



**Kigamba & 2 others v Kigamba & another (Environment & Land Case
63 of 2015) [2022] KEELC 2227 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 63 OF 2015**

FM NJOROGE, J

MAY 5, 2022

BETWEEN

MARTHA WAIRIMU KIGAMBA 1ST PLAINTIFF

RAHAB WAMBOI NJUGUNA 2ND PLAINTIFF

DOUGLAS KAHATO GIKONYO 3RD PLAINTIFF

AND

LUCY WANJIRU KIGAMBA 1ST DEFENDANT

SAMMY MORAYA KIGAMBA 2ND DEFENDANT

JUDGMENT

1. The plaintiffs filed the instant suit on 5/5/2015 by way of a plaint dated 4/5/2015 which seeks the following orders:
 - a. A declaration that the plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of their respective lands known as Title Nos. Trans- Nzoia/Cherangani/1267, Trans- Nzoia/Cherangani/1268 and Trans- Nzoia/Cherangani/1271 and therefore the defendants are wrongfully in occupation of the suit properties herein and are accordingly, trespassers and not entitled to remain on the suit properties.
 - (b) A permanent injunction restraining the defendants by themselves, their servants, agents, employees or any other persons acting for or on their behalf whatsoever from ingressing, trespassing, wasting, selling, leasing, carrying on any construction or erecting structures, carrying out any operations and/or activities of any nature or doing any such nature of things whatsoever on the plaintiffs' parcel of land known as Land Title No. Trans-Nzoia/Cherangani/1267 registered in the names of Martha Wairimu Kigamba, Land Title No. Trans-



Nzoia/Cherangani/1268 registered in the names of Rahab Wamboi Njuguna and Land Title No. Trans-Nzoia/Cherangani/1271 registered in the names of Douglas Kahato Gikonyo.

- (c) A permanent injunction restraining the defendants by themselves, their servants, agents, employees or any other persons acting for or on their behalf whatsoever from remaining on or continuing in occupation of the suit properties.
- (d) General damages for trespass.
- (e) Costs and interest.

PLEADINGS

The Plaintiff

2. In the plaint, the plaintiffs state that they are the registered owner of all that lands known as Title Nos. Trans-Nzoia/Cherangani/1267, Trans-Nzoia/Cherangani/1268 and Trans-Nzoia/Cherangani/1271 respectively (hereinafter also referred to as “the suit properties”); that the suit lands arose from the subdivision of title number Kitale Cherangani /135 which was registered in the name of Daniel Kigamba Kahato (deceased) who was polygamous with 2 wives; that among his dependants were his two sisters named Martha Wairimu Kigamba and Jane Wanjiru and his brother one John Njenga; that the said Daniel Kigamba Kahato subdivided plot no 135 and distributed it amongst several persons including the plaintiffs and documented that distribution; that by the time he died the plaintiffs had begun processing their titles; that the 2nd plaintiff is the wife of Daniel’s brother and that Daniel had consented to a portion of the land that that brother was entitled to being registered in her name; that the share given to Daniel’s sister named Jane Wanjiru was registered in the name of Jane’s son; that Daniel obtained the relevant consents of the land control board and signed the transfer forms and had the mutation registered; that however the defendants trespassed on the suit lands in 2015, remained in possession and conducted farming thereon; that confrontations between the plaintiffs and the defendants have been recurring since the trespass began; that the plaintiffs have sustained loss and damage hence the instant suit.

The Defence

3. The 1st and 2nd defendants filed their joint defence dated 2/6/2015. In their defence they stated that title number 135 was still registered in Daniel’s name even after he died on 13/12/2014 and the subdivision of the land which gave rise to the suit parcels was fraudulently and unlawfully processed. The particulars of fraud pleaded in the defence are inter alia that the plaintiffs presented forged documents including transfer forms to the Land Registrar, that the plaintiffs concealed Daniel’s demise from the Land Registrar and caused the suit properties to be transferred to their names without following the lawful procedures. Collusion with lands office staff in that process is also alleged by the defendants. They aver that their father had not signed any transfers in the plaintiff’s favour or to any other persons as at the date of his demise. The defendants aver in the alternative that the documents used in the process were prepared when the deceased was sickly, bedridden and unable to make any rational and independent decisions and they are therefore void and of no evidential value, the plaintiffs allegedly having tampered with the deceased’s land after his death. The defendants deny trespassing on the suit parcels and plead that they are lawfully occupying and working on the land just as they had been doing before Daniel died, and that the plaintiffs have never resided or worked on the suit parcels. They aver that the plaintiffs have no written agreements or sale contracts with the deceased Daniel which could give them proprietary interest in any part of the deceased’s land. They add that they were not served with any demand prior to the institution of the instant suit.



