



REPUBLIC OF KENYA



**Kigen v Lagat & 2 others (Land Case 240 of 2016)
[2024] KEELC 6469 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
LAND CASE 240 OF 2016
EO OBAGA, J
OCTOBER 3, 2024**

BETWEEN

CHARLES KIMUTAI KIGEN PLAINTIFF

AND

EVANS KIPCHIRCHIR LAGAT 1ST DEFENDANT

CHALAN CONSULTANTS LTD 2ND DEFENDANT

UASIN GISHU COUNTY, LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

Introduction;

1. The Plaintiff filed this suit against the Defendants in which he sought the following reliefs: -
 - a. Permanent injunction against the 1st Defendant his agent and/or assignees from interfering, alienating or dealing in any other manner to the detriment of the plaintiff in respect to the interest in the suit land known as Kiplombe/Kiplombe Block 10 (Growel)/381 formerly plot No. 42.
 - b. Declaration that the title deed for the suit land being Kiplombe/Kiplombe Block 10 (Growel)/381 formerly plot No. 42 was obtained fraudulently and/or irregularly.
 - c. The 3rd Defendant do cancel the title deed issued to the 1st defendant for the suit land known as Kiplombe/Kiplombe Block 10 (growel)/381 formerly plot No. 42 and the register be rectified by the 3rd defendant to indicate the name of the plaintiff and the fresh title deed be issued in the name of the plaintiff for the suit land upon payment.
 - d. Costs of this suit.
 - e. Any other relief this court may deem necessary to grant.



2. The 1st Defendant filed a defence and raised a counter-claim in which he sought the following reliefs: -
 - a. A permanent injunction restraining the plaintiff from encroaching, trespassing, developing, cultivating, selling or dealing in any manner with that parcel of land known as Uasin Gishu/ Kiplombe/Kiplombe Block 10 (Growel)381.
 - b. An eviction order against the plaintiff from that parcel of land known as Uasin Gishu/ Kiplombe/kiplombe Block 10 (growel)381.
 - c. Mesne profits.
 - d. Costs.
 - e. Interests.

Background:

3. In or around 1984, residents of ELgeyo/Marakwet came together and purchased Growel Farm measuring 10.40 hectares. The farm which belonged to an Asian family was transferred and was registered in the name of three individuals to hold it in trust for the Residents. The three were Isaack K. Cheboi, Moses K. Yator and Charles Maiyo.
4. The farm was later subdivided and resulted in title numbers Kiplombe/Kiplombe (Growel)/337 to 516. Twenty-five acres was set aside for Centre plots. The Residents came from ten locations namely Kitany, Mosop, Marichor, Kabiemit, Kapmwosor, Metkei, Kibargoi, Soy, Chemoibon and Kocholwo. The area chief of each of the ten locations was given ten plots to allocate to his or her residents. The Centre plots were each measuring 50x100 ft.
5. The original plaintiff died on 8.11.2020 (Deceased) and was substituted by his son Titus Kimutai on 23.1.2023. the Plaintiff and the 1st Defendant are each claiming plot number Kiplombe/Kiplombe (Growel) 381 which was originally plot No. 42. The plot is currently registered in the 1st Defendant's name but is occupied by one Barnabas Kibet on behalf of the Deceased.

Plaintiff's evidence;

6. The Plaintiff who was initially an assistant chief of Turesia sub location of Soy Location within Elgeyo Marakwet testified that in 1992, they were informed that there was land available at Growell Farm. As leaders, they were asked to inform their subjects to contribute so that they can get land within the Farm. He collected a sum of Kshs 25,000/= which he banked at National Bank of Kenya.
7. The Farm plots were shared among the contributors. There were ten (10) Centre plots which were reserved for leaders from each of the ten locations. The ten Centre plots were shared among leaders. He was given the suit property. This was in 1997. This was after he paid Kshs 500/= to Chalan consultants Ltd, a firm of surveyors who showed him the land.
8. In 1999, he took Barnabas Kibet Maiyo to the suit property but was unable to trace the beacons. He went to Chalan consultants Ltd where he paid Kshs 1000/=. He was shown the beacons after which he asked Barnabas to put up a house and take care of the plot for him. Barnabas settled on the land until 2022 when he informed him that the 1st Defendant had gone to the suit property claiming that it belonged to him.
9. The Plaintiff wrote letters to the Land Registrar and Chalan Consultants ltd seeking clarification on the 1st Defendant's claim. When he did not get an explanation from the two, he went to his lawyer



who wrote a demand letter and caused a restriction to be registered on the suit property. He thereafter filed this case.

