



**Lagagen (Suing as an Administrator of the Estate of Daudi Cheptarus Kimining) v Kimining & another (Environment & Land Case 21 of 2020) [2023] KEELC 18831 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18831 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 21 OF 2020**

**A OMBWAYO, J  
JULY 12, 2023**

**BETWEEN**

**EUNICE CHEPKORIF LAGAGEN ALIAS EUNICE CHEPTARUS (SUING AS AN ADMINISTRATOR OF THE ESTATE OF DAUDI CHEPTARUS KIMINING) ..... PLAINTIFF**

**AND**

**JACOB KOMEN KIMINING ..... 1<sup>ST</sup> DEFENDANT  
LAND REGISTRAR – KOIBATEK ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Eunice Chepkorir Lagagen alias Eunice Cheptarus (hereinafter referred to as the plaintiff) suing as the administratrix of the estate of Daudi Cheptarus Kimining has come to this court against Jacob Komen Kimining and the land Registrar Koibatek (hereinafter referred to as the defendants) stating that the plaintiff and the defendant are the biological children of the late Daudi Cheptarus Kimining who died on 10<sup>th</sup> June 2010. Daudi Cheptarus Kimining was the biological son of the late Kumin Kimining who died in 1963. The plaintiff and 1<sup>st</sup> defendant were grandchildren of Kumin Kimining.
2. On or about 16<sup>th</sup> November, 1995 the 1<sup>st</sup> defendant caused himself to be registered with the 2<sup>nd</sup> Defendant, as the owner of land parcel number LEMBUS/KISOKON/59 which measures approximately 40.0 Hectares or 100 acres.
3. The said registration of the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant over the suit parcel herein was done fraudulently and in breach of the laid down procedures and the law.
4. The defendants' deliberate, illegal and fraudulent acts and/or omissions have deprived the dependants and beneficiaries of the estate of the late Kumin Kimining their rightful share over the estate.



5. The defendants' actions are arbitrary, conventional, whimsical, and illegal, and have been done with the intention of depriving the plaintiff his land without following due process.
6. The defendants' deliberate, illegal and fraudulent acts and/or omissions have exposed the plaintiff and other beneficiaries of the estate of the late Kumin Kimining to suffer loss and damages.
7. The plaintiff prays for a declaration that the transfer of Land Parcel Number Lembus/Kisokon/59 and registration of the same in the name of the 1<sup>st</sup> defendant was irregular, unlawful, fraudulent and therefore null and void ab-initio.
8. Moreover, the plaintiff prays for an order for cancellation of the registration of the 1<sup>st</sup> defendant from the title of land parcel Number Lembus/Kisokon/59 and the said title to revert to the names of Kumin Kimining, now deceased. Lastly, the plaintiff seeks General, punitive/ Exemplary damages and Mense profits. Costs and interest of the suit.

### **1St Defendants Case**

9. The 1<sup>st</sup> defendant filed a statement of defence generally denying the allegations in the plaint and specifically denying that the plaintiff and 1<sup>st</sup> defendant are the biological children of Daudi Cheptarus Kimining. He contends that the late Kimining died on 1930 and not in 1963. The defendant denies that he caused himself to be registered as proprietor of the suit land and states that he has been in possession since time immemorial. Even prior to the death of his father Daudi Cheptarus Kimining .
10. The 1<sup>st</sup> defendant asserts that the plaintiff has never been in possession and has never had any beneficial interest in the land and that the plaintiff has no capacity to administer the estate of Kumin Kimining and has no capacity to institute the suit. The 1<sup>st</sup> defendant raises a preliminary objection that the suit herein is time barred. He prays that the suit be dismissed with costs.