The Plaintiffs' Case

4. PW1, Douglas Kahato Gikonyo, the 3rd plaintiff testified on 17/7/2018, 23/7/2018 and on 8/5/2019. He relied on and adopted as his evidence in chief his two statements recorded on 4/5/2015 and on 14/11/2016 respectively. His evidence closely followed the contents of the plaint. In his oral evidence, he stated that the defendants are Daniel's children and thus his cousins whose mother, who was named Hellena Njoki Kigamba, is deceased; that his mother's name is Jane Wanjiru, Daniel's sister; that plot number 1271 belongs to him; that plot no 1267 belongs to the 1st plaintiff and plot no 1268 to the 2nd plaintiff; that all those plots were subdivisions of plot no 135 which was in Daniel's name; that Daniel's second wife, Lucy Njeri, is still alive; that Daniel was compelled by the court in HCCC 112 of 2007 to subdivide his land; that he subsequently obtained a consent of the land control board to subdivide after he applied for it; that the consent stated that the suit land was to be subdivided into 8 portions; that a mutation was prepared by a Surveyor names Ezekiel Katili; that by the time he died on 13/12/2014 Daniel had secured the relevant consents and signed transfers and all that remained was for the plaintiffs to pay for the processing of their titles and they delayed in doing so till 2015 when they were issued with titles; that the consents to transfer plot no 1267 was issued on 18/12/2013; that the consent for plot 1268 was obtained on 4/9/2013; that the consent to transfer plot no 1270 was issued on 18/12/2013; that the defendants never trespassed on plot number 1270 but did so with regard to plots no. 1267, 1268 and 1271; that a notification from the District Officer dated 22/4/2013 notified all that the land would be subdivided on 25/4/13 and all concerned parties were present at the subdivision; that according to Daniel's records, the defendants were also allocated land by Daniel, with the 1st defendant getting 1 acre while the 2nd defendant got an entitlement together with other girls in the family. He denied the allegations that the plaintiffs presented forged documents or signatures to secure the titles in their names and that they never concealed Daniel's death. He also denied any collusion with the lands office staff in the alleged fraud. He stated that Daniel had already applied for consents and executed transfers before his demise; that no person filed any suit to oppose Daniel's intention. He maintained that he and the other plaintiffs were Daniel's dependants, and that in particular, he and his brother depended on Daniel through their primary and secondary school studies and he partly paid their fees with the rest being borne by their mother. He averred that though the defendants were shown their land parcels they never took possession while Daniel was alive.
5. When cross-examined by counsel for the defendants he admitted that he never attended the meeting held in November 2006; that he benefited from receipt of two plots from the deceased's estate though his name was not among those of the persons Daniel gave land; he stated that he purchased plot number 1270, and that Daniel sought the consent for the transaction.
6. On re-examination by Mr. Teti, counsel for the plaintiffs, the plaintiff stated that the defendants were summoned to the meeting that distributed the deceased's property but they failed to attend, that they had assaulted the deceased and his 2nd wife in the past; that the mother to the defendants was awarded 8.5 acres by the court which Daniel surrendered to her after visiting the land control board for consent; that the land was subdivided on 12/3/2014; that the consent granted by the board speaks of 8 portions and that he does not know how the caution registered over the land by Hellena Njoki the 2nd wife was removed. He maintained that Daniel had signed the transfers before he died. She also maintained that the daughter to Daniel is named exactly like her aunt, Martha Wairimu Kigamba, but the former was not given any land by the deceased. In support of that allegation, she pointed out that PExh 13 read "Martha Wairimu, elder sister." It is that deceased's elder sister, he stated, who had been living on the land and not the deceased's daughter.



