



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC E005 OF 2020**

**ALINOOR ABDI ELMI.....PLAINTIFF**

**VERSUS**

**FLORINE CHERONO OPEYO & CORNELIA CHELANGAT CHERUIYOT (Sued as the legal representatives of the estate of PAUL KIPCHIRCHIR CHERUIYOT Alias PAUL CHERUIYOT).....1<sup>ST</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR .....2<sup>ND</sup> DEFENDANT**

**THE DIRECTOR OF SURVEY.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 28 October 2020 the Plaintiff herein six for the following orders.

- i. A permanent injunction restraining the 1<sup>st</sup> Defendant by itself or its agents from unlawful entry, licensing, developing, subdividing, transferring, selling and/or doing any other act that may prejudice the Plaintiff's right to pursue this matter legally to its logical conclusion.
- ii. A declaration that all that parcel of land known as Kericho/ Municipality Block 5/230 formally (un-surveyed Plot No. 17 Kericho/Municipality Block No. 631/723) lawfully belongs to the Plaintiff as purchaser for valuable consideration.
- iii. A declaration that the title currently held by the late Paul Kipchirchir Cheruiyot alias Paul Cheruiyot in respect of the same property is null and void.
- iv. An order directing the Chief Land Registrar to cancel the registration of the late Paul Kipchirchir Cheruiyot alias Paul Cheruiyot in Kericho/ Municipality Block 5/230 formally (un-surveyed Plot No. 17 Kericho/ Municipality Block No. 631/723)
- v. Any other further relief that the honorable court may deem just and fit to grant.
- vi. Costs of this suit.

2. On the 2<sup>nd</sup> March 2021, one Miss Koech Advocate purported to come on record for the Defendants wherein by consent both counsel agreed that the parties do maintain status quo pending the hearing of the main suit. The consent was adopted as the order of the court and parties directed to comply with the provisions of Order 11 of the Civil Procedure Rules.

3. There having been service of the Plaintiff's pleadings effected upon the Defendants and there having been neither response nor appearance at the hearing of the application, the Plaintiff, vide his application dated the 24<sup>th</sup> June 2021 sought for interlocutory judgment against the Defendant wherein the same was entered by the Deputy Registrar on the 25<sup>th</sup> June 2021.

4. On the 5<sup>th</sup> October 2021, the Plaintiff again sought for judgment to be entered against the Defendant and the matter be set down for hearing on formal proof. Judgment was entered against the Defendant since they had not filed any papers, and a date for formal proof was fixed wherein the matter proceeded for hearing on the 1<sup>st</sup> November 2021.

**Plaintiff's Case.**

5. The Plaintiff, Alinoor Abdi Elmi testified as PW 1, to the effect that he was a businessman and lived in Kericho. That he had recorded his statement and filed his documents on 28<sup>th</sup> October 2020 which he wished to adopt as his evidence in chief. He produced the said documents as Pf exh 1-12 wherein he proceeded to testify that one Nandilal had sold to him the suit land after having purchased the same from one Leah Njeri Njoroge.

6. That from the time of purchasing the land, which was initially known as No. 631/723 before the title was issued, he had continued to pay rent until the land was registered as Kericho/Municipality block 5/230 in his name and as per the certificate of search herein produced as his exhibit.

7. His evidence was that in the month of August, 2019, he had discovered that title to his land had been forged by one Njoroge when he found one Florina and her daughter trying to sell the land. He had reported the matter at Kericho Police Station wherein the suspects had been arrested. They were released on free bond pending investigations.

8. That he had then been told by the police to continue being in occupation of the land and that he should report if anything happened. That he was now seeking that the court confirms his title to the suit land and orders that the forged title be cancelled.

9. The second witness Mansoor Nandilal Maniklal who testified as PW2, adopted his witness statement and proceeded to testify that before his father died, he had asked him to give the Plaintiff the piece of land he had sold to him. That after he became an Administrator to the estate of his late father and had been issued with a temporary Grant in Succession Cause No. 143 of 2019, he had fulfilled his father's wish by giving the Plaintiff the piece of land which was plot No. Kericho Municipal Block 5/230 which the Plaintiff had bought from his father. He also confirmed that the relevant procedures had been followed and that as a family, they did not have any complaint against the Plaintiff.

10. The Plaintiff thus closed their case and filed their submissions dated the 1<sup>st</sup> December 2021 on the 3<sup>rd</sup> December 2021 to which they submitted that the dispute in question related to land parcel No. Kericho Municipal Block 5/230 wherein two parties lay claim for the same, with each party in possession of their respective title deed.

