



**Kurgat & another v Metit (Environment & Land Case  
E011 of 2023) [2024] KEELC 5190 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5190 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE E011 OF 2023**

**MN MWANYALE, J**

**JULY 8, 2024**

**BETWEEN**

**TIMNA JEPKOECH KURGAT ..... 1<sup>ST</sup> PLAINTIFF**

**ELIUD KIPNGETICH KORIR ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JULIUS KIPKURGAT METIT ..... DEFENDANT**

**JUDGMENT**

1. Vide their Amended Complaint dated 23/8/2023, the Plaintiffs Timna Jepkoech Kurgat and Eliud Kipngetich Kurgat have sued the Defendant Julius Kipkurgat Metit seeking that judgment be entered for them in terms of the following prayers; -
  - a. That a declaration be issued that the 1<sup>st</sup> Plaintiff is the absolute proprietor of the whole of Nandi/Kaboi/329.
  - b. An order of permanent injunction restraining the Defendant by himself, his servant, agents, proxies and/or persons exercising authority from them from claiming, inhibiting, alienation, dealing, disposing, trespassing and/or in any other manner interfering with the Plaintiff's quiet use, occupation and possession of all that land parcel registration number Nandi/Kaboi/329 belonging to the 1<sup>st</sup> Plaintiff.
  - c. That, this Honourable Court be pleased to issue orders of mandatory injunction compelling the Land Registrar, Nandi County to remove the restrictions illegally placed by the Defendant on the Applicant's land known as Nandi/kaiboi/329.
  - d. Costs and interests of this suit to be borne by the Defendant.
  - e. Any other orders that the Honourable Court may deem fit to grant.



**Plaintiff's Case: -**

2. It is the Plaintiff's case that she is the registered owner of NANDI/KAIBOI/329, having inherited the same from her late husband Nelson Kipkorir Arap Kurgat, and that the 2<sup>nd</sup> Plaintiff being a son of the 1<sup>st</sup> Plaintiff is occupying the suit land.
3. That the Defendant had laid unsubstantiated allegation with the DCI Nandi East who had summoned the Plaintiff and threatened to institute criminal proceedings against them.
4. The Plaintiff's husband Nelson Kipkorir arap Kurgat had purchased the suit property from Korgen Arap Chesimet the Defendants were apprehensive that their rights and interests in NANDI/KAIBOI/329 will be violated threatened or infringed by the Defendants.
5. On the basis of the above the Plaintiffs sought for judgment against the Defendant as set out at paragraph 1 of this judgment.

**Plaintiff's Evidence: -**

6. 3 witnesses testified for the Plaintiffs case. PW1, the 1<sup>st</sup> Plaintiff testified and adopted her witness statement, she also produced the documents in the list of documents dated 23/8/2023 as P Exhibit 1 to 5 and the documents in her further list of documents dated 21/11/2023 as P Exhibit 6.
7. It was her testimony that when she was married her husband was living on the ancestral land but he bought an additional property NANDI/KAIBOI/329 from Arap Chesimet, and she inherited the property after her husband had passed away, hence the property was hers.
8. On cross – examination, she stated that she was married in 1948, they moved to the property in 1977 having bought it before the demise of Chesimet in 1974. It was her further testimony that the property initially shared a boundary with their ancestral property. She conceded that although entry No. 3 of P exhibit 3 showed that there was a Succession, she was not aware of the succession cause.
9. She confirmed that she had been interrogated at Nandi Hills Police Station but she did not know the succession cause. They had requested the family of Chesimet to transfer the property to them but they had refused hence the suit, the witness stated that they had bought the suit but she did not have the agreement for sale, she only the Agreement for Sale, she only know the Defendant as the son of Chesimet.
10. In re-examination, the witness stated that the property was bought when Arap Chesimet was still alive, and her husband was the one who followed up on the land transaction. She was not aware whether the transfer was made immediately but it was possible that succession was done.
11. PW2, Eliud Korir, equally testified, it was his testimony that his late father had bought a property in about 1968 or 1968 from Arap Chesimet, and in 1972 the family of Arap Chesimet gave them vacant possession, the witness was about 23 years old.
12. No person from the family of Arap Chesimet came to be property till 2013 when they came to claim a balance of purchase price and claimed that the property was theirs. The witness stated that his father was registered on 26/10/1977 as per entry 3 of the green card but the witness did not have the succession cause number and he was not ware on 22/3/1974. He stated that there was need for succession but there was no certificate of confirmation of grant, but they had the title deed for the property.



