



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 110 OF 2013**

SAMWEL KISANG' CHEBOI.....1<sup>ST</sup> PLAINTIFF

GILBERT KIPKOECH TOLGOS.....2<sup>ND</sup> PLAINTIFF

DAVID YANO CHEBOI

(Suing as Trustee of MARAKWET CHEPSIRO INVESTMENT GROUP)

**VERSUS**

ELISHA KIPLETING MUREL.....1<sup>ST</sup> DEFENDANT

THOMAS KIPKORIR KOECH.....2<sup>ND</sup> DEFENDANT

OBADIAH KUIMUTAI SAINA.....3<sup>RD</sup> DEFENDANT

NOAH KIRWA CHUMA.....4<sup>TH</sup> DEFENDANT

ELIAZER KEMBOI

(Being sued as the administrator of the Estate of the late

WILSON KIPKEMBOI BUSIENEI).....5<sup>TH</sup> DEFENDANT

THE CHIEF LAND REGISTRAR.....6<sup>TH</sup> DEFENDANT

THE NATIONAL LAND COMMISSION.....7<sup>TH</sup> DEFENDANT

THE ATTORNEY GENERAL.....8<sup>TH</sup> DEFENDANT

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff filed a plaint dated 3/3/2017. On 11/5/2018 they filed a further amended plaint dated 8/5/2018. In that further amended plaint the plaintiffs seek judgment against the defendants jointly and severally for orders which I will state verbatim herein below as follows:-

(a) A declaration that the parcel of land Reference No. 4366 belongs to the plaintiffs and that the plaintiffs are the legal owners of the said land.

(aa) An order directing the 7<sup>th</sup> - 9<sup>th</sup> defendants to reverse and/or restore into the register for LR. No. 4366 to reflect the plaintiffs as the owners.

(b) An order directing the Land Registrar to cancel the register, the entries therein and the titles numbers:-

(1) Chepsiro/Kibuswa Block 1(Kelchinet) 105 139.4 Ha.

(2) Chepsiro/Kibuswa Block 1(Kelchinet) 118 14.49 Ha.

(3) Chepsiro/Kibuswa Block 1(Kelchinet) 116 303.0 Ha.

(4) Chepsiro/Kibuswa Block 1(Kelchinet) 112 15.66 Ha. and

(5) Chepsiro/Kibuswa Block 1(Kelchinet) 113 55.43 Ha.

(c) An order for eviction to remove the 1<sup>st</sup> - 6<sup>th</sup> defendant, their members, agents, servants and/or assignees from the suit property.

(d) An order for permanent injunction to restrain the defendants, their members, agents, servants and/or assignees from further interfering with the subject property and/or trespassing on to the plaintiffs' parcels of land known as LR. No. 4366.

(e) An order reverting the subject land LR. No.4366 to the provisions of Registration of Titles Act (Cap. 281 - now repealed).

(f) An order for rectification of the register and all registration documents to reflect the plaintiffs as the owner of LR. No. 4366.

(g) Costs of this suit.

(h) An order for mesne profit.

## **PLEADINGS**

### **The Plaintiff**

2. In their plaint, the plaintiffs averred that they under the auspices of a group called Marakwet Chepsiro Investment Group are the registered owners of the suit land known as **Land Reference 4366 – South East Of Kitale Municipality** which measures **1282.01 ha** and that some members of the group occupy part of the land; that the defendants and their agents have trespassed onto a portion of the suit land and illegally remained thereon despite the plaintiffs' efforts to evict or remove them; that the 1<sup>st</sup>-3<sup>rd</sup> plaintiffs were issued with a title deed over the suit land as trustees of the Marakwet Chepsiro Investment Group (hereinafter also referred to as "Chepsiro") on **27/6/2012**; that however the defendants fraudulently caused the conversion of the land from the RTA regime to the RLA regime and they have embarked on subdividing the land for sale to third parties in order to avoid the plaintiff's claim.

