plaintiff's parcel of land. As regards the Defendant's alleged encroachment into the suit land, Counsel for the Plaintiff submitted that the Plaintiff though the proprietor of the suit land, only occupied 0.13 Ha, while the other half was occupied by the Defendant herein. He drew the attention of the court to the report by PW4 which he urged was uncontroverted, and asserted that this limb of the claim had been proven. Counsel



cited Section 107 of the *Evidence Act*, arguing that the Plaintiff had proved her case on a balance of probabilities against the Defendant and urged the court to grant her the orders sought.

### **Defendant's Submissions**

32. The Defendant commenced his submissions by relying on Section 23 of the repealed Registration of Titles Act, now reflected at Section 26 of the *Land Registration Act*. Counsel submitted that a certificate of title can only be challenged on grounds of fraud or misrepresentation, or where it was acquired illegally, unprocedurally or through a corrupt scheme. The Defendant submitted that the right to property under Article 40 of *the Constitution* is qualified and not open to abuse as is clear from Article 40(6) thereof. He submitted that the Plaintiff is not entitled to the excess portion of land acquired through fraud and misrepresentation. He added that the Plaintiff's title had failed the test for sanctity of title and must be cancelled and the register rectified.
33. The Defendant submitted that under Article 40(6), the protection to the right to property does not extend to property that has been acquired unlawfully. The Defendant argued that the Plaintiff did not legally, lawfully or regularly acquire from the legal or beneficial owners any land exceeding 0.2 Acres. That her registration as owner was argued to have been laced with fraud, misrepresentation, illegality and irregularity, which factors oust any claim over the suit land. The Defendant asked that as a consequence, the court ought to dismiss the Plaintiff's suit with costs. He relied on *Chemei Investment Limited vs the Attorney General & Others*, Nairobi Petition No. 94 of 2005, *Alberta Mae Gacci vs Attorney General & 4 Others* (2006) eKLR and *Samuel Kamere vs Land*.

### **Analysis and Determination**

34. I have carefully considered the pleadings filed by the parties herein, the witness testimonies and exhibits produced, as well as the submissions and the authorities cited. On that account, it is my considered view that the following issues arise for determination: -
  - i. Who between the Plaintiff and the Defendant is the bonafide owner of land parcel No. Eldoret Municipality Block 20 (Kapyemit)/124?
  - ii. Whether the Plaintiff obtained title to the suit property fraudulently;
  - iii. Whether the Defendant trespassed into the suit property
  - iv. Whether the Plaintiff is entitled to the prayers sought;
  - v. Who should pay costs of the suit?

#### **a. Who between the Plaintiff and the Defendant is the bonafide owner of land parcel No. Eldoret Municipality Block 20 (Kapyemit)/124?**

35. The history of the suit property is that it initially belonged to one Solomon Kimaiyo Ngelechei. Vide an agreement for sale dated 6<sup>th</sup> December, 1983 (PEX5) Mr. Ngelechei sold 1.15 Acres of his land to the late Samuel Gichuki Kabithi for KShs. 8,500/-. Three individuals witnessed this agreement, one of them being Shadrack Rutto (DW2), who testified that he was the secretary of Kapyemit Farm between 1963 and 1993. His records cannot then be accurate, since he stated in his witness statement filed in court on 22<sup>nd</sup> August, 2023 that Samuel Kabithi purchased 1 Acre from Kapyemit.
36. It appears from the copy of the Green Card (PEX6), that Samuel Gichuki was the first registered owner of the land. He was issued with a title deed over what was now known as Eldoret Municipality Block 20 (KAPYEMIT)/124 measuring 0.26 Ha, the suit property herein. PEX4 is a Certificate of Official



Search dated 19<sup>th</sup> September, 2013 showing that the suit land belonged to the late Samuel Gichuki Kabithi. Up to that point, there is no dispute as to the ownership of the land.

37. There is no dispute that the late Samuel Gichuki sold land to Cecilia Gathoni, what the parties cannot agree on is the size of the land sold. PEX1 is an Agreement for sale of land between the said Cecilia Gathoni and the Plaintiff herein. The Agreement shows that the Plaintiff purchased the suit property herein measuring 0.26 Ha and the agreement was witnessed by among others, one Ann Wamboi, who is described therein as the “Wife to Samuel Gichuki Kabithi”. This court was informed by the Plaintiff and her witnesses that Cecilia bought the entire parcel of land comprised in plot 124 and sold it to the Plaintiff in its entirety.
38. PEX14 is a duly signed and registered transfer form, which shows that the land was transferred to the Plaintiff by Hama Wambui Gichuki. The transfer form is accompanied by a Land Control Board Consent issued by the Eldoret Municipality Land Control Board on 24<sup>th</sup> March, 2016. This is in line with the records of the land office, which from the green card shows that the land was transmitted from the late Samuel Gichuki to Hama Wambui Gichuki, and a title deed issued to her on 17<sup>th</sup> March, 2016. Hama then transferred it to the Plaintiff, who was issued with a title deed on 4<sup>th</sup> May, 2016. The [Land Registration Act](#) is very clear on issues of ownership of land and at Section 24(a) thereof, it provides as follows:-