13. On cross – examination, the witness stated that he filed the case after the DCI summons. He stated that his late father had bought the property but was not aware whether the same had been transferred to him. The witness had not seen transfer forms from Arap Chesimet. That the children of Arap Chesimet had come in 2013 to seek a balance of purchase price and later they had placed a caution against the property. It was his statement that his late father had bought the property.
14. PW3, the Nandi County Land Registrar, Judith Chepkoech Cherutich testified. It was her testimony that the suit property NANDI/KAIBOI/329 was registered to the 1<sup>st</sup> Plaintiff Timna Jepkoech Kurgat through transmission, but there was no copy of the certificate of confirmation of grant. Prior to her registration, the property had been registered in the name of Nelson Kipkorir Arap Kurgat who had acquired the parcel from Konsen Arap Chesimet through succession made on 26/10/1977. The original title deed in the name of Kipkoech Arap Chesimet who had changed names to Konsen Arap Chesimet as well as the title of Nelson Kurgat, had been surrendered.
15. The witness stated that there were no documents to support entry No. 3, the said documents were missing however the title deed held by Timna the 1<sup>st</sup> Plaintiff was genuine as it the registration reflected her name.
16. The witness when shown a certificate of confirmation of grant in respect of the Estate of the late Nelson Kurgat and the parcel number NANDI/KAIBOI/329 formed part of the Estate as it appeared on the certificate but no copy of the confirmation was on the parcel file. There was a restriction by Government of Kenya in respect of a road reserve.
17. The Plaintiffs title was genuine and the two previous title deeds were surrendered.
18. In cross – examination, the witness indicated that entry no. 3 on the green card was by way of succession but the succession cause was not indicated. The said entry ought to have been supported by transmission form (L.R. NO. 19) (now L.R. 39) which form was missing in the parcel file. L. R. NO. 19 emanated from Grant of Letters of Administration (form 41) was also missing in the parcel file as was L.R. NO. 7 (now L.R. 42).
19. She further stated that the original title he was surrendered although it was not indicated who surrendered the same. The forms must exist for transmission to occur, and original titles surrendered when or new proprietor was registered.
20. The forms for the effecting transfer by transmission were not in the parcel file (L.R. NO. 19 and L. R. NO. 7). The witness stated that no good title would have been transmitted in absence of the said forms, hence no good title would have passed from Korishen Arap Chesimet to Nelson Kurgat. The witness could not tell whether the documents existed or not, as there were no copies thereof.
21. On re-examination, the witness stated that it was compulsory for the forms to be made before the entries were made. Administrators ought to be registered before the beneficiaries. The witness was of the view that the lands office was to blame, as there is possibility that some documents could have been misplaced. She was of the view that the title of Nelson could was not registered property.

**Defence Case And Evidence: -**

22. It is the Defendants case, that NANDI/KAIBOI/329 belonged to his late father but the same was fraudulently transferred without following the due process under the *Law of Succession Act* hence there was intermeddling with the said Estate, that the Plaintiff's suit was frivolous, vexatious and an abuse of the Court process, as it was tainted with illegalities, procedural impropriety, fraud and misrepresentations.



23. The Defendant particularized illegalities, fraud and misrepresentation against the Plaintiffs, to wit,
- i. Failure to institute succession proceedings to legally transmit the suit property from Korsen Arap Chesimet to the Plaintiff.
  - ii. Failing to institute succession proceedings to transmit suit property to the Plaintiff
  - iii. Illegally and intentionally intermeddling with a deceased Estate contrary to Section 45 of the Law of Succession.
  - iv. Illegally and fraudulently misleading the Land Registrar Nandi that she had a valid RI7 pursuant to fictitious succession proceedings.
  - v. Attempting to gag the police from investigating the illegal and fraudulent acquisition of title to NANDI/KAIBOI/329.

The Defendant thus prayed for Plaintiffs suit to be dismissed and the Defendant counterclaim be allowed.