### **The defence of the 1<sup>st</sup> -5<sup>th</sup> defendants.**

3. The 1<sup>st</sup> - 5<sup>th</sup> defendant filed their defence on **13/11/2013** which they later amended on **7/3/2017**. They further amended it on **10/6/2019**. In their further amended defence dated **10/6/2019** the 1<sup>st</sup> - 5<sup>th</sup> defendants denied the plaintiffs' claim over the entire suit land or that the plaintiffs are in occupation of part of the suit land; they raised an alternative defence and stated that if the plaintiffs obtained any registration in their favour as alleged then it was secured fraudulently; they denied trespass and stated that the instant suit is *res judicata* in that the dispute between the parties herein over the suit land has been finally resolved in **Eldoret HCCC No 190 Of 1999** which decision was against the plaintiffs; that the registration of the Marakwet Chepsiro Investment Group as a self-help group by the plaintiffs on **20/4/2011** was done with the sole aim of laying a fraudulent claim over the land; that the land was registered in the name of that group under a repealed law; that the suit is statutorily time barred and that the orders sought by the plaintiffs would if granted be against public policy and natural justice. It was also alleged that the plaintiffs lack *locus standi* to bring the suit.

### **The defence of the 6<sup>th</sup> -8<sup>th</sup> defendants.**

4. The **6<sup>th</sup> - 8<sup>th</sup> defendants** filed their statement of defence on **14/9/2017**. They denied the plaintiffs' claim of having been issued with title and of ownership over the suit land or that the plaintiffs have attempted to remove the defendants therefrom; they denied that the conversion of the suit land from the RTA regime to the RLA regime was fraudulent; they stated that the 1<sup>st</sup> -5<sup>th</sup> defendants paid for their title deeds in **1990** as seen in the various green cards issued in their favour.

### **Reply to Defence**

5. The plaintiffs filed a reply to the further amended defence on **28/6/2019**. In that pleading they denied the claims of fraud and insisted that their title was legally obtained. They also maintained that they are the trustees of the Marakwet Chepsiro Investment Group having capacity to sue.

## The Plaintiffs' Evidence

6. **PW1, Samwel Kisang Cheboi**, testified on **30/7/2014** and on **24/10/2018**. He stated that the land is owned by the Marakwet Chepsiro Investment Group; that he is the chairman of the group while the 2<sup>nd</sup> plaintiff is the secretary and the 3<sup>rd</sup> plaintiff treasurer; that they brought the suit on behalf of the group; that they have sued the 1<sup>st</sup> – 5<sup>th</sup> defendants on behalf of Loima Multipurpose Co-operative Society; that Marakwet Chepsiro Investment Group was registered on **9/3/2001** vide certificate number **176014**; that the certificate of registration was issued on **20/4/2011**; that he has been chairman for over **10** years; that purpose of the group was to purchase land for its **601** members; that prior to the date of registration it was known as the Chepsiro Group for over **20** years; that the Chepsiro Group acquired the suit land in **1970**; that subsequently another group claimed ownership of the same land; that the Chepsiro Group approached the Ministry Of Lands which issued it with a letter of allotment over **LR Number 4366** measuring **3236 acres** on **7/7/1992**; which is the suit land; that the group was required to pay **Ksh 921,270/=** which was paid vide receipt number **1261655 (PEXh 3)**; that its members had stayed on the land pending the issuance of that allotment letter; that they still occupy the suit land; that a title document (**PEXh 5**) was issued to the plaintiffs as trustees of the Group on **27/6/2012**; that **Ksh 600,000/=** was paid as stamp duty and a certificate of that payment dated **2/6/2010 (PEXh 6)** issued; that ground rent was paid for up to the year **2009** vide a receipt no **0183725 (PEXh 8)** dated **4/3/2009** and a rent clearance certificate (**PEXh 7**) was issued; that long before the issuance of a letter of allotment to the plaintiffs, the defendants claimed ownership of the suit land and invaded it and prevented the plaintiffs from utilizing the same; that the Chepsiro Group met and resolved to sue the defendants and that a demand letter was issued (**PEXh 10**) and that the defendants should be evicted from the suit land.