First Defendant's evidence;

10. The 1st Defendant adopted his witness statement which he recorded on 14.3.2019 and filed in court on 18.3.2019. he testified that he is registered owner of the suit property since 27.7.2012 after he purchased it using his hard earned money. He stated that the plaintiff had trespassed on to it and wanted to grab it. He stated that the plaintiff has never been a member of Growel farm and his continued occupation of the suit property is causing him continuous damage as he had no right of colour over the suit property.
11. The 1st Defendant stated that in 2005, he in the company of his father, went to the chief of Soy location where they made a request for a plot allocation. The chief told him that since he was a young man, he was going to give him a plot. He was allocated the suit property which was vacant. He went and paid survey fees to Chalan Consultants and in 2012, he obtained title to the suit property.

Second defendant's evidence;

12. The second Defendant neither entered appearance nor filed defence. There was therefore no evidence adduced from their end.

Third Defendant's evidence;

13. The 3rd Defendant adduced evidence through the Land Registrar DW3 Elizabeth Nyakundi. She testified that the origin of the suit property is traced from LR. No. Kiplombe/Kiplombe Block 10 (Growel) 2 whose register was opened on 12.3.2004. The property was later transferred to Isaac K. Cheboi, Moses K. Yator and Charles Maiyo on 5.9.2005.
14. On 14.9.2006, the title to the property was closed on subdivision. It resulted in LR. Numbers Kiplombe/Kiplombe Block 10 (Growel) 337 to 516. The owners then supplied them with a members' register which was duly signed by the Growel Farm officials. This register was used to generate titles among them the suit property. The suit property was transferred to the 1st Defendant. She testified that she was unable to avail the parcel file and as such, she was not in a position to tell how the transfer to the 1st Defendant was undertaken.

Plaintiff's submissions;

15. The plaintiff submitted that he managed to show how he came to own the suit property. He also submitted that the registration of the suit property was done in collusion with the officials of the 3rd Defendant. The 1st Defendant had stated in his statement that he purchased the suit property. There was no sale agreement produced; no application for consent of Land Control Board was produced; no transfer form was produced, there was no evidence of payment of stamp duty and or payment of any statutory payments.
16. The plaintiff relied on the case of Kirugi & another –vs- Kabiya & 3 others (1987) where the Court of Appeal states as follows:-

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof” Likewise failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”



17. The plaintiff submitted that the 1st Defendant's case cannot stand in view of section 3(3) of the Law of Contract Act which states as follows:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. the contract upon which the suit is founded— (i) is in writing; (ii) is signed by all the parties thereto; and CAP. 23 [Rev. 2012] Law of Contract [Issue 1] 6
- b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”.

18. The plaintiff relied in the cases of Patrick Tarzan Matu & another – Vs- Nassim Shariff Abdula & 2 others (2009) eKLR and Siverbird Kenya Limited –Vs- Junction Limited & 3 others (2013) eKLR which both state that if there is no compliance with section 3(3) of the Law of Contract Act, then no suit can be brought for either breach of Contract or damages based on the same.

19. The plaintiff further submitted that the 1st Defendant did not obtain consent of the Land Control Board and therefore the transaction if any became void. In this respect the plaintiff relied on the case of Mbuthia Charagu –vs- Kiarie Kaguru Civil Appeal No 87 of 1986, where the Court stated as follows:-

“Unless there is a consent of the Land Control Board all the transactions relating to the transfer are null and void”.