24. In the counterclaim the Defendant brought the same on his behalf and behalf of the Estate of Korsen Arap Chesimet, and pleaded that NANDI/KAIBOI/329 was subdivided and registered in the Plaintiff's name the Plaintiff knew the same belonged to Korsen Arap Chesimet, without obtaining certificate of confirmation of letters of Administration and in contravention of Section 45, 47, 55 and 82 of the *Law of Succession Act*, illegally, unprocedurally, fraudulently allocated herself and caused to be registered in her name the said Estate and suit property NANDI/KAIBOI/329.
25. The Defendant in his counterclaim pleaded that in view of the illegality, the Court should not allow a person to keep an advantage which he had obtained by fraud, and that the title belonging to the Plaintiff in view of Sections 26 & 27 of the *Land Registration Act* is not indefeasible and the Defendant are estopped for illegalities.
26. In the counterclaim, the Defendant sought for a declaration that the Plaintiff acquired title to NANDI/KAIBOI/329 through fraudulent and or illegal means of the said title.
- a. Orders directing the Land Registrar Nandi County to remove all the entries 3 to 13 bestowing ownership of NANDI/KAIBOI/329 to the Defendants, in the counterclaim and restore the same in the name of Korsen Arap Chesimet to enable due succession process to be followed.
  - b. The Honourable Court be pleased to sanctioned and condemn the Defendant ex debito justitiae for intermeddling with the property of by committing the 1<sup>st</sup> Plaintiff to 3 months civil jail pursuant to Section 45 of the *Law of Succession Act*.
  - c. Exemplary costs be awarded to the Plaintiffs in the counterclaim for the hard ship endured while fighting for a share of property NANDI/KAMOBO/4027 a subdivision of NANDI/KAIBOI/329.

**Defence Evidence: -**

27. The Defence called 3 witnesses DW1, an expert witness, William Irungu, a Principal Civil Registrar of Births and Deaths based in Narok Civil Registration Offices, testified in respect of Death Certificate entry no. 0164063 and he produced the death certificate and a verification report as D Exhibit 1 and 2 respectively.
28. On cross – examination, he stated that the death had occurred in 1974 but it was registered on 29/8/2014 and that form A3 had been used to process the death certificate. The form related to an



- application for late registration of a death and the date of death was supplied from the registration process.
29. DW2, Police Constable Kennedy Maiyo based at DCI Nandi East equally testified that he had received a complaint from the Administrator of Estate of Korsen Chesimet namely Hillary Kipkurgat Metet; which complaint was recorded on OD No. 25/17/2023, he recorded statement from witnesses and he made a finding that the land in question, NANDI/KAIBOI/329 was transferred fraudulently from Korsen Arap Chesimet to Nelson Kipkorir Arap Kurgat. The fraudulent transaction made on 26/10/1977 through entry No. 3 on the green card (P Exhibit 3). Transfer used indicated succession, but the Land Registrar indicated that the said succession documents were not on the parcel file.
  30. It was the witness's evidence that after his investigations, he recommended that Timna Jepkoech Kurgat and Eliud Kipngetch Korir be charged with several offences including obtaining Land Registration by false pretenses, forcible detainer and intermeddling with deceased's property. The witness produced the covering report as D exhibit 3.
  31. On cross – examination the witness stated that there was no transfer of the file since he had started investigations, even though the property was in Nandi South which had DCI officers. The complaint had been filed on 17/10/2023. He confirmed that he had recommended the Plaintiff's to be charged with obtaining registration by false pretense and forcible detainer.
  32. He stated that there was no succession done between Korsen Arap Chesimet and Nelson Kurgat, hence the whole process ought to be nullified. He confirmed that there was a succession between Nelson and Timna and that Timna was not responsible for entry No. 3.
  33. DW3, was the Defendant himself. He adopted his witness statement as part of his evidence in chief. The witness further produced the Grant Letter of Administration Ad Litem as D Exhibit 4, official search of NANDI/KAIBOI/329 as D Exhibit 5, and copy of Green Card of NANDI/KAIBOI/329 as D Exhibit 6.
  34. It was his testimony that he had planted tea and grown trees from the 1970's which trees are about 1 ½ metres in diameter. He stated that the Plaintiffs had encroached part of his property, he had tried to remove them through the Chief's office and the late Nelson Kurgat told him he would buy him an alternative property.
  35. He had reported the issue to the police station but they filed their suit. He stated that the Plaintiff's allegation that they had bought the property was not supported by any agreement and that there was no succession in respect of his late father's property.
  36. On cross – examination, the witness stated that he learnt of the fraud in 2023, and placed a restriction which was entry No. 14 on P exhibit 13. The witness stated that he had planted trees and his house had been demolished.
  37. The witness was not aware who had surrendered the original title deed and when it was surrendered. He confirmed that he did not complain during the lifetime of Nelson Kurgat although in 2013, Nelson had tried settling. He confirmed that the property was fenced and that Nelson had informed him to look for another property. He had taken the friendly route since the Plaintiff's were neighbours and did not know that Mr. Nelson would die.
  38. After the testimony of the three defence witnesses, the Defence case closed and parties filed their written submissions which are summarized as here follows.