7. PW2, Joseph Njenga Kahato, testified on 18/9/2019. He adopted his statement of 14/11/2016 filed on 28/11/2016 as his evidence-in-chief in this suit. His evidence is that the 1st plaintiff is his sister and the 2nd plaintiff is his wife while the defendants are the children of Daniel Kigamba and Hellena Njoki. That the deceased had two wives, Hellena Njoki the first wife and Lucy Njeri; that Lucy had 6 children while Hellena had 10; that all parcels subject matter in the instant suit are products of subdivision of parcel no 135 which belonged to Daniel; that Daniel's first wife Hellena sued him and she was given 8.5 acres; that Lucy was also given the same size of land; that Jane Wanjiku got approximately 2 acres; Joseph Njenga (PW2) about 2 acres and that they had been all living on the parcel number 135 even before Daniel married his first wife. His further evidence was that the land used to belong to Martha Wairimu Kigamba who could not be registered as proprietor for lack of a national identity card in days of yore; that meetings regarding the subdivision of the land were held before it was subdivided and they were attended by the local administrator, a chief; that Daniel gave PW2 plot number 1268 and it was agreed between him and Daniel that it would be registered in his wife's name; that Jane Wanjiku is of unstable mind and so the land allocated to her was registered in her son's name; that the process of seeking registration commenced soon after subdivision while Daniel was still alive and that Daniel sought transport and subsistence expenses from the beneficiaries in order to facilitate it and signed all the relevant documents after which the remaining part was to be pursued by the beneficiaries. That after Daniel was buried, an unidentified woman called PW2 and demanded that they vacate the land by December 2014, and in January 2015 the defendants invaded the suit land and cultivated it, accusing the plaintiffs of having faked documents; that there was no fraud on the part of the plaintiffs; that Daniel had not bought the land using his money but using money that had belonged to their mother and other members of the family including the 1st plaintiff. He corroborated the evidence of PW1 to the effect that the defendants used to assault their father and hence soured their relationship with him and that they were aware of the process of subdivision but they feared to come to the land for that reason; that every person who was given land was given as the head of his family and so it can not be that Daniel's daughter was given land in the process; that therefore the children of Hellena Njoki and Lucy Njeri were not given land; that the Kikuyu community from which the parties originate have a system of naming children, with the first child being named after the husband's father or mother depending on gender; that consequently, if the first daughter is named after the mother to the husband, then the second daughter is named after the mother to the wife. He explained that Daniel's daughter was named exactly like the 1st plaintiff but the person who was meant to get the land was the 1st plaintiff, and a land control board consent was issued to that effect. PW2 further explained that other daughters of Daniel, that is Wanjiru, Wangechi and Wambui were not given land. He stated that Daniels' daughter, Martha Wairimu has never lived in the land but the defendants had. In addition, he stated that Daniels daughter, Martha was married and that she had resided at Munyaka with her husband.
8. Upon cross-examination by Mr. Karani, he stated that all the family members had contributed to purchase of the land though they had been born in Limuru; that their parents lived at Limuru; that the 1st plaintiff had been married but later divorced, having lived with her husband at Bahati; that upon divorce she came back to Kitale and was employed at a white man's farm; that after the whites left she remained as a squatter on the land but she could not be registered as proprietor thereof as she did not possess an identity card; that her brother Daniel was also a squatter on the same land; that PW1 came to the land in 1967; that after Daniel and the 1st defendant were given the land the family moved from Limuru to the land; that they then contributed money to purchase the land they had occupied; that one of Daniel's children attended the family meetings which were held at Daniel's home and that though Daniel summoned the defendants they failed to attend the meetings, and records were made by Daniel that his two wives would get 8.5 acres each and that some portions were to be given to the plaintiffs. He stated that a government surveyor visited the land and excised portions measuring 8.5



acres for each of Daniel's two wives; that no other subdivision was done subsequently, but Daniel took the plaintiffs to the Kaplamai Land Control Board in 2013 and consents were obtained; that it was PW2's wife who attended the land control board; that before his demise, Daniel caused the caution that had been registered over the land removed, and that by December 2014 the land was no longer in his name. he stated that he had built a house on the land but he relocated to Lessos after ethnic clashes arose in 2007.