7. On cross-examination by Mr Asseso, **PW1** stated that the suit land is not yet subdivided. He also admitted that litigation over the suit land had existed in Eldoret and in Kitale; that his group sued in Eldoret and the case was concluded; that the Kitale case was dismissed; that he does not know the size of the land occupied by the defendants; that they bought the land from a white settler; that they had a written agreement with the settler; that the sale agreement has not been produced in court; that they bought the land in **1970**; that he was not the group chairman in **1970**; that title was not obtained immediately as the group did not have money to process the same. However upon re-examination by Mr. Nyairo he stated that the Kitale case was a criminal case preferred against the plaintiffs upon complaint by the defendants.

8. On **24/10/2018 PW1** testified further and stated that he still has the main title over the suit land. He also dismissed the transfer documents filed by the defendants as fake. Upon cross-examination by Mr Odongo for the **6<sup>th</sup> -8<sup>th</sup>** defendants he stated that he does not have the list of the group members; that the "Chepsiro Group" named in the allotment letter is the same as the "Marakwet Chepsiro Investment Group;" that they had not registered the group at the time of the issuance of the allotment letter; that they took more than the **30** days period given in the letter of allotment to comply with the conditions therein.

9. On re-examination by Mr Nyairo he stated that by the time they paid for the land they had not received any letter cancelling their allocation and that they were subsequently issued with the title to the suit land. He added that the defendants invaded the land, burnt the plaintiff's houses and occupied the part the plaintiff had resided in.

10. **PW2, Gilbert Kipkoach Tolgos** testified on **30/7/2014**. He adopted his statement recorded on **3/6/2013** as his evidence-in-chief. His evidence is that he is the secretary to Chepsiro; that the group though registered on **24/4/2011** had existed for many years before that date; that the group was allotted the suit land in **1992** and issued a letter of allotment the same year; that the group comprises of many members and it took time before monies for conveyance of the suit land could be collected through members' contributions; that title was issued in favour of the Marakwet Chepsiro Investment Group on **27/6/2012**; that the defendants have trespassed onto the suit land claiming ownership thereof but the plaintiffs are the proper owners and so the defendants should be evicted.

11. Upon further cross-examination by Mr Asseso **PW2** stated that he has been secretary to the group since **2004**; that by **1992** he was a member of the group; that he is only aware of a Kitale case concerning the suit land. Upon further re-examination by Mr Nyairo, he stated that they have been on the suit land since **1970**.

12. **PW3, David Yano Cheboi** testified on the same day as **PW1**, and **PW2**. He adopted his statement recorded on **3/6/2013** as his evidence-in-chief. His evidence is that he is the treasurer of the Marakwet Chepsiro Investment Group. The rest of his evidence corroborated that of **PW2** in every respect.

13. **PW4, No. 67708, Corporal Samuel Kamau** testified on **24/10/2018**. He stated that he is a police officer **No 67708** working with the National Cohesion And Integration Commission on secondment from the directorate Of Criminal Investigations; that he was in **2012** attached to the land fraud investigation unit at the CID Headquarters Kiambu Road, and was instructed by his senior one Nicholas Etyang to visit the Ministry Of Lands offices at Ardhi House and see the then Commissioner Of Lands Mr. Mabea; that he went there and met Mr. Mabea who instructed him to investigate four original titles that he was in possession of; that he was supposed to establish whether they had been regularly processed; that Mr Mabea handed over the titles to **PW4**; that **PW4** investigated the titles by recording Mr Mabea's statement first and later meeting the officers alleged to have signed the title deeds; that **PEXh 5** was one of those title deeds; that the **4** other title deeds were not related to the suit land; that concerning **PEXh 5**, **PW4** visited the suit land at Cherangany in Trans Nzoia; that he interviewed one Samuel the area Chief; that the said Samuel informed him that the land belonged to the Chepsiro Group; that through Samuel's assistance he summoned the three plaintiffs herein to CID headquarters; that the plaintiffs produced their documentation whose authenticity **PW4** confirmed with the Ministry of Lands Offices; that the clearance certificate was issued by the Lands office and the title **PEXh 5** was regularly and properly issued by the Ministry Of Lands. That the title to the suit land issued to the plaintiffs was signed by Mr. Mabea and witnessed by one F.N. Orare, Registrar of Titles. His conclusion was that the title **PEXh 5** was properly issued and he confirmed as much to the Commissioner of Lands. **PW4** produced no documentary evidence while he was testifying.