**Plaintiff's Submissions: -**

39. In their submission the Plaintiff's have framed and submitted on 4 issues for determination.
40. On issue 1, the Plaintiff submit that the 2<sup>nd</sup> Plaintiff has locus to institute the proceedings under Article 40 and 64 of *the Constitution* as read together with Article 22 (i) of *the Constitution*.
41. The Plaintiff submits that under Section 28 of the *Land Registration Act* clothes the 2<sup>nd</sup> Plaintiff with the requisite locus in terms of customary trusts that he enjoys over the suit land, which arose out of possession and occupation. In support of this limb the Plaintiff's cite the decision in the case of Mbui vs Mbui.
42. On issue 2, the Plaintiffs submit that they have acquired an indefeasible title with absolute ownership over the suit property and place reliance on Section 24 (i) (a) of the *Land Registration Act*, and Section 26 of the said Act. The Plaintiff thus submits that they hold absolute and indefeasible title. They placed reliance on Dina Management Limited vs County Government of Mombasa & 5 others, on a bonafide purchaser.
43. The Plaintiff submit that they followed the due process for the registration of the title to the 1<sup>st</sup> Plaintiff upon demise of her husband, and hence they acquired good and indefeasible title.
44. On issue number 3, the Plaintiff's submit that the Defendant is not entitled to the relief's sought since the Plaintiff's title is indefeasible, the 1<sup>st</sup> Plaintiff's husband being a bonafide purchaser for value without notice.
45. The Plaintiff submit that as the Defendant's father had divested himself of the suit property by virtue of sale to the 1<sup>st</sup> Plaintiff's late husband, the Defendant cannot inherit what his father did not have as he did not have any interests.
46. Lastly, the Plaintiff seeks for costs of the suit, which they submit follows the event under Section 27 of the *Civil Procedure Act*.

**Defendant's Submissions: -**

47. The Defendant has framed and submitted on 4 issues for determination to wit,
  - i. Whether the subject matter NANDI/KAIBOI/329 was legally transmitted from Estate of Korsen Arap Chesimet alias Kipkoech Arap Chesimet (Deceased) to Nelson Kipkorir arap Kurgat (also deceased) whose Estate Administrator is Timna Jepkoech Kurgat (vide Letters of Administration).
  - ii. Was the 1<sup>ST</sup> Plaintiffs acquisition of the title to NANDI/KAIBOI/329 legal or illegal?
  - iii. Does the 1<sup>st</sup> Plaintiff hold a good title to NANDI/KAIBOI/329?
  - iv. Is the counterclaim merited in law?
  - v. Which ultimate orders ought to be granted by this Honourable Court?
48. On issue number 1, it is the Defendants submission that the transmission from Korsen Arap Chesimet Alias Kipkoech arap Chesimet the original registered owner to Nelson Kurgat as per entry 3 of the green card was through succession however there was no proof of succession proceedings hence the transmissions,was not only illegal but also null and void ab intio, since the mandatory transmission documents could not be found in the parcel file.