9. On being re-examination by Mr. Teti, he stated that he built the house which appears in the photograph produced in evidence in the hearing; that he had lived on the land and cultivated it since 1967; that Jane Wanjiku still lives on the land and that Daniel was not compelled by the plaintiffs to give them land. That Daniel only gave them land after giving his wives land, but by the end of the process of the plaintiff's acquisition of titles he was deceased. PW2 stated that he was present at the survey exercise as was the first wife to Daniel, who never complained.
10. PW3, Rahab Wambui Njuguna, the 2nd plaintiff, testified on 23/2/2021. She adopted her witness statement dated 4/5/2015 as her evidence-in-chief in this suit. Her evidence is that she concurs with all the evidence given by PW2 in the case and she adopts the same.
11. Upon cross-examination by the defence counsel she stated that she is not Daniel's daughter, but sister in law, having been married to his brother; that plot no 1268 is hers, having been transferred to her by Daniel; that the deceased had written about the sharing out of his land; that her name is not among the beneficiaries but she represents her husband who is the deceased's brother.
12. Upon cross-examination by Mr. Teti she stated that she did not acquire the land by way of sale; but it was agreed that she be registered as proprietor in place of her husband. She also maintained that Daniel was alive by the time the land control board consents were obtained for the transaction; there was no agreement for sale as it was not a sale of land.
13. PW4, Martha Wairimu Kahato aka Martha Wairimu Kigamba, testified on 23/2/2021. She adopted her written statement filed on 5/5/2015 as her evidence-in-chief in this suit. Her evidence is that she Martha Wairimu Kahato alias Martha Wairimu Kigamba; that Daniel was her brother; that she is the registered owner of plot no 1267.
14. Upon cross-examination she stated that she did not have her identity card with her in court; that she was given 1.5 acres by Daniel; that Daniel never gave any of his children land; that one of the Daniel's children is her namesake Martha Wairimu Kigamba; that Daniel executed the transfer while he was alive; that she had lived with Daniel and her name was included in the distribution while none of Daniel's children was included; that though then title she holds reads Martha Wairimu Kigamba, the land belonged to her and she had given it to Daniel to distribute it. It was never Daniel's land from the beginning, she stated, but her land which could not have been registered in her name due to her lack of an identity card.
15. At that juncture, the plaintiffs closed their case.

The Defendants' Case

16. The defence case commenced on 23/2/2021 when DW1, Lucy Wanjiru Kisemba, the 1st plaintiff testified. She adopted her witness statement dated 19/2/2017 as her evidence-in-chief in this case. She also relied on the documents filed. Her evidence is that she is the first born to the first wife of Daniel; that the first house had 10 children and the 2nd house had 6; that she and her siblings were not present at the sitting alleged sitting at which the suit land is said to have been given to the plaintiffs; that Daniel died in 2015; that titles to the suit land were issued in 2015 after Daniel's demise; that the land belonged



