



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT KERICHO**

**ELC CASE NO. 73 OF 2016**

**ESTHER CHEMUTAI KETER.....PLAINTIFF**

**VERSUS**

**DAVID KIPKORIR KOECH.....1<sup>st</sup> DEFENDANT**

**STELLA CHEMUTAI KETER.....2<sup>nd</sup> DEFENDANT**

**RACHEL CHEMUTAI KETER.....3<sup>rd</sup> DEFENDANT**

**DISTRICT SURVEYOR-BURETI SUB-COUNTY.....4<sup>th</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein, being dissatisfied with the acreage of land given to her during the distribution of their late husband Kipsorgoi Keter's Estate, filed suit vide her plaint dated the 23<sup>rd</sup> September 2016 seeking for orders that judgment be entered against the Defendants herein that the 4<sup>th</sup> Defendant, the District Land Surveyor Buret sub-county be directed to verify and award her and the Defendants equal shares in the portion of land known as LR No. Kericho/Cheborge/312 and thereafter amend the mutation form. She also sought for costs of the suit and any other or further relief that the court may deem fit and just to grant.

2. In response, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants filed their joint statement of defence dated the 19<sup>th</sup> March 2018 to which they denied the particulars as contained in the plaint stating that the Plaintiff was physically present during the demarcation and distribution of the suit parcel of land between her co-wives. That the Plaintiff had even confirmed the correctness of the acreage and appended her signature on the mutation form wherein after, title deeds had been issued to each of the four beneficiaries.

3. The 4<sup>th</sup> Defendant neither entered appearance nor filed their defence.

4. Subsequently parties complied with the provisions of Order 11 of the Civil Procedure Rules wherein the matter proceeded for hearing as herein under;

**Plaintiff's case.**

5. The Plaintiff, Esther Chemutai Keter testified as PW1 to the effect that she was 84 years old and lived in Keringet in Nakuru. That David Kipkorir Koech (1<sup>st</sup> Defendant) was her stepson while Rachel and Stella 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively were her co-wives. That the suit property Kericho/Cheborgei/319 measuring 20 acres was jointly registered in the names of their late husband's wives namely Priscilla Cheronno Keter, Esther Chemutai Keter, Stella Chepkoech Keter and Racheal Cherotich Keter, as the owners in the year 1990 after his death in the year 1986. She produced the title deed as Pf exh 1. That after sub-division of the suit property, she had been given only 3 acres instead of 5 acres of land.

6. She also produced the mutation form executed on 9<sup>th</sup> June 2016 as Pf exh 2 and proceeded to testify that she had been registered as proprietor of title No. LR Kericho/Cheborge/898 and 902 measuring 1.36 Ha and 0.32 Ha respectively. That the aggregate for the two parcels was 1.68Ha which translated to 4.1 acres instead of 5 acres and therefore the land allocated to her was less by 0.9 acres. She sought that the court orders the land surveyor to resurvey the suit property so that she could get her rightful share of 5 acres. She also produced the form for Grant of letters of Administration Intestate (P & A 41) dated 2<sup>nd</sup> August 1989 as Pf exh 3.

7. On cross examination by the 1<sup>st</sup> Defendant, the Plaintiff testified that after the death of their husband, the 4 widows had met and agreed on how to distribute the family land wherein it had been agreed that the land was to be subdivided equally among the 4 houses. That she had taken long to file suit after the land was sub-divided because she had not been aware of the size of the portion she had been given.

8. There was no cross examination by the 2<sup>nd</sup> Defendant whereas in answer to the 3<sup>rd</sup> Defendant, she had responded that it was not true that they had agreed that some houses get a bigger portion than others and further that she was aware that the sub-division had later resulted into 8 titles.

9. PW2, Daniel Cheruiyot Terer, testified that he came from Kemoigit, Cheborge Location, Kericho County, was a farmer and a village elder. That he knew the Plaintiff and 1<sup>st</sup> Defendant as his neighbors. That he also knew the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as widows of the late Kipsorgoi Keter while the 1<sup>st</sup> Defendant was the son of the late Mr. Keter's 1<sup>st</sup> wife. That he knew that there had been a meeting held by the elders, but which he was not present, where all the four wives and their children were present and wherein it had been decided that the late Keter's land to be divided equally among his four wives.