14. Upon cross-examination by Mr. Asseso, **PW4** did not recall seeing an allotment letter; according to the information he received from the plaintiffs, the suit land was not allocated to them but was bought by them. However he also did not recall seeing an agreement during his investigations. He further asserted that the land was not obtained by the plaintiffs through the direct allotment method.

15. The plaintiffs then closed their case.

## The Defendant's Evidence

16. **DW1, Thomas Kipkorir Koech**, testified on **25/10/2018** and on **20/11/2018**. He adopted his written witness statement dated **15/12/2014**. His evidence is that he does not know the plaintiffs; that Loima Cooperative Society comprises of many members who live on the suit land; that he does not know the plaintiff's group; that the plaintiffs are not the owners of the suit land; that the suit land was earlier owned by C.K. Wanguhu and D.D. Shah; that Isaac Kosgey, Elisha Murei, Chuma Murei, Nahashon Mbugua, and Kipkurgat Kenduiywo were the transferees; that Isaac was their leader; that they left Nandi District together except for Nahashon who came from Lari; that in the **1980s** they divided the land according to their families; that **DW 1** was a beneficiary who obtained title on **19/11/1990** to **2** portions of the suit land named no **112** and **222**; that there was a case over the suit land that was conducted at Eldoret which was decided in favour of the defendants; that the appeal thereon was decided in favour of the defendants also; that the land was originally about **3800** acres and he holds about **140** acres.

17. Upon cross-examination by Mr. Nyairo **DW1** stated that his portions emanated from **LR No 4366**; that the title to **LR 4366** was surrendered on **30/3/1989** in accordance with the law; that he was not involved in the surrender; that the land was bought in the **1960s** and he has lived thereon since **1982**; that before then he was living in Nandi; that his father had a house on the land but he lived in Nandi from where he carried out his farming operations on the suit land; that he did not know of the details of the sale transaction with Wanguhu and DD Shah; that he only met with the plaintiffs in court; that every shareholder who had bought shares from Loima Cooperative Society had a portion of land on the suit land; that it is not true that the plaintiffs live on the suit land; that he has nothing to show that the original title was surrendered to the government by the original owners for subdivision purposes; that he also stated that he did not have any receipts to prove that he paid any monies to the government regarding his registration as the owner of the land. He denied that he was allocated the land by the government and insisted that his father whom he inherited it from bought the land in the **1970s**; his father died in **1993** but he had transferred the land to him while he was still alive; he also stated that he had no documentary evidence to show that his father transferred the suit land to him or that he took him to the land control board; that the main parcel was subdivided by the Ministry Of Lands; that one of his brothers has been enjoined in the suit as a defendant and also has a parcel of land emanating from the main parcel.

18. Upon cross-examination by Mr. Odongo **DW1** reiterated the same matters above. He admitted to having been in school by the time the land was purchased; he stated that he did not know why the surrender of the main title occurred; that there is no consideration for the surrender reflected on the main title. That the sons to Isaac Kosgey one of the original purchasers of the land also got subdivisions registered in their names too; that Elisha Kipleting and Nahashon Mbugua got parcels numbers **116** and **117** respectively. Elisha Murei's manager, one Wilson Kipkemboi got plot no **119**. Every person was given land according to his contribution. He stated that his title came after the surrender of the main parcel and subdivision. He denied ever applying for the land from the government and stated that his father caused the parcel to be transferred to him to avoid the task of transfer in future. He stated that by the time the plaintiffs' letter of allotment was issued titles had already been issued to the defendants.

19. Upon cross-examination by Mr Asseso, he reiterated that numerous persons had already benefited from allocation and transfer of parcels resulting from the subdivision of the main parcel.

20. **DW2, Obadiah Kimutai Saina**, testified on **20/11/2018** and on **8/10/2020**. He adopted his witness statement recorded on **15/12/2014** as his evidence-in-chief and adopted the evidence given by **DW1** *in toto*. He stated that he does not know the plaintiffs and their group; that he is not a member of Loima Co-operative society; that his co-defendants are neither members nor officials of Loima Co-operative Society; that his parcel was no **105** but he subdivided it and sold it to four persons in **2012** and that his parents bought the land.