11. The Plaintiff thus filed the issues for determination as follows;

- i. Who is the legal owner of formally (un-surveyed Plot No. 17 Kericho/Municipality Block No. 631/723)
- ii. Whether the honorable court should order the Chief Land Registrar to cancel the 1<sup>st</sup> Defendant's title
- iii. Whether the honorable court should issue an order of permanent injunction against the 1<sup>st</sup> Defendant.
- iv. Who should bear the costs of the suit

12. On the first issue for determination, the Plaintiff submitted that he was the legal and indefeasible owner of formally (un-surveyed Plot No. 17 Kericho/ Municipality Block No. 631/723), as per the certificate of lease herein produced as Pf exh5 and the copies of the official search produced as Pf exh2.

13. The Plaintiff relied on the provisions of Section 26 of the Land Registration Act to submit that it was not possible to have two different absolute and indefeasible owners claiming under the same title. That the land in question was initially allocated to the deceased Leah Njeri Njoroge as per Pf exh 4 wherein in 1994 she sold the same to one Nandilal Cherenik Nandilal vide a sale agreement of 16<sup>th</sup> June 1994 herein produced as Pf exh 8. Subsequently the suit was sold and the Plaintiff herein via a sale agreement dated 14<sup>th</sup> June 2003 wherein the land parcel, un-surveyed Plot No. 17 Kericho/Municipality Block No. 631/723) was amended to reflect No. Kericho Municipality Block 5/230.

14. Since the land was still registered to the deceased Leah Njeri Njoroge, a succession cause was commenced in the Kericho Chief Magistrates court Succession Cause No. 143 of 2018 wherein the Plaintiff was allocated No. Kericho Municipality Block 5/230 vide the confirmation of grant dated 11<sup>th</sup> September 2019 herein produced as Pf exh 6. The Plaintiff took possession and has continued to pay a fee to the Municipal Council.

15. That since the matter was not defended, no document had been produced by the 1<sup>st</sup> Defendant to confirm how he had acquired his own certificate of title. That since it is trite that for a title to be canceled the old one must be surrendered for cancellation and keeping in mind that the Defendant still had title to date only leads to the fraudulent inference on the part of the 1<sup>st</sup> Defendant.

16. That although the Land Registrar had purported to cancel the Plaintiff's title and issue a new one to the 1<sup>st</sup> Defendant, yet the powers of the Registrar of rectification, did not include the power to cancel a proprietor's title, as envisaged by Section 80 of the Land Registration Act. The decision by the land Registrar to cancel the Defendant's (sic) title was therefore ultra vires and in bad faith.

17. The second issue as to whether the honorable court should order the Chief Land Registrar to cancel the 1<sup>st</sup> Defendant's title, the Plaintiff's submission was that Section 80 of the Land Registration Act was clear in that the court could rectify the register by directing that any registration be cancelled or amended if it is satisfied that such registration was obtained, made or omitted by fraud or mistake. That the fraudulent actions of the 1<sup>st</sup> Defendant to transfer land to himself without legal justification should be rectified by canceling his title.

18. The third issue for determination as to whether the court should issue an order of permanent injunction against the 1<sup>st</sup> Defendant, the Plaintiff submitted that pursuant to the celebrated case of **Giella vs. Cassman Brown [1973] EA 358**, that prima facie the Plaintiff had satisfied the court of the validity of his title as against the 1<sup>st</sup> Defendant's title and therefore it would be just and proper to issue an order of

permanent injunction against the 1<sup>st</sup> Defendant.

19. On the last issue for determination as to costs the Plaintiff submitted that costs were given at the discretion of the court as per the provisions of Section 27(1) of the Civil Procedure Act. That in most cases the successful party would be granted costs of the suit. That taking into consideration the prejudice suffered by the Plaintiff in filing the suit to correct the fraudulent activities by the Defendants, it would only be just to award him costs.

#### **Determination.**

20. I have considered the uncontroverted evidence adduced in court, the documents produced as exhibits and the fact that the Defendants neither entered their appearance nor filed their defence herein. I have also considered the fact that the Plaintiff's contention that the registration of the suit property in his name vested in him the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

21. It is evident that the Defendants herein had been served with the summons to enter appearance but they chose not to defend the case. Although the suit was undefended, yet the Plaintiff still had the duty to formally prove his case on the balance of probabilities as required by law.