10. On cross-examination by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, he confirmed that he did not know anything about the sub-division, but that he was aware that each co-wife had a title deed although the parcels of land were not equal to the effect that the Plaintiff's share was about 4.2 or 4.3 acres

11. PW3 David Kipkoech arap Kilel's testimony was that whereas the Plaintiff, Rachel and Stella were his aunties and widows to his uncle, the 1<sup>st</sup> Defendant was his cousin. That sometime in the year 2016 there had been a family meeting convened by the Plaintiff at the Chief's office at Cheborge. At that meeting, the Plaintiff had informed the attendees that her share of their late husband's land was smaller than that of her co-wives as she had got about 4 acres while the others had more than 5 acres. That after deliberations she had been informed that the Succession Court, which had heard the matter relating to the distribution of the deceased's estate in 1988, had decided that the land be divided into 4 equal shares. That the meeting, which had been chaired by the area chief had then resolved that the land be divided equally among the 4 widows.

12. During cross examination, he confirmed that the sub-division of land was to take into account the access roads to the various houses. That the roads took up some land and this was to apply equally to all the sub-divisions. That he was aware that each of the parties had separate titles and that there were portions of the suit land that were marshy but had tea bushes on them and they no longer flooded during the rainy season. That he was also aware that the suit land had been sub-divided about 30 years ago.

13. That the 2<sup>nd</sup> Defendant's land, although prone to flooding was no longer swampy. He also testified that he did not know whether the Plaintiff had signed the transfer form or not.

14. PW4, Timothy Wafula Wanjala, the District Surveyor Bureti, Sotik and Konoin Sub-County testified that he worked with the Ministry of Lands and Physical Planning. That L.R No. Kericho/Cheborge/319 measured 8.1 hectares and had been sub-divided into 8 portions in the year 1999 vide mutation No. 078200. He also confirmed that whereas some portions of the land had tea bushes, others did not have.

15. That the resultant numbers of the subdivision were; 897, 898, 899, 900, 901, 902, 903 and 904. That the portions with tea bushes were parcels No. 901, 902, 903 and 904 and that he was not able to tell which portion was given to who as he had not been to the ground. He further gave the details of the subdivisions as follows;

- i. Parcel No. 897 measured 1.37 Ha
- ii. Parcel No. 898 measured 1.36 Ha
- iii. Parcel No. 899 measured 1.70 Ha
- iv. Parcel No. 900 measured 1.36 Ha
- v. Parcel No. 901 measured 0.65 Ha
- vi. Parcel No. 902 measured 0.32 Ha
- vii. Parcel No. 903 measured 0.31 Ha
- viii. Parcel No. 904 measured 07.2 Ha

16. He proceeded to testify that at the time the mutation form was approved by a surveyor in the year 1999, he was not stationed in Bureti. He produced the mutation form as Pf exh 4.

#### **Defence case.**

17. The Plaintiff closed its case wherein David Kipkorir Koech, the 1<sup>st</sup> Defendant testified as DW1 to the effect that both the Plaintiff, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were his step-mothers. He confirmed that his late father Kipsargoi Arap Keter had 4 wives wherein his mother, who was the eldest wife was called Priscillah Keter. That his father who died intestate in the year 1986 was the registered owner of land parcel No. Kericho/Cheborge/319. That his mother had 2 children, himself and the late Joseph Koech who also died and left behind two daughters and four sons.

18. That after his father's death, his elder brother had applied for letters of administration wherein the suit property had been subdivided among his father's four widows wherein his mother had been given 5 acres wherein out of it there was a portion that had a swampy area and

about 0.6 acres had tea bushes. That at the time, the Plaintiff, who had 7 sons and 2 daughters did not complain about the portion of land that she had been given. That even as she had started complaining, her portion was all arable.

19. He produced copies of title deeds in respect of land parcel No. Kericho/Cheborge/897 and 901 registered to his late mother's names as Df exh 1 & 2 and stated that he was yet to apply for letters of administration to his mother's estate. He further testified that he did not understand why the Plaintiff had sued him as none of the resultant titles from his late father's land had been registered in his name.

20. On cross examination, the 1<sup>st</sup> Defendant confirmed what he had testified in his evidence in chief and proceeded to state that his mother was called Priscilla Keter and that although his father died in 1986, he had not produced any death certificate. That he was the only surviving son of his mother and that when the land was divided among his mothers, each of them was content with their portion.