### **Evidence**

11. When the matter came up for hearing, the plaintiff testified that his father Daudi Cheptarus Kimining had 4 wives. Her grandfather was the owner of the suit property measuring 40 Ha and died in 1963 and that her father died in 2010. She claims that her brother fraudulently transferred the suit parcel of land in his name in 1995. She was born in 1954 but never saw her grandfather and never knew where he lived. She stated that her father was Daudi Cheptatus Kimining who had 4 wives and that she was from the second house. Her grandfather was Kumin Kimining who was the owner of the parcel of land known as Lembus/Kisokon/59 measuring 40 hectares. His grandfather had not distributed the land in Kisokon. When her father died, her brother fraudulently transferred the whole land without succession. His father had the title, and it is not clear how 1<sup>st</sup> defendant transferred the parcel into his name.
12. The Defence called Susan A Imbili, the Land Registrar Koibatek who stated that the land parcel in dispute measures 100 acres. A registration was first opened on 26<sup>th</sup> September 1962 in the name of Kumin Kimining. That on 4<sup>th</sup> March 1969 the suit was changed to Agricultural Finance Corporation before it was discharged on 13<sup>th</sup> November 1995. A correction of name was effected on 16<sup>th</sup> November 1995 and a title deed was issued the same day. A caution was registered on 16<sup>th</sup> June 2015 by the plaintiff who claimed a beneficiary interest. The caution was later removed on 17<sup>th</sup> February 2016 another caution was registered by Kipkemboi Lekabou claiming a beneficiary intent.
13. Defence witness 2, Jacob Komen Kimining states that the plaintiff is his younger sister. He is the owner of the suit-land having been registered in 1962 as the proprietor. His father had 4 wives and some



sisters. His grandfather died in the 1920's. He is the first born son in the family and was named after the deceased grandfather's brother one Arap Komen otherwise referred to as Kumin in the Kalenjin dialect who died as a young man sometimes around the year 1930 and this is something that is known to the plaintiff herein and all his family members.

14. His grandfather was not called Kumin Kimining, he was Sialu Cheptarus. Komen was the brother to his grandfather; he died at a young age even before marrying. He therefore left behind no asset, no dependant and/or beneficiary. He died even before the suit property was surveyed and allocated. He has been in occupation of the suit property since the year 1962 even during the lifetime of his deceased father, the late Daudi Cheptarus Kimining. The subject property was allocated to him sometimes in the year 1962 by the government of the Republic of Kenya when he was a school going boy.
15. His deceased father was polygamous and his biological mother was called Sara Chebet (now deceased). His step mother went by the name Martha Tungo and there was the last one, Joyce Tungo. He used to live with his mothers on the subject property until when they ultimately left.
16. He was allocated the subject property in the presence of his deceased father among other elders. The allocation was done by members of a committee set up by the government to aid in the allocation programs together with a survey team. He was called from school then to be allocated property. He remembers that his twin sister accompanied him but she was not allocated property for the reason that she is a female; girls were not allocated property then. Most of his classmates some of whom are his witness herein were also allocated property then.
17. DW3, Dina Kabilo Chebii, a daughter to Daudi Cheptarus stated that their father had 4 wives. Her mother was Sarah Cheptarus and also mother to the 1<sup>st</sup> defendant and the plaintiff. She stated that she grew up and went to school together with the 1<sup>st</sup> defendant herein and her twin brother.
18. She knows that the 1<sup>st</sup> defendant herein lives on the suit property and that the suit property belongs to the 1<sup>st</sup> defendant. He has been living thereon since the 1960s.
19. They were taken from class in the year 1962 to be allocated property, she accompanied her twin brother and saw him being allocated the suit property. She witnessed him affix his thumb print against his name and the parcel number allocated to him. She was never allocated any property because then women were not allocated property; culturally
20. They used to live on his late father's property in Mogotio before his brother, the 1<sup>st</sup> defendant herein, moved to Muserechi in 1963.
21. When his brother left to live on his land, his deceased father asked her mother to accompany him on the land because he had grown old and it was his belief that the 1<sup>st</sup> defendant could then take good care of her as he was still a strong young man.
22. She remembers he was shown the property and her deceased father took care of the property for him until he was issued with a title deed.
23. She knew that her brother, the 1<sup>st</sup> defendant herein was named after the late Kumin Kimining, his uncle who died long before the 1<sup>st</sup> defendant was allocated the suit property. The late Kumin Kimining died before marrying and he left behind no heirs. She never saw him because he died a long time ago.
24. Her later grandfather's name was Sialo Cheptarus and not Kumin Kimining. She never saw either of them.