- to her parents; that the original parcel was 24 acres in size; that her mother had lodged a caution over the land as her father had intended to sell it; that the court ordered that her mother be given 8.5 acres but no title deed has been issued in her name yet.
17. Upon cross-examination by Mr. Teti DW1 stated that she and her siblings never assaulted their father as alleged by the plaintiffs; that PW4 is the elder sister to Daniel; that the criminal investigation department had declined to investigate the case further since there was litigation pending in court; that by 5/10/2014 Daniel was alive; that the persons listed in P.Exh 14 are Daniel's children; that they never attended any land control board meeting; that they were not aware of the land control board consents; that the defendants entered the suit land in 2015.
 18. Upon re-examination by Mr Karani DW1 stated that the plaintiffs are currently using the suit land; that the plaintiffs never informed the defendants of their being given land by the deceased Daniel; that the defendant's always believed that their father owned the land and they were never informed of any intention to give land to non-family members; that the name Martha Wairimu Kigamba on the title deed held by the 1st plaintiff is DW1's sister's name.
 19. DW2, Sammy Muraya Kigamba, the 2nd defendant testified on 25/2/2021 and on 23/7/2021. He adopted his witness statements recorded on 2/6/2015 and on 19/2/2017 as his evidence-in-chief in this suit. His evidence is that he is son to Hellen Njoki Kigamba wife to Daniel; that his family was not aware of any intention to give land to non-family members; that the only subdivision that he is aware of is that that was ordered in the court case between his parents; that a letter (DExh 1) from the District Officer had stated that the land would be subdivided in accordance with the decision in that case; that a second letter (DExh 2) stated that the land would be subdivided in consultation with the assistant chief; that DW2 conveyed the letter from the DO to his mother and the land was subdivided; that a meeting took place on 24/4/2013 and his father surrendered the land to his mother; that there was no sitting between the defendants, the plaintiffs and his father, however there was a meeting between the plaintiffs and his father and DW2 and his siblings were not involved; that the 1st plaintiff's proper name is Martha Wairimu Kahato and not Martha Wairimu Kigamba which latter name refers to DW2's 7th born sister; that his said sister lost her husband while still young and had two secondary school going children; that she was given the land she had been farming on, which is represented by PExh 2; that only 8.5 acres were excised for DW2's mother and 8.5 acres was part of the remainder; that his father was alive by the date of the land control board application for consent issued on 12/3/2014; that however his father's slot was signed by an unknown person; that the signature on the verifying affidavit in Case No 112/2007 (DExh 3(b) does not match that on the application for land board consent (DExh 3(a)); that a search at the lands office (DExh 4) had revealed the land to be registered in his father's name; that the caution on the title placed by his mother was still in place; that according to him the land could not have been subdivided whilst the caution was still so lodged and so the resultant titles are illegal; that the court order was between his parents and benefited no one else; that the land registry cooperated with the plaintiffs in the clandestine issuance of the illegal titles; that on 17/7/2013 his mother met her demise and Daniel was taken ill and died on 13/12/2014; that in 2014 Daniel became blind due to his illness; that he is not aware that Daniel ever attended the land control board; that before he ploughed the suit land he asked the defendants to demonstrate that Daniel had given them land but they failed; that the titles to the suit land were issued on 30/3/2015 when the defendants had already sowed on the suit land; that he and his siblings should have been involved in the distribution as the land had belonged to his father. In his opinion that land ought to have been distributed amongst children and not amongst families, and the plaintiffs deserved no land.
 20. When subjected to cross-examination by Mr. Teti, DW2 stated that the grant of representation to his father's estate had been secured but he failed to produce it on demand; he also admitted that the titles



held by the plaintiffs are subdivisions of plot number 135; he revealed that his father had a third wife, named Lucy Njeri Thuita, and who is still alive but who was not given land; that his father was alive but unwell by the date of the subdivision of the land on 25/4/2013 but died on 13/12/2014; that all the land control board consents bore a date before the date of his father's lifetime; that the mutation showed that the land was to be subdivided into 8 portions; that the plaintiffs have not been prosecuted for forgery despite a report to the CID; that despite having all the plaintiffs' exhibits since 2015 he did not seek to prove that the signatures said to be by his late father were false; that the court order that divested the subdivision never barred the giving away of land to any other person.

21. On being re-examined by Mr. Karani, he stated that before 2015 the defendants were using the suit land. He faulted the titles of the plaintiffs' as illegal for having been obtained before succession proceedings were taken out in respect of his father's estate and for having altered the desired effect of the court's decision in Case Number 112 Of 2007.
22. DW3. Martha Wairimu Kigamba, testified on 23/7/2021. She adopted her statement recorded on 4/12/2019 as her evidence-in-chief in this suit. She stated that she is a widow with 5 children, and she had asked her father to help her. That her father promised to give her land to enable her fend for her children; that to this end her father showed her the piece of land on which she would farm; that her father died intestate; that the piece of land he bequeathed her is now parcel no 1267; that in 2015 she farmed on the land but she was served with an injunction order and she never harvested the crop; that the plaintiffs are in possession of the land to date; that she believes that the title to plot no 1267 was issued in her name in accordance with her father's wishes and it should be surrendered to her.
23. Upon cross-examination by Mr. Teti, she revealed that Lucy Njeri, her step mother, lived on land that used to be part of parcel 135 and that she has not complained against the plaintiffs; she admitted that she is still residing at her late husband's land at Munyaka. She stated that her father had shown her the land comprised in title no 1267 in 2013 before the subdivision, but that act of gifting was not put down in writing.
24. Upon re-examination by Mr. Karani, she stated that she ceased farming activities on the suit land when the plaintiffs claimed the land. She denied ever having quarreled with her father; her husband left her one acre upon his death on which she still lives. After the above evidence was adduced, the defendants closed their case.