21. He also confirmed that the Plaintiff was registered as the proprietor of land parcel No. 898 and 900. That the access road and public road were on a portion of his late mother's land. That his mother had died in the year 2011 wherein he had collected her title deed in the year 2016. The 1<sup>st</sup> Defendant also testified that a small portion part of his father's land was swampy but that they had since reclaimed it. He also confirmed that he had his own parcel of land measuring 4.5 acres which was not family land.

22. The 3<sup>rd</sup> Defendant Stella Chemutai Keter testified as DW 2 to the effect that she was the 3<sup>rd</sup> wife of the late Kipsargoi Keter whilst the Plaintiff was his 2<sup>nd</sup> wife and her co-wife. That she had 7 children, 4 daughters and 3 sons and that the Plaintiff had sued her over their late husband's land to which she was not the one who had sub-divided it, rather it had been subdivided by her late stepson Joseph and the Plaintiff's son Joshua.

23. That after the land had been divided, everybody had signed for their share and there had been no immediate complaint by any of them but the Plaintiff started complaining in the year 2016 before they collected their title deeds which she produced as Df exh 3(a) & (b). She sought for the Plaintiff's suit to be dismissed.

24. On cross examination, she confirmed that their late husband was the registered owner of land parcel No. Kericho/Cheborge/319 measuring 20 acres wherein she had been given 5 acres out of the same and had been registered as proprietor to Kericho/Cheborge/899 and 903.

25. She denied claims that she had obtained the suit property illegally. That she had collected her title deeds in the year 2016 and did not know why the Plaintiff refused to collect her title deeds. That further, each of the widows got her parcels of land wherein hers included a water-logged portion, public land and a public road.

26. Rachel Cherotich Keter, the 2<sup>nd</sup> Defendant testified as DW3 to the effect that she was the 4<sup>th</sup> wife to the late Kipsargoi Arap Keter. That she had one daughter and 3 sons and that she was in court because the Plaintiff had sued her claiming that she had got a bigger portion, of their late husband's land, than hers.

27. That she had not been the one who had determined what share each of the widow was to get, the subdivision having been done by the Plaintiff's son Joshua and the late Joseph wherein each of the widows got about 5 acres. That after the land had been demarcated, each of them had been satisfied with their portion. That she had got a portion that had a larger swampy area as well as a portion that had some tea bushes. That she did not understand why the Plaintiff was complaining as her son was involved in the demarcation of the land. That she had two title deeds to her name to which she produced as Df exh 4(a) and (b). She sought for the Plaintiff's suit to be dismissed with costs.

28. On cross examination, she confirmed that during the sub-division, Joshua and Joseph and brought a government surveyor to demarcate the land and that this exercise had been done after they had applied for the grant of Letters of Administration. That she did not have the grant with her but that her land measured about 5 acres. That she also did not know whether the original title deed in their joint names had been surrendered but that they had taken long to collect their title deeds because they had been waiting for the Plaintiff to accompany them.

29. She also disputed the fact that the Plaintiff did not participate in the sub-division and confirmed that indeed she had appended her signature to the mutation forms. She also confirmed that although she did not know how big the Plaintiff's land was, yet her portion was the most fertile and that she did not get any swampy portion like the rest of them.

30. DW 4 David Kiplagat Kimetto, a retired teacher and the 1<sup>st</sup> Defendant's neighbor testified that his parcel of land was No. Kericho/Cheborgei/332. That the person who had stood over the supervised the subdivision of the suit land by the surveyor was one Joshua Kiplagat Koech wherein the subdivision had proceeded in the presence of all the widows who were satisfied. That after 90 days, Joshua Kiplagat had collected the mutation forms wherein he had witnessed the widows' execute the same by placing their thumbprints thereon as a sign to signify that they had no complaints. That after 25 years of peaceful living, Joshua had lodged a complaint that the land was not regularly subdivided. The witness requested the court to decide the matter as per the first sub-division or to refer the matter back to the family, the clan and mediators.

31. During cross examination, PW4 confirmed that the name Joshua was not mentioned in his statement but it covered the family as a whole. That although he was a neighbor to both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he did not know their land parcel numbers. He went on to state that Joshua Kiplagat had collected the mutation forms from the land's office and that he had seen them. That he had participated in the subdivision/signing of the mutation and from he had heard, the widows had been given 90 days to Appeal/complain.