20. The Plaintiff submitted that the 1st Defendant's title deed cannot stand as it was obtained illegally. He relied on section 26 of the land Registration Act which states as follows: -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

21. The Plaintiff relied on the case of Elijah Makeri Nyangware -vs- Stephen Mungai Njuguna & another (2013) eKLR where the Court stated as follows: -

“First, it needs to be appreciated that for section 26(1)(b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy 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 as long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not to



have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

22. The Plaintiff further relied on the case of *Dismas Munalo Kalamu –Vs- Martin Juma Kwata & 4 others* (2020) eKLR where it was held as follows:-

“Clearly therefore no interest in the suit land passed to the plaintiff on 2nd November 2007 as he would like this court to believe. The plaintiff appears to place a lot of premium on the fact that he holds the title to the suit land”.

23. The plaintiff further relied on the case of *Mumu Maina –vs- Hiram Gathia* (2013) eKLR where it was 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 interested which need not be noted on the register.”

24. further reliance was placed on the case of *Zacharia Wambugu Gathimu & another –Vs- John Ndungu Maina* (2019) eKLR where it was held as follows: -

“Although there was no evidence adduced that pointed out to the Defendant as being a party to the fraud or misrepresentation and that he might have been an innocent purchaser for value, yet I am satisfied that the conditions provided for impeachment of a title as per the provisions of section 26(1) (b) have been met. I find that the title to the Defendant having been obtained illegally, unprocedurally and/or through a corrupt scheme, the same is liable to be cancelled. Regrettably, the doctrine of estopped and equity would not apply in the present instance to sanitize an illegality.”

25. The plaintiff further submitted that it was not possible for the 1st Defendant to be allocated land when he was a minor. The ten plots which were given to each location were meant for leaders such as chiefs, assistant chiefs, elders and teachers. It was therefore not possible for the 1st Defendant to be given land when he was a minor and not a leader.

26. Finally, the plaintiff submitted that courts have consistently held that they will not recognize titles which are obtained illegally. In support of this, he relied on the case of *Chemey Investments Limited 0Vs- Attorney General & others* (2018) eKLR where the Court of Appeal stated as follows:-

“Decision abound where courts in this land have consistently declined to recognize and protect title to land which has been obtained illegally or fraudulently merely because a person is entered in the register as proprietor... The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense”.

First Defendant’s submissions;

27. The 1st Defendants submitted that the Plaintiff did not produce any documents to show that he had been allocated a plot at Growel Farm. He only produced an allocation list dated 3.7.2019 which was long after the allocation had been made to the 1st Defendant. He submitted that he produced an



allocation list which showed that there was no one who had been allocated plot No. 42 and a members list where it is shown that the was allocated plot 42.

28. The 1st Defendant cited the case of Muia (suing as the representative of the Estate of Lucy Nthenya Muia) –vs- Mutuku 7 4 others (2024) KEELC 1703 (KLR) 20th March 2024 and the case of Samuel Kipngeno Letting –Vs- Ezekiel Tonui (2016) eKLR for the proposition that the plaintiff had not adduced evidence to show that he was allocated the suit property.
29. The 1st Defendant further submitted that the plaintiff had not adduced any evidence of fraud against him. He relied on the cases of R. G. Patel – Vs- Lalji Makani (1957) EA 314 where 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.”
30. Still on the issue of fraud, the 1st Defendant relied on the case of Arthi Highway Developers Ltd –Vs- West End Butchery Ltd & others (2015) eKLR where the court stated that fraud must be proved and cannot be inferred from the facts pleaded. This was the same position in the case of Mahandra Shah – vs- Barclays Bank International Limited & another (1979) eKLR.

The second and Third Defendants’ submissions;

31. The 2nd and 3rd Defendants did not file any submissions. As at 10th September 2024 when I was writing this judgment, none of the two Defendants had filed their submissions in the e-filing system of the judiciary.

Analysis and determination;

32. I have carefully considered the evidence adduced herein as well as the submissions of the plaintiff and the 1st Defendant. The issues which emerge for determination are as follows:-
 - a. Who between the plaintiff and the 1st Defendant was allocated the suit property;
 - b. Was the registration of the suit property in the name of the 1st Defendant done procedurally and lawfully;
 - c. Are the plaintiff and 1st Defendant entitled to the reliefs in the main suit and counter-claim respectively;
 - d. Which order should be made on costs.

a. Who between the plaintiff and the 1st Defendant was allocated the suit property;

33. There is no contention that there were ten plots which were allocated to Soy Location. Among the ten was the suit property. There is also no doubt that as per the minutes of 14.1.1996 which were produced by both the plaintiff and the 1st Defendant, the suit property had not been allocated to anyone from Soy Location.
34. The Defendant adopted his witness statement which he recorded on 14.3.2019. In this statement, he clearly stated that he purchased the suit property using his hard earned money. He did not produce any sale agreement to confirm that he purchased the suit property and for what consideration. There was no transfer produced or payment of any statutory duties such as stamp duty etc.