SUBMISSIONS

25. The plaintiffs filed written submissions on 27/9/2021. The defendants filed their written submissions on 22/10/2021.

DETERMINATION

26. I have considered the parties' pleadings, the evidence tendered in support thereof as well as the submissions filed.
27. It is not in dispute that the plaintiffs had before subdivision of plot no 135 lived thereon for a very long time. PW1 and PW4 place the date of their entry into the land in the 1970s. the only bit of history as to how the land was acquired was through the evidence of the two witnesses, PW1 and PW4. It was stated that PW4 was the first one to occupy the land and Daniel the person who was later on registered as proprietor of the land followed PW4, still in the 1960s into the land. It was alleged that he (Daniel) was registered as proprietor as PW4 could not be so registered as she lacked a national identity card which was a prerequisite for land registration. It is also not in dispute that before he died Daniel and



his first wife were embroiled in a court dispute from which arose a decree directing that Hellena, the wife be given 8.5 acres out of the suit land which was done.

Issues for Determination.

28. The main issues arising for determination in this matter are as follows:
- a. Whether there was forgery in the acquisition of titles nos. Trans Nzoia/Cherangani/ 1267, Trans Nzoia /Cherangani/1268 and Trans Nzoia/Cherangani /1271 by the plaintiffs;
 - b. What Orders should issue?
29. The issues are discussed as hereunder:

(a)Whether there was forgery in the acquisition of titles nos. 1267, 1268 and 1271 by the plaintiffs;

30. The parcel number Trans Nzoia /Cherangani /135 was undoubtedly registered in the name of Daniel Kigamba Kahato, now deceased, who was husband to two wives. Daniel and the first wife were engaged in a court case in which the following orders were issued by the High Court in HCCC 112 of 2007 on 27/6/2012: -

“By consent of both parties the suit is compromised in the following terms: -

1. The plaintiff to surrender to the defendant 8.5 acres out of title deed no Trans Nzoia /Cherangani /135;
2. The plaintiff to include his own costs for the subdivision process;
3. The defendant to pay the necessary stamp duty for the transfer of 8.5 acres to her;
4. Each party to bear its own costs.”

31. According to P. Exh 7, a letter of consent dated 12/3/2014, the local land control board gave its consent for the subdivision of parcel number Trans Nzoia /Cherangani /135 into 8 portions ranging from 0.56 ha to 3.2ha. No evidence was called by the defendants to disprove the plaintiff's evidence that such consent was issued. Save verbal assertions on the part of the defence, no evidence was also adduced that could cast doubt on the plaintiff's assertion that Daniel signed the application for the land control board consent to subdivide (P. Exh 6). There is consensus on the part of both parties that Daniel died on 13/12/2014, about 9 months after the consent to subdivide was issued. The terms of subdivision on the consent are on all fours with the terms of subdivision sought in the application. I am persuaded that the two documents are therefore genuine.

32. On 22/4/2013 after the grant of the consent to subdivide, the District Officer Kaplamai Division wrote a letter (P. Exh 12) to Daniel and Hellena through the local Chief and, citing the above court order, informed them as follows:

“...the government surveyors would undertake the survey and implement the subdivision according to an agreement “which was signed before the Assistant Chief... the work is scheduled on 25/4/2013 at 10.00 am....”

33. From the date on the mutation sketch attached to the letter of consent to subdivide which is 8/8/2014, it would appear that subdivision proceeded as desired in the application and that by the time of Daniel's demise in December 2014, the subdivisions had been issued with parcel numbers.