32. Sally Cheroni testified as DW 5 to the effect that she was a neighbor to the parties herein. That she was aware that personnel from the survey office had visited the suit land that belonged to one Keliot, wherein they had subdivided the same, in her presence. That amongst the people who were present were David, Chemutai, Grace and Rachel who were Keliot's wives. That after 25 years, the matter had started afresh in a Succession Cause and everybody had been given their land wherein after Chemytai had refused the swampy land but later she had

demanding for it seeking that the same be subdivided into two.

33. On cross examination, the witness confirmed that the proprietor of the suit land died when she was six years old but that she had been there when the same was being demarcated. She also confirmed that the deceased's son Joseph, who was not party to the suit, had initiated the succession proceedings wherein parties had lived peacefully and after 25 years started a Succession Case. That the Plaintiff was dissatisfied and wanted additional land.

34. The witness was referred to her written statement wherein she intimated that she was illiterate. She kept quiet when she was cross-examined on the two different statements wherein the Defence closed its case and parties filed their respective submissions.

#### **The Plaintiff's submissions.**

35. After the Plaintiff's brief summation of the evidence herein contained she framed her issues for determination as follows;

- i. Whether the four widows of the late Kipsorgoi arap Keter should get equal shares out of land parcel LR No. Kericho/ Cheborge/319.
- ii. Whether the Defendants have acquired one (1) more (sic) acre than the Plaintiff in LR No. Kericho/ Cheborge/319 through adverse possession.
- iii. Whether the Defendants disapproved the Plaintiff's case.

36. On the first issue for determination, the Plaintiff submitted that it was an undisputed fact that she was entitled to equal shares in the land parcel LR No. Kericho/ Cheborge/319 with the Defendants since all four of them were legal widows of the deceased. Reliance was placed on the provisions of Section 26(1) of the Land Registration Act, which in my humble view was irrelevant as the said provision did not support the Plaintiff's submission herein above and nothing further was submitted on it.

37. On the second issue for determination, it was the Plaintiff's submission that the Defendants had not ascertained their rights over those of the Plaintiff but had in fact admitted in their pleadings that the Plaintiff's portion of land was less than the Defendant's which was a violation of the Plaintiff's Constitutional rights.

38. On their last issue for determination as to whether the Defendant disapproved the Plaintiff's case, the Plaintiff submitted that although the Defendants had asserted that the Plaintiff had participated in the subdivision of the suit land, no evidence was produced in court in support of the said testimony. To this effect, it had been submitted that the Plaintiff's evidence had proved that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's portions of land were bigger than the Plaintiff's land and therefore the court should grant orders directing the 4<sup>th</sup> Defendant to sub-divide LR No. Kericho/ Cheborge/319 into four equal portions. The Plaintiff sought that the Defendants meet the costs of the suit and for any other relief that the court may deem fit to grant.

#### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' submissions.**

39. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' submissions was to the effect that pursuant to the death of the original proprietor to LR No. Kericho/ Cheborge/319 land which measured about 20 acres, in 1986, the said suit land had been registered in the joint names of the deceased's four widows in 1990.

40. Thereafter and pursuant to the grant issued to the deceased's four wives, wherein they were to share the land equally, the Plaintiff sued her co-wives citing that she got a lesser share of their husband's property after subdivision.

41. After analyzing the Plaintiff's evidence, it was the Defendants' submission that the only issue that arose for determination was whether the Plaintiff got a lesser share of her husband's estate and whether she is entitled to the reliefs sought.

42. The Defendants submitted and that although the Plaintiff contended that the beneficiaries of her late husband's estate had filed Kericho High Court Succession Cause No. 105 of 1998, the certificate of confirmation of grant confirming that the estate had been shared equally was not produced in court as evidence. That what the Plaintiff had filed was a temporary grant.

43. That further the Plaintiff had not filed any certificates of search for the disputed parcels of land to assist the court in the tabulation of their respective shares of land. Further her assertion that the family had a meeting and deliberated on the mode of distribution of their late husband's property lacked the evidence to back it up as no minutes of the meeting had been produced in support of the same.

44. The Defendants submitted that the Plaintiff was on a fishing expedition and the court could not rely on speculative testimony that was not supported by tangible documentary evidence. That the Plaintiff was not sure of the parcel of land to which she sought orders as in her plaint she referred to LR No. Kericho/ Cheborge/312 while in her testimony she referred to LR No. Kericho/ Cheborge/319.