21. Upon cross-examination by Mr. Nyairo **DW2** stated that he got the land by way of inheritance from his father; that he has no evidence of subdivision of parcel no **105** which he claims to have previously owned or to show that he obtained a land control board consent for that transaction; that he is not aware that the plaintiffs have title to the main parcel.

22. Upon cross-examination by Mr. Odongo he stated that his father was amongst the purchasers and registered owners of the suit land; that the parcel from which his title descended was known as **LR No 4366/7**; that he has subdivided the same and sold to parties who are not named in the suit; that by the time his father died the suit land had not been subdivided; that he never sought a grant of representation to his late father's estate as his father had distributed all his land between **1983-1984** while still alive; that Nahashon Mbugua is deceased and his children have not been enjoined in the suit; that Edwin Kiprugut Kenduiywo is not a party to this suit; that only Kipleting Arap Murei was sued and his children were omitted yet they live on the land; that Chumo arap Murei is deceased; that he did not know that if his father's death certificate had been presented at the Lands Registry titles to his children would not have issued; that he does not have in his possession the death certificate of his father.

23. At this point the **1<sup>st</sup> - 5<sup>th</sup>** defendants closed their case.

24. In the defence by the **6<sup>th</sup>** and **9<sup>th</sup>** defendants, **DW3, Nelson Otieno Odhiambo, the Land Registrar, Trans Nzoia County**, testified on **8/10/2020**. He stated that the suit land was initially registered under the RTA regime; that an RTA title can be converted to RLA if it has no encumbrances and an entry is made in that title evidencing the surrender; that titles are thereafter issued as per an area list; that the suit land has been since subdivided into several portions and the original title closed; that the title to the suit land was transferred to Isaac Koskey and **4** others to hold in common in equal shares as per entry **no 36** on the main title; that beneficiaries needed grants of letters of administration to administer the land in the event one title holder died; that even when surrendered the owners named immediately before the surrender would afterward be named as owners of the land under the RLA land regime; that in the case of the suit land the names in which the suit land was registered after the surrender were not the same as those on the title immediately before the surrender. **DW3** stated that an area list was generated for **plots nos 103-119** but that area list did not reflect the names on entry **No 36** on the main title; that as an example **entry no 1** on the green card for plot no **103** read "*Government of Kenya*" because the earlier title had been surrendered to the Government; that **entry no 3** in the green card for **plot no 103** shows that that plot had already been subdivided into several other parcels and the title had been closed; also, the titles for **plots no 105 106,107,110,114,116, 117** had been closed on subdivisions from which numerous smaller parcels had been born. According to **DW3**, there is another title issued to the Chepsiro group in respect of the suit land. It showed that Chepsiro had paid **Ksh 1, 444,000/=** to the government and that its trustees had been registered as proprietors on its behalf. He stated that it is a mistake to have two IR numbers, that is, to have two grants in existence at the same time. He produced a certified copy of the title issued on **27/6/2012** in the

name of Samuel Cheboi & others on behalf of Chepsiro. While under cross-examination by Mr Nyairo for the plaintiffs he stated that the grant had been signed by Mr Mabea the former Commissioner Of Lands who was duly authorized to do that; he observed that the grant had a deed plan attached to it which he stated to have been prepared by a licenced surveyor and issued by the Director of Surveys; he confirmed that the grant was registered at the Central Lands Registry at Nairobi; that stamp duty was duly paid for it and that that is the same document that the plaintiffs had produces in evidence of their proprietorship of the suit land and that that grant has never been revoked;