34. The plaintiffs produced three letters of consent to transfer plots Nos 1267, 1268, 1270, and 1271 all dated 18/12/2013 which date is before Daniel's demise. I have not seen any evidence from the defendants to prove that Daniel never applied for them or that such consents authorizing transfer of the suit lands to the plaintiffs were not issued with the knowledge of the deceased.
35. It is the defendants' claim that the subdivision of the suit land went contrary to the court order issued on 27/6/2012. However, after proper scrutiny this court is of the view that the order confined its mandatory terms to the giving of 8.5 acres of land to Daniel's first wife without restricting any other dealings with the rest of the land comprised in plot no Trans Nzoia /Cherangani /135; this court therefore finds that in the circumstances that Daniel was at liberty to subdivide the land as he wished. It also finds that the subdivision thereof into 8 portions was done at his instance.
36. In the absence of evidence from the defendants to the contrary I find that the plaintiffs never forged or presented any forged documents to the Land Registrar in terms of the application for consent to subdivide and transfer, the transfer forms and the mutation. I am persuaded that those documents were all executed by Daniel Kigamba Kahato.
37. The second limb of the defendant's claim of fraud against the plaintiffs is the alternative defence that the documents regarding the transfer of the suit lands were prepared while the deceased was sickly and bedridden and unable to make any rational and independent decisions. Section 108 of the Evidence Act states as follows:
- “ 108. Incidence of burden
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.”
38. In addition, Section 109 of the Evidence Act provides as follows:
- “ 109. Proof of particular fact
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.”
39. No evidence was given by the defendants to demonstrate that Daniel was sickly, or even that he was so sick to the extent losing powers of cognition and thus unable to carry out his business. That ground must also fail.
40. The third limb of the defendant's claim regarding fraud was that the plaintiffs concealed from the Land Registrar that the proprietor of the suit land Trans Nzoia /Cherangani /135 had died by the time of the issuance of the respective title deeds on 30/3/2015. However in this court's view the moment a transfer is executed by the transferor to a transferee, the interest in the land vests in the transferee and all that remains is the registration of that transfer in order for the register to reflect that the transferee owns the land; it thus would not matter if the transfer was lodged for registration after the transferor in this case had died since he had divested himself of interest in the transferred parcels before his demise and they no longer formed part of his estate for distribution to its beneficiaries. There were no intestacy or succession procedures under the Law of Succession Act (Cap 160) that the transferees were bound to subject their transfer documents to as they had been executed by the transferor inter vivos with resultant disposal of interest to the plaintiffs. After the lodging of the transfers, the Land Registrar would be in order to register the mutation and transfers and issue titles to the transferees as happened in the instant case. In this courts view the mere uninterrupted possession of the land by the plaintiffs



without any attempts by Daniel to evict them renders it very probable that either they had a role in the acquisition of the land as claimed in which case it was family land or that even if there had no role, Daniel had accepted them as part of his life to the extent that he was willing to part with a portion of the land for their benefit. There is also great probability that the defendants were not granted the suit land as a whole land by Daniel because they stood to inherit a share of the 8.5 acres which their mother had been gifted by Daniel. Besides I did not hear the defendants to deny the plaintiffs claim that Daniel had already given the 1st defendant 1 acre and the 2nd defendant a right to share in the land given to the other girls in the family. These are probabilities that this court is not inclined to dismiss wholesale in favour of granting the defendants' rights over the suit land which orders would render the plaintiffs destitute. I hardly think depriving the plaintiffs of land they had occupied for decades would be proper in the circumstances of this case. I am not persuaded by the defendants' evidence that there was therefore any unprocedural, illegal or irregular transfer of the suit lands to the plaintiffs or collusion or other wrongdoing on the part of the Land Registrar or the Land Registry staff in issuing the title deeds cited in the instant case to the plaintiffs.

(b) What Orders should issue?

41. Having considered the pleadings and the evidence in this case at length it is the conclusion of this court that the defendants have failed to cast any doubt on the validity of the plaintiff's titles and they must be upheld. The plaintiffs have therefore established their claim on a balance of probabilities and the defendants have failed to establish their counterclaim to the required legal standard.
42. Consequently, I grant the plaintiffs judgment in terms of prayers nos (a), (b), and (c) of the plaint dated 4/5/2015. The defendants shall also jointly and severally bear the costs of these proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 5TH DAY OF MAY 2022

MWANGI NJOROGE

JUDGE, ELC, NAKURU.