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

39. Enter the Defendant, who claims that he bought the land from Clement Mambo, who in turn had purchased it from the late Samuel Gichuki. He has produced an Agreement dated 5<sup>th</sup> September, 2007 showing that he bought 100ft by 200ft of the parcel of land known as Eldoret Municipality Block 20 (Kapyemit)/124 from Rose Khavere Mambo.
40. It is not clear how much land the Defendant bought, in his testimony he first claimed that he bought 100ft by 200ft, but he later testified that he bought ¼ acre. Even DW2’s testimony did not shed any light on the acreage conveyed between the Defendant and his predecessors in title. DW2’s testimony is that the suit land initially measured 1 acre, then Samuel Gichuki sold a portion thereof of 0.5 Acres to Clement Mambo. Clement Mambo is alleged to have later bought an additional 0.3 Acres from Samuel, which means he became entitled to 0.8 of an Acre.
41. The facts as emerges from the evidence adduced herein and the evidence of DW3 who is a son of Clement Mambo, is that Clement became the registered owner of ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/231. A copy of the title to this piece of land was filed in court alongside the Defendant’s original statement of defence and it shows that the said portion measures 0.22 Ha. This is the portion of land that Clement Mambo bought from Samuel Gichuki Kabithi, and if his family wanted to sell any land, this is the land they should have sold to the Defendant.
42. That aside, the green card is clear that Rosemary Mambo was never at any point registered as an owner of the suit property. The Latin maxim *nemo dat non quod habet*, comes to mind. It translates to: “no one can give what they do not have”. Rosemary Mambo could not therefore purport to sell that which she did not own. In the case of Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maim (2019) eKLR, the Court held as follows;

“The *nemo dat* principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that



whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.”

43. Neither the late Clement Mambo nor his wife and family had any interest in the suit property capable of being sold to the Defendant herein. If indeed the late Clement Mambo had a claim over any portion of the suit property, the same has not been proved. In any event, the allegation by the Defendant and his witnesses that Clement Mambo purchased an additional 0.3 Acres is not supported by any evidence. As matters stand, I have no doubt that the suit property herein belongs to the Plaintiff, who is the duly registered owner thereto.

**(b) Whether the Plaintiff’s title was obtained fraudulently;**

44. Section 26(1) of the *Land Registration Act* states as follows:

- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

45. From the above extract of the *Land Registration Act*, the Certificate of Title issued by the Registrar upon registration 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. The title of that proprietor shall not be subject to challenge except on grounds of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

46. The Defendant in fact alleged that the Plaintiff obtained the suit land fraudulently. Fraud is defined under the Black’s Law Dictionary 10<sup>th</sup> Edition as:- “A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”. Whether or not the title was obtained fraudulently is a matter of evidence, and it must be established that there was fraud on the part of the Plaintiff. The Court of Appeal in *Emfil Limited vs Registrar of Titles Mombasa & 2 others* (2014) eKLR held that:-

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.”



47. Similarly, the Court of Appeal decision in the case of John Kamunya & Another vs John Nginyi Muchiri & 3 Others (2015) eKLR held that:-

“We find that the law is clear as put by Mr. Karanja that matters of “fraud” must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine.”

48. The Defendant did specifically plead the fraud and listed the particulars thereto. There is however no evidence that has been placed before this Court to intimate existence of fraud. In the case of Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 Others (2013) eKLR, the Court held that:-

“Despite our above finding, we feel it is necessary to address Mr. Mahan's submissions to the effect that the appellant had proved the particulars of fraud as pleaded in the Plaint because the 1<sup>st</sup> and 2<sup>nd</sup> respondents had failed to tender evidence at the hearing to rebut the same. In R. G. Patel vs. Lalji Makani (1957) E.A. 314, the predecessor of this Court at pg 317 held:

‘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.’

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In Mutsonga vs. Nyati (1984) KLR 425, at pg 439, this Court held:-

‘Whether there is any evidence to support an allegation of fraud is a question of fact.’

We find that the appellant did not prove fraud on the part of the respondents.”

49. I have seen the minutes produced by the Defendant of a meeting held by the elders on 1<sup>st</sup> June, 2016 to resolve the dispute. I find it interesting that the minutes of the said elder’s meeting indicate that:-

“Irene Waweru was unable to produce the agreement that confirms that she bought land from Gichuki.”

50. First, because even from those same minutes, the name of Irene Waweru does not appear as one of the people who were present at the said meeting, she therefore could not have been expected to be able to present the agreement at all. No reason was given as to why she was not present, neither is there any indication that she was present but refused to have her name included in the minutes, which leads me to believe that she did not attend the said meeting. Notably however, the minutes state that the Plaintiff was to return her title which she obtained “illegally”, and further, that the dispute was resolved and both parties agreed, yet the Plaintiff was absent from these deliberations. Secondly, Irene Waweru bought the land from Cecilia Gathoni and not Samuel Gichuki. In any event, even if the Plaintiff had been present, the elders had no jurisdiction whatsoever to issue a declaration of illegality on the title.