49. The Defendant placing reliance on Sections 45 and Section 82 of the *Law of Succession Act* submits that the 1<sup>st</sup> Plaintiff's husband's action of securing registration in his name amounted to intermeddling.
50. Plaintiff placed reliance on the decision in the case of *Kadzo Charo vs Alex Nzai Dzombo* (2019) eKLR, as well as the decision in the case of *RE: Estate of Jamin Inyanda Kadambi*, which was quoted to in the case of *RE: Estate of late Ephanus Nyambura Nduati*, both decisions pointing to the law that no immovable property could be transferred before confirmation of the Grant.
51. The Defendant thus urged the Court to nullify the said transactions, at the instant of the innocent beneficiaries and reliance was placed on the decision in the case of *Morris Mwiti Mburugu vs Denis Kimathi M'murungu* 2016 eKLR.
52. The Defendant combined and submitted on issue 2 and 3 together, and it was his submission that the Plaintiff did not have a good title to the suit property, since entry No. 3 on the Green Card was illegal and null and void ab initio. The subsequent succession of the property to the 1<sup>st</sup> Plaintiff was this a nullity; and in support of this, the Defendant placed reliance in the case of *diamond Trust Bank Kenya Ltd vs Said Hamid Shamisi & 2 others* (2015) eKLR, on the principle of *Nemo Dat quod non Habet*.
53. The Defendant urged the Court not to endorse and uphold a crime and illegality apparent on record and evidence; and on this limb of submissions the Defendant placed reliance on the decision of *Peter Ndambu Nzikali vs Onesmus Ndambu Musau* and urged the Court to strike out the case.
54. The Defendant thus submits that this been a purely issue of Succession the Court does not have jurisdiction to entertain the same.
55. Lastly, the Defendant submits that the counterclaim is merited as it has proved open contravention of Section 45, 47, 55 & 82 of the law of succession and that the title was procured illegally, unprocedurally fraudulently and by misrepresentation and the Defendant submits placing reliance on Section 26 of the Limitations of Actions Act, that fraud extends the limitation period, and hence the counterclaim is not time barred.
56. The fraud herein having been discovered on 23/4/2013, 10 years was well within the time frame of 12 years provided for under Section 7 of the *Limitation of Actions Act*. The Defendant placed reliance on the decision in *Justice Tureti Obrara vs Peter Koipetai Nengisoi* (2014) eKLR, quoted in the decision in the case of *Delilah Ondari vs Francis Ondieki Afandi* (2022) eKLR.
57. The Defendant submits for an order of nullification of the 1<sup>st</sup> Plaintiff's title and judgment be entered as prayed for in the counterclaim with costs.

**Issues For Determination: -**

58. From the plaint at paragraph 12 of thereof, the Plaintiffs specifically pleaded an issue of purchase of NANDI/KAIBOI/329 by Nelson Kurgat from Korshen Chesimet.
59. In the defence and the counterclaim, the issue of purchase was not specifically denied by was denied by a general denial at paragraph 9 of the Defence and Counterclaim.
60. The Defence and counterclaim mainly concentrated on the illegality of the registration of Nelson Kurgat and Timna Jepkoech and left out the issue of acquisition of the property by purchase as pleaded by the Plaintiff.
61. A number of issues were uncontested in the matter which the Court notes as follows;



- i. That the property was initially registered in the name of Korshen Arap Chesimet, also known as Kipkoech Arap Chesimet, who passed on around 2<sup>nd</sup> March 1974.
  - ii. That Nelson Kurgat was registered as the owner through succession in 1977; there was no proof of the succession in relation to the Estate of Korsen Arap Chesimet transmitting to Nelson Kurgat.
  - iii. That Timna Kurgat was registered through transmission in 2006, in respect of the Estate of Nelson Kurgat.
62. Having considered the pleadings, and evidence on record, analyzed the facts, evidence and submissions, taken into account the law and facts of this case, the Court frames the following as issues for determination; -
- i. Whether or not the Court has jurisdictions to hear and determine the matter
  - ii. Whether or not the registration of Nelson Kurgat and issuance of the title deed of NANDI/KAIBOI/329 to Nelson Kurgat and subsequent transmission to the 1<sup>st</sup> Plaintiff was lawfully and procedural as claimed by the Plaintiffs, or was illegal and unprocedural as claimed by the Defendant?
  - iii. What reliefs ought to issue?
  - iv. Who bears the cost of the suit?