45. It was their submissions that the provisions of Section 107(1) (sic) were clear that where one desired any court to give judgment as to any legal right dependent on the existence of facts which he asserts, must prove those facts exist. That the Plaintiff totally failed to meet the required threshold in establishing her case which was bad in law, frivolous and an abuse of the court process. That the Plaintiff's case had been brought close to 25 years after the title deeds had been issued, and the same should be dismissed.

#### **Determination.**

46. I have considered the matter before me the evidence as well as the submission. I find that the undisputed facts of this case being that the suit land being parcel LR No. Kericho/ Cheborge/319 measuring 20 acres was registered to the deceased Kipsorgoi arap Keter. That upon his death in the year 1986, the same was jointly registered in the names of his four wives Priscilla Cheronon Keter (represented by the 1<sup>st</sup> Defendant), Esther Chemutai Keter (the Plaintiff), Stella Chepkoech Keter (3<sup>rd</sup> Defendant) and Racheal Cherotich Keter (2<sup>nd</sup> Defendant) on the 27<sup>th</sup> March 1990.

47. There is also no dispute that subsequently the suit land had been divided and distributed amongst the deceased's beneficiaries, his four wives herein above, to which titles had been issued to their respective names as follows;

i. Priscilla Cheronon Keter - LR No. Kericho/ Cheborge/897 measuring 1.37 HA and LR No. Kericho/ Cheborge/901 measuring 0.65 HA both titles issued on the 9<sup>th</sup> June 2016.

ii. Stella Chepkoech Keter LR No. Kericho/ Cheborge/899 measuring 1.70 HA and LR No. Kericho/ Cheborge/903 measuring 0.31 HA both titles issued on the 9<sup>th</sup> June 2016

iii. Racheal Cherotich Keter-LR No. Kericho/ Cheborge/900 measuring 1.36 HA and LR No. Kericho/ Cheborge/904 measuring 0.72 HA both titles issued on the 9<sup>th</sup> June 2016

iv. The Plaintiff Esther Chemutai Keter, did not produce her Title deed.

48. There is also no dispute that the mutation form that created the above captioned titles was dated 20<sup>th</sup> November 1990 and had been executed by all the parties herein and the 1<sup>st</sup> Defendant's mother in the year 1999.

49. The Court therefore finds the issue arising herein for determination as follows:

i. Does the Plaintiff have any cause of action against the Defendants herein?

ii. Who should pay the cost of the suit?

50. On the first issue for determination, the Court shall deal with it in three phases:

i. Firstly that the Plaintiff's evidence fell short of the standard of proof as provided for by the law of Evidence.

ii. There was misjoinder of the 1<sup>st</sup> Defendant to the suit as he had no locus standi.

iii. Third that the suit is barred by virtue of the Limitation of Actions Act.

51. The Court finds that the Plaintiff herein has not established any actionable cause against the Defendants as it is trite that ' *he who alleges must prove*'. Section 107 of the Evidence Act is very clear on the above stated phrase wherein it provides as follows:-

*"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".*

52. The Plaintiff' claim against the Defendants herein is that pursuant to the sub division of their late husband's suit land No. Kericho/ Cheborge/319 to which the Probate and administration Court in the Succession Cause had ordered that each of the four wives of the deceased get an equal share, she had been given a lesser share of the land in comparison to her co-wives. The Plaintiff did not produce any documentary evidence like the certificate of confirmation of Grant issued by the Probate Court, which certificate would have reflected information relating to the orders that had been given by the said Court regarding the distribution of the Deceased's property, so as to enable this court determine on the issue as to whether or not to grant the orders so sought.

53. Rule 41(5) of the Probate and Administration Rules, provides as follows:

*"Where the court in exercise of its power under section 71(2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and ..."*

54. As the provisions of Section 107 to 109 of the Evidence Act place the onus of proof on the Plaintiff, it was her duty to disprove the same and her failure to do so rendered her allegation as un-proved and just mere allegations.