51. In addition, PW5 confirmed to this court that the registration of the Plaintiff as the owner of the land was done regularly and followed the laid down procedure, that there was no fraud involved. Taking into consideration the facts of this case and also considering the evidence adduced, this Court finds and holds that the Defendant did not demonstrate the existence of fraud on the part of the Plaintiff to the required standard of proof.



**b. Whether the Defendant trespassed into the suit property;**

52. To determine whether the Plaintiff is entitled to the prayers sought herein, I first need to question whether the Defendant has trespassed onto the suit property. Trespass is defined at Section 3 (1) of the Trespass Act, Cap 294 in the following words:-

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

53. I have also factored in the definition of the word trespass in *Municipal Council of Eldoret vs. Titus Gatitu Njau* (2020) eKLR, where the Court of Appeal held that:-

“35. In *M’Mukanya vs M’Mbijiwe* (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows:

“trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, (1953) 2QB 153.”

36. Further, in *Winfield & Jolowicz on Tort*, Sweet & Maxwell, 19<sup>th</sup> Edition at page 428 states as follows:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.”

54. Trespass is therefore an intrusion by a person into the land of another who is either rightfully in possession or is the owner.

55. This court has already determined that the suit property herein is owned by the Plaintiff. PW4 testified that she found a structure on the suit land belonging to the Defendant when she visited the land. There is no doubt that the Plaintiff never authorized the Defendant to enter her land and utilise it in any way or even develop it. I am therefore inclined to find that Defendant has trespassed into the suit parcel of land belonging to the Plaintiff.

**c. Whether the Plaintiff is entitled to the prayers sought;**

56. Having found that the Defendant trespassed into the Plaintiff’s land, it follows that without consent of the registered owner, the Defendant cannot be allowed to continue residing on or utilising the suit property. As such this prayer is meritorious, and the Plaintiff is entitled to the order of eviction sought in the Plaintiff.

57. The next issue is whether an order of permanent injunction should issue restraining the Defendant from utilising the land. The Principles on injunction were established in the celebrated case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358. Having looked at the facts of this case and considered the testimonies as well as the exhibits produced in court, I hold that the Plaintiff has indeed established



a prima facie case and proved her case to the required threshold. She is the duly registered owner, and the Defendant has no legal mandate to use the suit land in any manner. This therefore warrants the grant of the permanent injunctive orders sought. Consequently, I find that the Defendant either by himself, agents, servants and/or anyone claiming under him should be permanently restrained from encroaching into, trespassing into or in any other manner utilising the suit land.

58. The Plaintiff also sought an order that the County Surveyor and the Land Registrar visit the site and measure the suit property to ascertain its true position and acreage. This prayer would have been relevant if the suit herein was purely a boundary dispute. However, it is clear that both the Plaintiff and the Defendant came to court claiming ownership of the suit property on the grounds of purchase, thus this suit was primarily a dispute on the ownership of the land. The ownership of the suit land has now been determined, and the acreage thereof is clear from the title. There is no need to issue an order directing the County Surveyor and the Land Registrar to visit the land and measure it.

#### **d. Who should pay costs for the suit?**

59. It is very clear that Section 27 of the *Civil Procedure Act* gives the Court discretion to award costs. It is trite law that costs shall follow the event, meaning that the successful litigant is entitled to costs except in exceptional circumstances. Having noted that no such exceptional circumstance exist in this suit, the Court finds and holds that the Plaintiff being the successful litigant is entitled to the costs of the suit.

60. Arising from the above, I find that the Plaintiff has proved her case on a balance of probabilities as required under the law. I therefore enter judgement for the Plaintiff against the Defendant in the following terms:-

- i. A declaration do and is hereby issued that the Plaintiff is the rightful owner and is entitled to exclusive quiet and peaceful enjoyment of all that parcel of land known as Eldoret Municipality Block 20 (Kapyemit)/124 measuring 0.26 Ha.
- ii. A declaration do and is hereby issued that the Defendant is a trespasser on the Plaintiff's parcel of land known as Eldoret Municipality Block 20 (Kapyemit)/124.
- iii. An order is hereby issued directing the Defendant to vacate the suit property being Eldoret Municipality Block 20 (Kapyemit)/124 within Sixty (60) days from the date hereof and to demolish any and all developments erected thereon. Should the Defendant fail to comply, then the Plaintiff shall be at liberty to evict him without any further reference to this court.
- iv. A permanent order of injunction is hereby issued restraining the Defendant, his servants and or agents from encroaching upon, trespassing, occupying, developing or in any other way utilizing the Plaintiffs parcel of land known as Eldoret Municipality Block 20 (Kapyemit)/124 measuring 0.26 Ha.
- v. The Plaintiff shall have the costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 5<sup>TH</sup> DAY OF FEBRUARY 2025.**

**J. M ONYANGO**

**JUDGE**

In the virtual presence of:

Mr Oduor for the Plaintiff

Patrick Owuor present in person



Court Assistant: Hinga