**Analysis And Determination: -**

63. The issue of jurisdiction did not arise from the pleadings, but arose from the submissions of the Defendant who when placing reliance on the decision Peter Ndambu Nzikali & Another vs Onesmus Ndambu Musau (2015) eKLR where the Court in finding that it had no jurisdiction observed
- “.... the declaration of ownership of suit land sought in the plaint amounts to seeking distribution of the Estate contrary to Section 55 of Cap 160. The section prohibits distribution of Estate until grant confirmed under Section 82 of Cap 160 of ..... the Environment and Court jurisdiction under Environment and Land Act and Article 162 of the constitution of Kenya is limited to occupation, use and title to land and environment issues.....”
64. The above is the foundation to the challenge on jurisdiction. This issue was brought in the submissions by the Defendant and the Plaintiff’s submissions having being filed earlier were silent on the issue.
65. The Court of appeal in its recent decision delivered on 22<sup>nd</sup> March 2024 addressed and clarified the seemingly overlapping jurisdiction of the Environment and Land Court and High Court in Succession matters. In its decision in the case of Disaproperty Limited and Another vs James Kaguu Githae Civil Appeal No. E 155/2023 as consolidated with Civil Appeal No. E 157/2013 James Mugo Kinga vs Jack Kaguu Githae, at paragraph 33 of the said decision, the Court observed as follows;
- “The last issue for our determination related to the interplay between the jurisdiction of the Environmental and Land Court and that of the High Court under the Law of Succession Act (cap 160).”
66. At paragraph 37 of the above decision the Learned Judges of Appeal held “ it is notable that under Rule 43 (i) of the probate and Administration Rules made under the Law of Succession Act where



in succession proceedings, a party claiming that he was beneficially entitled to a parcel of land that the deceased left in his name, if there is a general dispute relating to the ownership of a parcel of land registered in the name of the deceased, such dispute has to be adjourned and be determined in originating summons in a separate Court, it is when such a determination is made that the succession Court can confirm the Grant bearing in mind the determination of course with *the constitution* and *Environment and Land Court Act*, such a dispute has to be referred to the Environment and Land Court for resolution.”

67. Noting that the Plaintiffs have pleaded purchase of NANDI/KAIBOI/329 at paragraph 12, this dispute thus involves not only the registration of NANDI/KAIBOI/329 to the Plaintiffs but also the ownership of the said parcel and this Court has jurisdiction to determine the said dispute on ownership.

In answer the issue number 1, the Court finds that it has requisite jurisdiction to determine this suit.

68. On issue number 2, the Court shall now examine the whether the registration and issuance of the title to NANDI/KAIBOI/329 to Nelson Kurgat, and subsequent transmission to the 1<sup>st</sup> Plaintiff was lawful and procedural. As noted in the foregoing paragraphs the original owner the late Korsen Arap Chesimet died on 2<sup>nd</sup> March 1974 and from the green card exhibited by both the Plaintiff and the Defendant, the late Nelson Kurgat was registered in 1977 as per entry No 3 though succession.
69. The said succession must have been in relation to the Estate of Korsen Arap Chesimet. PW3, the Land Registrar in her evidence indicated that there was no proof of this succession, as the relevant forms to support transfer by transmissions were not in the parcel file including the Certificate of confirmation of Grant, she stated however the two previous title deeds were surrendered. DW2, in his cover report indicated that the succession cause that led to the registration of Nelson Kurgat as the owner of the parcel was not disclosed and he did not find evidence to support the said succession and the entry No. 3 on the green card of NANDI/KAIBOI/329. The Plaintiff did not adduced evidence in support of entry No. 3.
70. The Court finds that there was no Succession proceedings that led to the entry No. 3 on the Green Card and that the registration of Nelson Kurgat as proprietor was unprocedural and illegal as its offended Sections 45 of the Succession Act. No good title vested in Nelson Kuirgat and his Estate could not equally benefit from the unprocedural registration of NANDI/KAIBOI/329 to him.
71. The root of the title was under challenge and the Plaintiffs ought to have gone beyond reliance on the title to prove the registration was lawful and procedural. Since there was no valid and lawful registration of Nelson Kurgat as the owner it follows that no valid title could pass to the Estate and registration of the 1<sup>st</sup> Plaintiff had no basis in law and her title to the property as it were is not protected under Section 24, 25 and 26 of the *Land Registration Act*.
72. In arriving at he said conclusion, I am guided by the decision of the Court of Appeal in Funzi Developers Ltd vs others vs County Council of Kwale Mombasa Civil Appeal No. 252/2005 (2014) eKLR where the Court held “..... a registered proprietor acquires an absolute and indefeasible title, if and only if the allocation was legal, property and regular..... a Court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal of irregularly obtained title....”