25. **DW3** further stated that an order had to emanate from the Minister of Lands to authorize conversion of title from RTA to RLA and that no such order existed in respect of the grant over the suit land; that he is also not aware of any gazette notice in respect of conversion of the suit grant from one land registration regime to the other; that **entry no 36** on the original grant issued in **1919** shows that the owners of the land surrendered it to the government unconditionally on **30/3/1989**; that in the context of that unconditional surrender the government could issue a grant over the land to any person it wished; that under RLA the green card is the document by which the government issued citizens land; he admitted that **DExh 2** does not reflect the names of the farm officials; that that area list is the document by which some persons were given land by the government; that however it does not expressly state that those persons were to be issued with land; that the normal instruments of transfer under RLA did not have to be used; that a transfer under RLA is not always needed and is not applicable when the land is being transferred from the government to a first individual owner. However, for an interest in land to shift from one person to another, the execution of a transfer was necessary under RLA. However he maintained that a document such as **PExh 2** is capable of disposing of land even when it is not registered. He further stated that in certain prescribed cases a document other than the statutory transfer form could transfer interest in land but stated that no application for such prescription was made in respect of the suit land. **DW3** admitted that the District Commissioner and the District Surveyor, being the persons who had signed **DExh 2**, had no power to allocate government land yet **DExh 2** is the list that was used to allocate some persons portions of the suit land; when shown **DMFI-2**, the transfer instruments that purported to transfer land to the defendants and others, **DW3** stated that it is not usual for the government to execute transfers to individuals and noted that in any event the purported transfer forms appeared not to have been executed by the purported transferor (government) yet they had been registered by the Land Registrar. **DW3** stated that only two of the 5 persons who had held the land under the RTA were issued with positions of land after the surrender of the title; when pressed further by Mr Nyairo in cross-examination, **DW3** reiterated that the land had been surrendered and the area list and transfers were competent to transfer the land to individuals. He maintained that the land was not available for allocation to the persons named in the grant dated **27/6/2012**, that is, the plaintiffs.

26. Under cross-examination by Ms Kuyiki **DW3** stated that the original grant issued in **1919** gave the size of the land as **3236 .0 acres** while the area reflected in the grant issued to the plaintiffs is different (**1282 ha**) and that the IR Numbers for both grants differ; that he was a Land Registrar in **2012** and that the **Land Registration Act** was in force while the **Registration of Titles Act** had been repealed and therefore the plaintiff's grant is not valid. When pressed further by Ms Kuyiki **DW3** stated that all the defendants had been named in the area list (**DExh 2**) and that they were allocated land and that therefore the titles issued to them are valid. He faulted the fact that the plaintiffs allege to have paid a consideration and stated that one can not pay consideration and at the same time be allotted land.

27. Upon re-examination by Mr Odongo, **DW3** stated that he does not know the names of the persons who prepared the area list. However he stated that the area list was transmitted to the Ministry of Lands Headquarters by the District Commissioner and the Ministry headquarters transmitted it to the Land Registrar Trans Nzoia.

28. At that stage the **7<sup>th</sup>** and **9<sup>th</sup>** defendants closed their case and at the application of Mr Nyairo the **8<sup>th</sup>** defendant's case was also ordered closed. Subsequently and upon an application dated **4/2/2021** and a consent of all parties recorded on **28/4/2021** allowing that application a copy of the letter dated **29/3/1989** from the Chief Land Registrar to the Land Registrar Eldoret was admitted in evidence in the instant suit.

## SUBMISSIONS

29. Submissions were filed on behalf of the plaintiffs on **7/11/2020**. The **1<sup>st</sup> - 5<sup>th</sup>** defendants filed their submissions on **9/2/2021** and further submissions on **10/5/2021**. The **6<sup>th</sup> - 8<sup>th</sup>** defendants filed their submissions on **25/5/2021** and further submissions on **10/5/2021**. I have considered all the filed submissions.

## DETERMINATION

### Issues for determination

30. This court has examined the proceedings in the civil case **Eldoret HCCC No 190 Of 1999**, the criminal case proceedings in **Kitale SPMCRC 2058 of 1999** and the ruling of the Hon Justice Wanjiru Karanja (as she then was) dated **19/12/2005** in **Kitale HC Misc Civil Application No 76 Of 2005** and arrived at the ineluctable conclusion that this suit is not *res judicata*.