55. The court further finds that LR No. Kericho/ Cheborge/897 and LR No. Kericho/ Cheborge/901 having been registered to the deceased Priscilla Cheronon Keter, mother to the 3<sup>rd</sup> Defendant herein, and the suit having been a land matter, the same survived the 1<sup>st</sup> Defendant's mother's death. Since the 1<sup>st</sup> Defendant's deceased mother could not be a party to a legal proceeding, it was incumbent upon the Plaintiff to await the appointment of the 1<sup>st</sup> Defendant as a legal representative to his mother's estate and/or to take out citation proceedings related to the estate of Priscilla Cheronon Keter thereto before enjoining the 1<sup>st</sup> Defendant as party to the present suit.

56. Section 2 of the Civil Procedure Act defines a legal representative as follows;

*“Legal representative means a person who in law represents the state of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”*

57. In **Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229** the Court of Appeal gave meaning to the term locus-standi by stating:

*“ . . . . .to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”*

58. The 1<sup>st</sup> Defendant has been sued in relation to the estate of his deceased mother Priscilla Cheronu Keter where no grant of representation has been applied for and/or obtained. The issue of *locus standi* is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without *locus standi* in a civil suit lacks the right to institute and/or be sued even where a valid cause of action subsists. The impact of a party in a suit without *locus standi* can be equated to that of a Court acting without jurisdiction since it all amounts to *null and void* proceedings. I find that the 1<sup>st</sup> Defendant therefore had no locus standi to be sued in the present suit and therefore the proceedings against him were null and void.

59. Secondly, it is trite law that the sanctity of a certificate of title is protected by the law which provides for situations when title shall not be absolute and indefeasible. Having established that the surveyor carried out the survey on the suit land wherein the Plaintiff executed the mutation forms which generated the impugned titles and that the parcels of land in question were registered under the Registered Land Act, (which was repealed upon the passage of the **Land Registration Act, 2012**) the parties registration was therefore governed by the provisions of Section 26 (1) of the Land Registration Act of 2012 which provides as follows:-

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

60. **To this effect the question to ask is whether the Defendants’ title was impeachable by virtue of Section 26(1) (a) (b) of the Land Registration Act.** In order to challenge the Defendants’ title so as to have it cancelled by amending the mutation form as prayed by the Plaintiff, evidence according to Section 26 of the Act ought to have been led to prove that the Defendant’s respective titles had been acquired fraudulently, through misrepresentation, illegally, un-procedurally, or through a corrupt scheme.

61. In the case of **Arthi Highway Developers Ltd vs West End Butchery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015) eKLR**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13<sup>th</sup> edition** at Page 427:

*“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of . . . . . It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved . . . . . General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.*

62. That the standard of proof on the issue of fraud was very clear in law wherein a party pleading the same is expected to go a notch higher than the mere balance of probability threshold as was held in the cases of **Mahendra Shah vs Barclays Bank International Ltd & Another [1979] eKLR** and in the case of **Davy vs Garrette [1978] Ch.473 at pg 469**, where it had been held that it was not allowable to leave fraud to be inferred from the facts. In this case, I find that there was absence of evidence to suggest fraud or misrepresentation by the title holders which left the court with prima facie evidence of ownership.

63. That in the case of **Hassan Mohamed Haji vs. Mohammed Keynan & Another [2019] eKLR** the Court had stated that where the issue arose as to the validity of a title as provided for under Sections 25 and 26 of the Land Registration Act, the burden was always on the person making the allegations to tender the evidence to prove the existence of the exception provided under Section 26 (1) (a) and (b) of the Land Registration Act.

64. In the instant case, although the Plaintiffs’ evidence was based on allegations that the Defendants had illegally occupied a larger portion of land in comparison to hers, she had not strictly speaking challenged the authenticity of the title held by the Defendants.

65. Third, it is not contested that the mutation form that created the above individual titles had been executed by the parties and the 1<sup>st</sup> Defendant’s mother in the year 1999 wherein subsequently titles were issued on the 9<sup>th</sup> June 2016. This means that the Cause of action occurred in the year 1999.

66. Section 7 of the Limitation of Actions Act provides as follows:

*“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..”*

67. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from

the date on which the right accrued. This means that the mutation having been made in the year 1999 wherein the parties took possession of their respective parcels of land, the Plaintiff could seek to recover her share of land from the Defendants, but only if she did so within twelve years from the date on which the right of action accrued to her.

68. There is no doubt that the period of about seventeen (17) years has lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court. The Plaintiff needed to commence her claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time they filed this suit, the claim was statute barred.

69. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

70. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

*'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'*

71. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. Plaintiff's suit is herein dismissed with costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF MAY 2021**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**