25. To the best of her knowledge, the suit property belongs to her brother, the 1<sup>st</sup> defendant herein and the allegations peddled by the plaintiff herein are far- flung, baseless and unfounded. She urges the honorable court to dismiss the same forthwith and with costs to the 1<sup>st</sup> defendant
26. DW4, James Rotich testified that the 1<sup>st</sup> defendant was allocated the suit land during adjudication. He knew the 1<sup>st</sup> defendant herein, Jacob Komen Kimining because they come from the same area and lived about three kilometers apart and that he was his classmate back in primary school and they grew up together as young boys budding in the village. He knew that the 1<sup>st</sup> defendant herein was the lawful owner of the suit property.
27. He remembers that the suit property was allocated to the 1<sup>st</sup> defendant sometimes in the year 1962 when they were still school going boys. This was made possible through a government program that was put in place to settle most people within the area they lived in. There was a committee set up to help in the allocation of property.
28. He remembers that the land set aside by the government for settlement of the members of the community was surveyed by government surveyors and who were equally present during the allocation. The members of the committee always visited their school because that is where most of their meeting were held.
29. In the year 1962 they were summoned from school and were taken to Kelelwa Pombo where they found so many people. They were taken out of class and Jacob was present with them. They used the same vehicle with the 1<sup>st</sup> defendant herein to the location where land was being allocated.
30. DW5 Peter Kipkwe Kibiwott relied on his statement and emphasized that the land was given to Jacob Komen Kimining in 1962 during adjudication. He was living on the land with his mother. He was given the land because he was 1<sup>st</sup> born of the house of Sarah Cheptarus. He knew that the 1<sup>st</sup> defendant's grandfather was called Cheptarus Sialu and that his father, Daudi Cheptarus Kimining was polygamous. The plaintiff herein is a sister to the 1<sup>st</sup> defendant herein. He was aware that by the year 1962, the late Daudi Cheptarus Kimining's wife called Martha Tungo did not have a son, she only had a daughter.
31. They inquired from the deceased, who among his children he would take for the property allocation programme that had been put in place by the government and he readily proposed his son, the 1<sup>st</sup> defendant herein, with an indication that it is only him who would be able to take care of his old wives.
32. He is aware of his own knowledge that during the allocation of properties, through the government programme, there was a programme put in place to aid in the allocation. He was among the members of the committee selected to aid in the process. The property in the area was subdivided by the government, after the subdivision, villagers were summoned with a view to allocating them property; mainly those who had attained the age of majority.
33. All this time he was present and witnessed the entire process. There were over 160 people comprising of old men of over 40 years old, young men of 18 years and above and there were also young men below the age of 18 years but who were also considered for allocation on account of cultural suggestions.

### **Analysis And Determination**

34. I have considered the submissions on record and do find that the 1<sup>st</sup> issue to be determined is whether the 1<sup>st</sup> defendant fraudulently caused the suit property to be transferred into his name. The plaintiff



produced a certificate of official search as evidence that the parcel of land was registered in the 1<sup>st</sup> defendant name. The green card was also produced which showed that Kumin Kimining was registered as proprietor on 26<sup>th</sup> September 1962. On 16<sup>th</sup> January 1995 Jacob Komen Kimining was registered as proprietor by way of change of name and title issued on the same date.