31. The main issues for determination in this matter are:

*(a) Whether the plaintiffs are entitled to a declaration that LR Number 4366 belongs to them and whether the subdivision of the suit land should be nullified and order that the title do revert to the RTA regime and that it be registered in the plaintiff's' names;*

*(b) Whether the defendants should be evicted from the suit land and enjoined from further interfering with it;*

*(c) Whether the plaintiffs are entitled to mesne profits;*

*(d) Who should bear the costs of this suit?*

32. The issues arising are addressed as hereunder.

*(a) Whether the plaintiffs are entitled to a declaration that LR Number 4366 belongs to them and whether the subdivision of the suit land should be nullified and order that the title do revert to the RTA regime and that it be registered in the plaintiffs' names;*

33. It is not disputed between the parties that **LR NO 4366** existed and that a grant was issued in respect thereof long ago to **Eric Louis and Rupert Walker** as tenants in common in the ratio of ¼: ¾ respectively. The term of the lease was **999** years from **1/10/1919 – 1/10/2918**. The plaintiffs included a copy of the grant in their documents. The Land Registrar **DW3** the custodian of land records in the Trans Nzoia County confirmed that **LR NO 4366 - Kitale** was registered under the **RTA** regime. His further evidence was that the land has been subdivided and the title closed. Referring to the copy of grant produced by the plaintiffs, he stated as follows in his evidence:

**“This is the copy of the original title issued on 1/10/1919 over the suit land for 999 years.... The title has several entries up to No 39.”**

34. The basis of the plaintiffs' claim to ownership is the grant issued on **27/3/2012** after they had been allocated the suit land. The Land Registrar **DW3** has confirmed that that grant was issued by the Commissioner of Lands. **PW4's** testimony was that he had investigated among others the grant issued to the plaintiffs and found that it is genuine.

35. The plaintiffs' claim conflicts with that of the defendants. The root of the defendant's claim is in the alleged transfer of the suit land to **4** persons, that is, **Isaac Koskei, Nahashon Mbugua, Edwin Kipkurgat Kenduiyo, Kipleting arap Murei and Chuma arap Murei**. According to **entry no 36** on the copy of title produced by the plaintiffs and on which the defendants also rely, the transfer is alleged to have occurred on **30/11/1971**.

36. The Land Registrar's evidence is that **LR 4366- Kitale** was transferred to the five persons named herein before and thereafter the title was surrendered to the government on **30/3/1989**. If that is the case then the propriety of the subsequent issuance of a grant to the plaintiffs must be viewed in the context of what transpired regarding the suit land between the date of surrender **30/3/1989** and **27/6/2012**. According to the defendants after the land was surrendered it was converted to the RLA regime and titles were issued thereunder. Some copies of the register in respect of the RLA titles issued were produced in court. Some of the RLA titles had already been subjected to subdivision and transfer to third parties not enjoined in this suit. According to the Land Registrar **DExh 2** was the area list that was used by the Ministry of Lands to distribute the suit land after it was subdivided. That area list appears to have been signed on **25/5/1989** by the District Commissioner and the District Surveyor. All the green cards or land registers produced by **DW3** as evidence of issuance of title after conversion were opened on **6/6/1989**, a dated after the preparation of the area list. Thereafter, titles issued on various dates in respect of different parcels. All these events took place long before the plaintiffs were issued with the grant to the suit land by the government. In the circumstances it would not be proper for a declaration to issue that **LR Number 4366** belongs to the plaintiffs because by the time they were allocated the land it had been converted into the RLA regime and subdivided and titles issued to other persons. Subject to what this court will say herein after, the foregoing puts paid to the plaintiff's quest for a declaration that the entire of the **LR 4366-Kitale** belongs to them and also the claim for nullification of the subdivision and reversion of the title back to the RTA regime for the sole purpose of the whole parcel being registered in the plaintiffs' names.