35. In his testimony before court on 15.3.2023, the 1st Defendant gave contradictory evidence to that in his statement. He stated that in 2005, he went to the Chief of Soy Location in the company of his father. The two made a request for allocation of a plot. The chief gave him plot No. 42 which was vacant. He claims to have paid survey fees to Chalan Consultants Ltd but there was no evidence of any payment adduced by him.
36. The 1st Defendant testified that in 2012 when he was processing title, he was away and that he left the task to his father who did it for him. This evidence is corroborated by letter dated 2.7.2012 which was written by his father Shaddock Chepkinyeng Cheruitich. This letter was addressed to Chalan Land Surveyors. In this letter, the 1st Defendant's father was telling Chalan Surveyors that the suit property belonged to the 1st Defendant. He went on to ask Chalan surveyors to adjust their records accordingly.
37. It is clear from the letter dated 2.7.2012 that the records held by Chalan consultants Limited had a different name and that is why he was asking the surveyors to adjust their records. He went ahead to tell Chalan Surveyors that the late Edward Orgut who was the chief of Soy Location had confirmed to him that the suit property belonged to his son. If the name of the 1st Defendant was in the register held by Chalan Consultants, the 1st Defendant's father could not have bothered to ask for adjustment of the records held by Chalan Consultants Ltd.
38. The 1st Defendant never bothered to take possession of the suit property which he alleges to have been allocated in 2005. There is evidence that the plaintiff took physical possession of the suit property in 1999. He gave it to Barnabas Kibet who constructed a house on it in 1999. Mr. Barnabas Kibet moved into the house he had constructed in 2000. He has since been there. It is therefore not true that as at 2005, the suit property was vacant as the 1st defendant alleges.
39. The plaintiff produced a receipt from Chalan consultants Limited dated 8.2.2011. He paid Kshs 5000/= being survey fees for the suit property. This receipt was not disputed. Though the 1st defendant claimed that he paid survey fees for the same property, he did not produce any receipt as evidence. When he was cross-examined, he was asked why he did not file a suit for eviction of whoever was occupying the suit property after he discovered that there was someone who was in occupation. His answer was that he did not file a suit as he wanted to sort out the matter out of court only to find that the plaintiff had sued him. This cannot be true. If indeed the suit property was allocated to him, he should have taken steps to have the alleged trespasser removed from the land.
40. PW4 Isaack Kipruto Cheboi was secretary of Growel Farm. In re-examination, he stated that the plaintiff had a receipt which was issued by Chalan consultants Limited but the 1st Defendant had no document to show that he was allocated the suit property. He further stated that the surveyors had no power to alter the names in the register. This witness stated in his evidence that he regretted what happened in this case and that he was leaving it to court to decide who is the owner of the suit property.
41. I observed the demeanor of this witness and I was of the opinion that he knew what happened but he did not want to take a position which could either support the plaintiff or the 1st Defendant. However, the evidence taken in totality point out that the suit property was allocated to the Plaintiff who proceeded to take possession and has remained so to date.
42. In his written witness statement, PW4 testified that he was approached by the 1st Defendant's father who told him that he had three Centre plots namely 381, 390 and 430. When he checked with the land office, he found out that plot 390 and 430 belonged to other individuals. He further noted that the only plot which did not have an owner was plot 381. He told him that the plot belonged to his son the 1st Defendant herein. On the basis of the information, the trustees who included himself listed the 1st



Defendant as owner of the suit property. He went on to state that according to records held by Chalan Surveyors, the land belonged to the plaintiff.