35. I do believe the evidence of James K Rotich a classmate of the 1<sup>st</sup> defendant who states that the land in issue was allocated to the 1<sup>st</sup> defendant in 1962 when they were still school going children. The land was surveyed and allocated to the 1<sup>st</sup> defendant and his parents were shown the land being allocated to avoid disputes.
36. This court finds that the behavior of the Daudi Cheptarus Kimining the father of the plaintiff and 1<sup>st</sup> defendant suggest that the land in dispute belonged to the 1<sup>st</sup> defendant because he never raised any issue with the 1<sup>st</sup> defendant owning the land even after correction of name on the register. He never attempted to allocate the land to his children because he knew it belonged to the 1<sup>st</sup> defendant. Peter Kipkwe Kibiwott knew the parties herein very well as brother and sister. Peter K Kibiwott explained how the 1<sup>st</sup> defendant was registered as the owner thus that his father Daudi Cheptarus Kimining had a wife known as Martha Tungo who did not have a son but only had a daughter. That Daudi Cheptarus Kimining chose the 1<sup>st</sup> defendant to hold the land on behalf of his old wives. The 1<sup>st</sup> defendant was registered as owner of land but no title deed was issued. According to DW5 the land was registered in the names of the 1<sup>st</sup> defendant when he was already living there with his mother and his sisters. The whole family was living the land in 1962. He states that Jacob was given the land because he was the 1<sup>st</sup> born in the family of Sarah Cheptarus. From the evidence on record, I do find that the 1<sup>st</sup> defendant had demonstrated that he was allocated the parcel of land and the same registered in his name as Kumin Kumining. The register was corrected later to reflect his name Jacob Komen Kimining after he obtained title.
37. The plaintiff has sued on behalf of her father but the father who died in 2010, 15 years after issuance of title never took any action against the 1<sup>st</sup> defendant. Moreover, DW2 Dina Kobilo Chebii, the plaintiff's sister testified that the land in question was allocated to the 1<sup>st</sup> defendant in 1962. The DW2 appeared a trustworthy and truthful witness. She is a sister to the plaintiff and 1<sup>st</sup> defendant and they grew up together hence knows the family secrets very well.
38. Having found as above, I do conclude that the plaintiff has failed to prove fraud against the defendants as the 1<sup>st</sup> defendant was registered as the proprietor in 1995 due to the change or correction of name and therefore the process was proper in law. The property was already registered in his name and therefore he could not be said to have defrauded his sisters.
39. It is trite law that whoever alleges fraud must prove. Section 107, 108, 109 of the [Evidence Act](#) provides that:-

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

40. In the case of *Githinga Kibutha vs Caroline Nduku ELCA No 16 of 2007* the court stated thus:-

“The *Land Registration Act* does not define fraud. Recourse must therefore be had to other sources of law. The Black’s Law Dictionary defines fraud thus:-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’.

Fraud would, therefore consist of deceitful actions which may be made through either positive assertions or concealment of facts. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.”

41. Similarly, in the case of *Denis Noel Mukhulo Ochwada & Another v Elizabeth Murungari Njoroge & Another [2018] eKLR*. The court stated that:-

“As regards standard of proof of fraud, the law is quite clear. In *R. G. Patel vs Lalji Makanji (Supra)*, the former Court of Appeal for Eastern Africa stated thus:-

“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.”

Also in the case of *Urmilla w/o Mahendra Shah vs Barclays Bank International Limited & Another [1979] KLR 76; [1976-80] 1KLR 116B* it was held that: “allegations of fraud must be strictly proven and that 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. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned”.

42. Furthermore, this court finds that the claim by the plaintiff is time barred having been filed on 10<sup>th</sup> March 2020 having 25 years after the alleged fraud. Section 4(2) of the *Limitation of Actions Act* prohibits this court from entertaining stale claims. This section provides as follows:-

“an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued provided that an action for Libel or slander may not be brought after the end of twelve months from such date”.

43. Fraud is a tort and therefore the limitation period is 3 years. Section 7 of the *Limitation of Action Act cap 22 Laws of Kenya* provides: -



7.	<p>Actions to recover land</p> <p>An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.</p>
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44. The plaintiff has come too late in the day that is 25 years after the alleged fraud. This is against public policy because the delay is unreasonable. In the case of *Gathoni v Kenya Cooperative Creameries Ltd* [1982] KLR 104 the court observed that:-

“The law of Limitation of Actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intended plaintiff to exercise reasonable diligence and take reasonable steps in his own interest”

13. Furthermore, in *Iga vs. Makerere University* [1972] EA it was held that:-

A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rules of Uganda which has same provisions with the Limitation of Actions of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

In *Bosire Ogero v Royal Media Services* [2015] eKLR R.E. ABURILI J stated that: ‘The law of Limitation of Actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them’.

44. She further stated that “.....The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of *Pauline Wanjiru Thuo vs David Mutegi Njuru* CA 2778 of 1998.’...

45. Whether the 1<sup>st</sup> defendant was registered as a trustee of the family could only have been discerned if it was pleaded and sought. The upshot of the above is that the suit is dismissed with costs.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NAKURU VIRTUALLY THIS 12<sup>TH</sup> DAY OF JULY 2023**

**A O OMBWAYO**

**JUDGE**