22. I have also considered the allegation by the Plaintiff herein that through fraud, the 1<sup>st</sup> Defendant herein managed to secure title to the suit land herein and therefore in essence there are two competing titles to land parcel No. un-surveyed Plot No. 17 Kericho/ Municipality Block No. 631/723) which was amended to reflect No. Kericho Municipality Block 5/230.

23. I find the issue for determination as being whether the Plaintiff is entitled to the orders so sought in his plaint and secondly, who is to pay for costs of the suit.

24. From the documentary evidence, vide a copy of the letter of allotment dated November 1984, herein produced as Pf exh4, un-surveyed Plot No. 17 Kericho/ Municipality Block No. 631/723 had been allotted to one Leah Njeri Njoroge. Subsequently the suit land was surveyed and Leah Njeri Njoroge, now deceased, was issued with certificate of lease running from 1<sup>st</sup> October 1984 for a term of 99 years.

25. Leah Njeri Njoroge then transferred the suit land to Nandilal Cherenik Nandilal and one Robert Rotich Koech. On the 28<sup>th</sup> June 1994, Nandilal Cherenik Nandilal was then granted approval by the Municipal Council of Kericho to develop the plot by putting up a commercial building. Subsequently, vide a sale agreement of the 14<sup>th</sup> June 2003, Nandilal Cherenik Manekelal sold the parcel of land to Ali Noor Elmi Ali who took occupation and possession of the suit land which contained temporary structures.

26. On the 28<sup>th</sup> June 2012, the un-surveyed Plot No. 17 Kericho/ Municipality Block No. 631/723 was changed to parcel No. Kericho Municipality Block 5/230 wherein pursuant to a confirmation of Grant to the estate of the late Leah Njeri Njoroge issued on the 11<sup>th</sup> September 2019, the Plaintiff, Ali Noor Elmi Ali obtained his title on the 9<sup>th</sup> October 2019 wherein he has been making the necessary payments on the lease. I also note that although the Plaintiff has lay claim that the 1<sup>st</sup> Defendant also procured a title to the same suit land and therefore there were two competing titles yet there is no evidence herein exhibited to confirm the said allegations.

27. From the copy of the lease herein that the Plaintiff's registration as owner of the suit land was a first registration, the provision of Section 24(a) of the Land Registration Act in regard to the interests and rights of a registered proprietor provides as follows;

(a) 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; and

28. Whereas Section 25(1) of the same Act provides

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

29. The law is very clear on the position of a holder of a title deed in respect of land to the effect that **Section 26(1) of the Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 .....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.

30. It will be seen from the above provisions that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

31. The Defendant did not adduce any evidence that the Plaintiff acquired Title to the suit land illegally, un-procedurally or through a corrupt scheme.

32. Based on the evidence adduced above, and in relying on Section 26(1) of the Land Registration Act, the Court finds that the Plaintiff has indeed satisfied the legal provision that he is the proprietor of the suit land and hence has absolute ownership including all rights and privileges appurtenant to it.

33. In light of the above, this court finds that the Plaintiff has established that he is indeed the duly registered proprietor of the suit property and is entitled to all the rights appurtenant thereto.

34. It has been demonstrated that despite service, the Respondents failed to file their papers and/or defend the suit. The court thus makes the following orders:

i. A permanent injunction is hereby issued restraining the 1<sup>st</sup> Defendant by itself or its agents from unlawful entry, licensing, developing, sub dividing, transferring, selling and/or from dealing or in any way interfering with the land parcel Kericho/ Municipality Block 5/230

ii. It is herein declared that that all that parcel of land known as Kericho/ Municipality Block 5/230 formally (un-surveyed Plot No. 17 Kericho/ Municipality Block No. 631/723) lawfully belongs to the Plaintiff as purchaser for valuable consideration.

iii. The alleged title currently held by the late Paul Kipchirchir Cheruiyot alias Paul Cheruiyot, in respect of the same property is herein declared as null and void.

iv. The Chief Land Registrar Kericho shall cancel the registration of the late Paul Kipchirchir Cheruiyot alias Paul Cheruiyot in Kericho/ Municipality Block 5/230 formally (un-surveyed Plot No. 17 Kericho/ Municipality Block No. 631/723) within 30 days from the date of delivery of this judgment.

v. Costs to the Plaintiff at the lower scale since the suit was undefended.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 3<sup>RD</sup> DAY OF MARCH, 2022**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**