*(a) Whether the defendants should be evicted from the suit land and enjoined from further interfering with it.*

37. The plaintiffs did not produce any evidence of the size of land that they or the defendants occupy on the ground, and whether that land is covered by the titles issued upon subdivision of the RTA parcel. From the evidence given in this suit at least **1297.7** hectares of the suit land were allocated to **16** individuals and a church. This court was not informed whether the area list produced as **DExh 2**, whose list of allottees commences at allottee no. **103**, is complete. However, judging from the fact that an area list is a document that stands on its own and that there would be no reason for such a document not to commence from allottee number **1**; it is possible that a portion of the area list was withheld from evidence by the parties in this case. In this court's view it was incumbent on both the plaintiffs and the defendants to be candid with the court and indicate whether all the land comprised of in **LR 4366** had been subdivided upon surrender and the resultant subdivisions allocated to individuals but they never demonstrated that fact. However, it is noteworthy that the plaintiffs are in occupation of some of the suit land just as are some of the defendants. The plaintiffs also have a document that was, according to the Land Registrar, issued by the Commissioner of Lands in respect of the suit land. The aggregate acreage of land reflected on the plaintiff's grant dated **27/6/2012** is stated to be **1282.1 (3168.06 acres.)** The land reflected as having been allocated amongst the defendants is as per the area list is **1297.7 hectares (3206.6 acres)**. It would appear that the area list produced in this case as **DExh 2** distributed the entire land, with the exception of a few hectares, among some very few people.

38. It is the plaintiffs who have instituted the instant claim. They are bound by law to establish their claim by calling evidence. **Section 107** of the **Evidence Act** provides as follows:

**“Burden of proof**

**(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.”**

39. **Section 108** of the **Evidence Act** provides as follows:

**“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.”**

40. The plaintiffs would fail in this suit if they failed to establish that the land comprised in **LR 4366** as surrendered by the 5 persons who were named as the new owners in **entry no 36** of the **1919** grant was still available for allocation to them as at the date of the issuance of the grant they got from the Commissioner Of Lands which is dated **27/6/2012**. The letter of allotment issued by the government to the Chepsiro Group is dated **7/7/1992**. According to the evidence availed, the defendant's interest in the land appears to have crystallised before the plaintiffs were issued with a grant over it. Consequently, this court finds no basis for the grant of the plaintiff's prayer that the defendants be evicted from the portions they occupy on the suit land.

***(c) Whether the plaintiffs are entitled to mesne profits***

41. Owing to what I have stated earlier in this judgment, the plaintiffs' claim for *mesne profits* can not stand. The plaintiffs have failed to establish their claim on a balance of probabilities.

***(d) Who should bear the costs of this suit?***

42. The plaintiffs having brought the instant suit and having failed to establish their claim on a balance of probabilities as required by law ought to have been condemned to bear the costs of the suit; however this being a very contentious land matter and the parties being neighbours to one another on the ground it is proper that each party bears its own costs for the sake of amity.

43. However even as I conclude this judgment I must comment on the process used in the procurement of the defendants' documents of title. It appears to be tainted with a considerable impropriety and one only needs to peruse the evidence of the Land Registrar to appreciate this. There is no evidence that the land was purchased from the original owners as no agreement was produced. There is also no indication of the terms of the purported surrender of the title. It is admitted that there is no evidence that the conversion of title from RTA regime to RLA regime was sanctioned by the Minister. There was no evidence that the proper process of subdivision of the land was undertaken under the supervision of the Director of Surveys; the purported transfer instruments purporting to transfer the subdivisions of the land from the government to the defendants are unknown in law and in any event were not executed by the alleged transferor, the government. The defendants aver that they are in occupation of the suit land and so do the plaintiffs, begging the question: what is the exact size of the suit land? If the plaintiffs and the defendants are all on the same land that was formerly **LR NO 4366**, then the only conclusion is that the defendants are not in occupation of the entire parcel. It is clear that the defendants defence is pre-occupied with fending off the plaintiffs' claim against them rather than establishing that there was propriety in their acquisition of the papers that they hold.

44. The recommendation of this court is that the National Land Commission and the Director of Surveys do look into the plaintiff's claim with a view to ascertaining the location and size of the land that they occupy and consider them for allocation of land if it is available for that purpose. It is the conviction of this court that if that is done the conflict between the parties herein will be fully and finally resolved.

45. Finally I wish to thank all the counsel involved in this matter for their patience and industry in the prosecution of their respective clients' claims.

**CONCLUSION.**

46. The upshot of the foregoing is that the plaintiffs' suit as contained in the further amended plaint dated **8/5/2018** lacks merit is hereby dismissed and each party shall bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2021.**

**MWANGI NJORGE**

**JUDGE, ELC.**