73. In Dina Management Limited and County Government of Mombasa & 5 others Petition 8 E 10/2021 at paragraph 110 the Learned Judges of the Supreme Court held as follows ....

“indeed the title or lease is an end product of a process, if the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, His Excellency Daniel Arap Moi had no valid legal interests which he could pass to Bawazir & Company (1993) Limited who in turn could pass to the Appellant.”

74. The same reasoning applies in all its fours in the circumstances of the case and thus in answer to issue number 2, the 1<sup>st</sup> Plaintiff does not hold a valid title to NANDI/KAIBOI/329 in view of the irregularity and illegalities of registration of Nelson Kurgat from Korsen Arap Chesimet and subsequent transmission to Timna Jepkoech Kurgat.

75. On issue number 3, as to whether there was a sale of NANDI/KAIBOI/329 by Korsen Arap Chesimet to Nelson Kurgat or whether it was an unlawful invasion, by movement of boundaries and forceful occupation, the Court now considers the above issue in light of evidence placed before it. Both PW1 and PW2 stated in their evidence, that the Late Nelson Kurgat and Korshen Arap Chesimet had entered into an Agreement for Sale. The said Agreement for Sale was not produced in Court, but it was slated to have been concluded before the passing of Korishen Arap Chesimet in 1974.

76. The occupation by Nelson Kurgat on NANDI/KAIBOI/329 was thus placed in 1972 pursuant to the said Agreement by PW2.

77. The law that guided the sale having been made before the commencement of the *Law of Contract Act*. Section 3 (3) of the *Law of Contract Act* came into force in 20003 and Section 3 (7) thereof exempts oral verbal agreements entered before commencement of the Act.

78. In Peter Mbirir Michuki vs Samwel Mugo Michuki the Court observed as follows; “it is our view that Section 3 (7) of the *Law of Contract Act* makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the Law of Contracts Act came into effect in 20003 and does not apply to oral contracts for sale concluded before Section 3 (3) of the Act came into force. The provision to Section 3 (3) of the *Law of Contract Act* applies in this case and we hold that the sale agreement between the Appellant and the Plaintiff did not violate or offend the provisions of the *Law of Contract Act*.”

79. The Plaintiff herein pleaded purchase of the property by Nelson Kurgat and since the provisions of Section 3 (3) of the law of Contract did not apply, the said agreement could have been made orally and was part performed by way of taking occupation by Nelson Kurgat during the lifetime of Arap Chesimet, as alluded to by PW2 who grazed cattle there at in 1972.

80. The Defendant was born in 1972 while his family vacated the suit property and the Plaintiffs family had taken possession of the same in 1972, according to the evidence of PW2.

81. The taking of the possession during the lifetime of Arap Chesimet who moved out of the parcel in 1972 and later died in 1974 is a clear indication of part performances of an Agreement of Sale.

82. The version of the Defendant, that his father did not sale the property is at the best, hearsay, since the Defendant could not possible recall events of 1972, when he himself was born in the said year, while the Court believes the testimony of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff in so far as they adults and were able to speak of event within their knowledge. The 2<sup>nd</sup> Plaintiff (PW2) for example started that in 1972, he was 23 years and they started grazing on the property pursuant to a sale between his father and Arap Chesimet



that had happened in or about 1968 or 1969, and they were given possession after the family of Arap Chesimet left the property.