43. Pw4 further stated that the 1st Defendant's father was a relative of Edward Orgut who was the chief of Soy location. The witness statement by PW4 clearly confirms that the suit property had been allotted to the plaintiff but records were changed at Chalan Consultants Limited who inserted the name of the 1st Defendant. This is after the 1st Defendant's father had requested Chalan Consultants Ltd surveyors to change the records to reflect that the suit property belonged to the 1st Defendant. I therefore find that the suit property was allocated to the plaintiff.

b. Was the registration of the suit property in the name of the 1st Defendant done procedurally and lawfully;

44. There is no doubt that the title to the suit property is registered in the name of the 1st Defendant. The question to be answered is whether this registration was procedurally and legally registered. To begin with, DW3 Elizabeth Nyakundi who is a Land Registrar at Uasin Gishu County Lands office testified that she was unable to tell how the 1st Defendant came to be registered as owner of the suit property. This was because she could not find the parcel file.
45. While dealing with issue number (b) hereinabove, I demonstrated that the evidence of the 1st Defendant in as far as acquisition of a suit property was contradictory. His testimony before court and his witness statement were at variance. He purported to disown the written statement version. It is clear that it is his father who was close to the late chief Edward Orgut. It is this Edward Orgut who inserted the name of the 1st Defendant in the members' register.
46. There is documentary evidence that the 1st Defendant's father wrote to Chalan consultants Ltd on 2.7.2012 asking them to adjust their records accordingly. This was an act of influencing the surveyors to alter the records. There is nothing which was given in evidence by the 1st Defendant to show how he came to be registered as owner of the suit property. He is only relying on title which he obtained on 27.7.2012 long after the plaintiff had taken possession of the suit property. The 1st Defendant was under obligation to show that his title was issued procedurally. He did not. This was the holding in the case of Mumu Maina –vs- Hiram Gathia Maina (Supra).
47. The third Defendant filed a copy of the extract from the register popularly known as green card which contained different entries. This was the original list of documents filed with their defence. However, when the Land Registrar came to testify, she produced a completely different copy of green card. This shows that the 3rd Defendant had something to hide. The third Defendant was complicit in this scheme to give title to a person other than the one who deserved to get title.
48. The 1st Defendant stated that he was not around when title was processed. It is his father who did everything. There is evidence from PW4 that the Defendant's father was close to the trustees and was a relative of the chief of Soy Location who is now deceased. He used his closeness to the chief and officials to alter documents which were finally used to have the 1st Defendant registered as owner of the suit property.
49. The evidence has shown that the title in the name of the 1st Defendant was procured through a corrupt scheme. It is therefore impeachable under section 26(i)(b) of the *Land Registration Act*.



c. Are the plaintiff and 1st Defendant entitled to the reliefs in the main suit and counter-claim respectively;

50. From the above analysis, it is clear that the suit property was allotted to the plaintiff who was by then Assistant Chief of Turesia Sub-Location. The suit property was registered in the 1st Defendant's name through a corrupt scheme. It therefore follows that the 1st Defendant's counter-claim fails in its entirety. On the other hand, it is clear that the plaintiff paid Kshs 5000/= for survey fees. This was the only amount to be paid as the land had already been acquired with the help of the late Hon. Nicholas Biwott. I find that the plaintiff has proved his case on a balance of probabilities and is entitled to the reliefs in the plaint.

Disposition;

51. The court makes the following final orders. The 1st Defendant's counter-claim is dismissed. I proceed to enter judgement for the Plaintiff against the Defendants as follows: -

- a. A permanent injunction is granted against the 1st Defendant, his agents and /or assignees from interfering, alienating or dealing in any other manner with the plaintiff's interest in land known as Kiplombe/Kiplombe Block 10 (Growel) /381.
- b. A declaration that the title deed in respect of LR. No. Kiplombe/Kiplombe Block 10 (Growel) /381 was irregularly obtained through a corrupt scheme.
- c. The 3rd Defendant is directed to cancel the title deed issued to the 1st Defendant in respect of LR. No. Kiplombe/Kiplombe Block 10 (Growel) /381 and have a fresh title issued in the name of the plaintiff.
- d. The Plaintiff shall have the costs of the main suit and counter-claim.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF OCTOBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

M/s Kibet for Mr. Kibii for 1st Defendant.

Mr. Kiboi for Plaintiff.

Court Assistant –Laban

E. O. OBAGA

JUDGE

3RD OCTOBER, 2024