83. The Court further finds from the evidence of PW3, that there was a surrender of the original title of Arap Chesimet even though the person who surrendered it was not noted to be very relevant. PW3 stated that the surrender of the original title is a requisite for the registration of new proprietor. Given that Nelson Kurgat was registered in 1977, it follows then the surrender of the original title in of Arap Chesimet was made contemptuously with the registration of Nelson Kurgat, and since Arap Chesimet had died earlier in 1974 the surrender of his original title would not have been made by him but must be deemed to have been made by the late Nelson Kurgat so as to secure his registration as the new proprietor.
84. Having found that Nelson Kurgat was in possession of the original title in the name of Arap Chesimet points to an exchange and/or deliver of the same by Arap Chesimet through a sale and/or purchase by Nelson Kurgat.
85. It follows that the occupation from 1972 and the surrender by Nelson Kurgat of the original title in the name of Arap Chesimet was consistent with the applicable law then which was the proviso of Repealed Section 3 (3) of the [Law of Contract Act](#). The Repealed Section 3 (3) of the law of contract provided as follows; -

“No suit shall be brought upon a contract for the disposition of an interest in land unless the Agreement upon which the suit is founded or same memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract;

- i. Has in part performance of the contract taken possession of the property or any part thereof or
- ii. Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract...”

86. Given the occupation by the Nelson Kurgat and the surrender of the original title to the Lands Registry, the Court finds on a balance of probability, that there was an oral Agreement of Sale between Nelson Kurgat and Arap Chesimet.
87. The oral Agreements for Sale having being made before the coming into force of the new Sections 3 (3) in 2003, was therefore excepted, and there was thus a valid Agreement for Sale between Nelson Kurgat and Arap Chesimet.
88. In answer to issue number 3, the Court finds that there was an Agreement for Sale of NANDI/KAIBOI/329 from Arap Chesimet to Nelson Kurgat and the entry and taking of possession by Nelson Kurgat and his family was not through an unlawful invasion by movement of boundaries and forceful occupation as claimed by the Defendant.
89. On issue 4 on what reliefs ought to issue, the Defendant has partly succeeded in providing evidence of unlawful and illegal registration of Nelson Kurgat as the proprietor and the subsequent registration of the 1<sup>st</sup> Plaintiff but the Plaintiff has succeeded in proving ownership by purchase of the suit property.
90. It follows that the registration of entry No. 3 to 14 must be rectified so as to return the suit property to the Estate of Arap Chesimet for onward transmission to Estate of Nelson Kurgat represented by the



1<sup>st</sup> Plaintiff who has succeeded in proving absolute ownership of the property and needs to be lawfully and procedurally registered as such.

91. Having found the registration of Nelson Kurgat at entry No. 3 of the green card to have been illegal and unprocedural and having found the existence of a sale between Arap Chesimet and Nelson Kurgat, the Defendant's counterclaim to have the property revert to the Estate of Arap Chesimet for distribution to the beneficiaries is thus untenable and the counterclaim and the counterclaim thus fails.
92. The reliefs that commend themselves to the Court in view of the existence of a purchase by Nelson Kurgat are as in the disposition.

**Disposition: -**

93. The Court thus makes the final orders as here follows; -
  - i. The Land Registrar Nandi County to rectify the registration of Timna Jepkoech Kurgat as the owner of NANDI/KAIBOI/329 by deletion of entries 3 to 14 in the Register of the NANDI/KAIBOI/329 and reinstating the same to Korshen Arap Chesimet aka Kipkoech Arap Chesimet under Section 80 of the *Land Registration Act*.
  - ii. The 1<sup>st</sup> Plaintiff having proven absolute ownership by purchase is hereby declared the absolute proprietor of NANDI/KAIBOI/329.
  - iii. The Estate of Korsen Arap Chesimet aka Kipkoech Arap Chesimet to undertake succession of the suit property and to note the purchaser's interest of Estate of Nelson Kurgat represented by the 1<sup>st</sup> Plaintiff. The succession and transmission related costs shall be borne by the Plaintiffs and/or their legal representatives. The succession to commence within 12 months from date hereof.
  - iv. In default of (iii) above, the Deputy Registrar of the Court to execute any necessary documents to effect the transfer to Timna Jepkoech Kurgat the Plaintiff and/her personal representation.
  - v. Each party shall bear its own costs.

**JUDGEMENT DELIVERED AND DATED AT KAPSABET THIS 8<sup>TH</sup> DAY OF JULY 2024.**

**HON. M. N. MWANYALE,**

**JUDGE**

In the presence of;

Mr. Rotich for the Defendant

Mr. Korir for the Plaintiff

