



**Chumo v Soi (Civil Case 68 of 1999) [2023] KEHC 20189 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20189 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 68 OF 1999  
SM MOHOCHI, J  
JULY 11, 2023**

**BETWEEN**

**REBECCA CHUMO ..... PLAINTIFF**

**AND**

**SAMWEL KIPROTICH SOI ..... DEFENDANT**

**JUDGMENT**

1. The suit property is the land known as LR No 8327/171 Nyota Complex, a 15-acre piece excision from the Agricultural Development Corporation ADC Nyota Farm as part of a settlement scheme in the late 1980's, this Court recalls and notes that the entire process in which land of the Agricultural Development Corporation ADC Nyota Farm became private property formed part of the recommendations of the Report Commission of inquiry into the Illegal/Irregular Allocation of Public Land.
2. This suit was filed on the February 19, 1999 under certificate of urgency and an injunction against the defendant was issued on February 26, 1999, by the late D Rimita Judge as he then was, pending hearing and determination of the suit.
3. This is a contestation of possession in-fact, on the part of the Plaintiff vs possession in-law, on the part of the Defendant, and the validity or invalidity of the title held by the Defendant.
4. For the last twenty (24) years and five (5) months, this case has remained pending and that, thirteen (13) judges, Late justice D Rimita, Rtd Justice M Apondi, Rtd Lady Justice SC Ondeyo, Rtd Justice A Visram, DK Musinga JA, Lady Justice M Koome CJ, Rtd Justice D Maraga CJ Emeritus, Lady Justice R Wendoh, Justice Waithaka, Justice Munyao Sila, Justice J Mulwa, Lady Justice R Ng'etich and the undersigned have dealt with this suit to its conclusion.
5. The Court regrets the delay occasioned with myriad reasons that has entailed from complaints to the Chief Justice by the litigant, to a judgment being set aside, a part-heard hearing case that remained pending for almost 10 years, the transfer of the case to the Environment and Land Court (ELC) and



return to the High Court as the same was a part-herd matter and could not thus be transferred. This Court desires by this judgment to bring to conclusion this long running dispute.

6. This Court has considered the entire record, the typed proceedings, the pleadings and affidavits filed from 1999, the entire prosecution's case and witness testimony, the exhibits produced in support of her case, her written submissions, the defendant's defence, amended defence, filed affidavits, the exhibits produced in support of his case, the defendant's testimony before Hon. Ag Justice Musinga (as he then was) on the June 23, 2004.
7. This Court did not have the occasion of conducting the hearings and observing the demeanour of the witnesses, noting that the hearings were conducted on the June 23, 2004, September 22, 2005 before Hon Ag Justice Musinga (as he then was) and between the December 14, 2020 and July 22, 2021 before Hon Lady Justice R Ng'etich.

### **Plaintiffs Case & Submission**

8. The Plaintiff commenced this suit vide a Plaint dated February 18, 1999 which was amended on March 17, 2003 she prays for an Injunction to issue against the defendant, restraining him by himself, his agent, and or servants from evicting her from the land known as LR No 8327/171 Nyota Complex, an Order of Cancellation of the Certificate of title issued to the Plaintiff (sic) and the certificate of title be issued to her, Interest on a, b, above at Court rates and any other relief the Court may deem just and fit to grant award.
9. In the Amended Plaint, the Plaintiff pleads that, she is the registered owner of LR No 8327/171 Nyota Complex and that in 1991, she was allocated the above plot after having been displaced from an original allotment.
10. That the Defendant had been earlier allocated the suit plot but was asked to surrender the same to the plaintiff and move to the new one allocated to him.
11. That Land in Nyota Complex was intended to settle the landless and each beneficiary was to get one plot. The Defendant was allocated land on which he settled to date, whereas the Plaintiff settled on LR No 8327/171. After the Plaintiff was allocated IR No 8327/171 and she settled thereon, the Defendant without any color of right fraudulently and illegally misrepresented to Agricultural Development Corporation that he was the lawful allottee and caused himself to be registered as the owner of ILR No 8327/171. The particulars of fraud are pleaded as follows: -
  - a. Misrepresenting that he is the lawful allottee,
  - b. Obtaining two titles from the scheme whereas he was only entitled to one,
  - c. Misrepresenting to the ADC that IR No 8327/171 was vacant whereas he knew that the Plaintiff was in occupation.
  - d. Failing to surrender the documents after he was asked to do so and instead hurriedly proceeding to cause himself to be registered as the owner.
12. On March 30, 2022, the parties consented to the admission of the Reply to Defence and Defence to Counterclaim dated March 25, 2022 where the Plaintiff pleaded that she is the beneficial Owner of all that parcel of land known as LR No 8327/171 Nyota Complex allocated to the Plaintiff by Agricultural Development Corporation.
13. In the Defence to Counterclaim, that she settled on parcel of land known as LR No 8327/171 after being allocated and shown the said parcel, That the Defendant fraudulently misrepresented to



- Agricultural Development Corporation the suit property was vacant for allotment, whereas she was in occupation, the defendant was thus issued with a certificate of title and refused to surrender the same despite repeated request.
14. The Plaintiff stated that she lives on the suit property in Nyota Complex, Agricultural Development Corporation Molo, carrying thereupon farming activities.
  15. That in 1986, she applied to Agricultural Development Corporation for a farm and she was allocated Plot) No 120 at Nyota Complex. When she went to view it, she found it occupied by one James Sedola. She informed the Managing Director of Agricultural Development Corporation that the plot was occupied.
  16. She was told that she would be given another plot which initially had been allocated to one Samuel Soi who had refused it, saying it was too small. It was 15 acres and it was plot No 171. She accepted the new offer and she moved onto the plot in 1991. Later. one Mr Kimalel Rop, a Provincial Director of Social Services came and told her that the farm belonged to him. The dispute was heard by the District Officer and Mr Rop's case was dismissed. Her cousin, Samuel Yebei, who was staying with her on the farm called her and told her that the Defendant had gone to the farm wanting to fence it. She then filed this case and the Defendant was restrained from entering the farm.
  17. She also testified that the Defendant has never occupied the farm. The late Dr Walter Kilele, the Managing Director of Agricultural Development Corporation gave her a letter dated October 29, 1991 directing that she be allocated Mr Soi's former plot (PW Exh 1). Mr Soi was compensated with a plot elsewhere measuring 30 acres. He was asked to surrender the 15 acres to her. She produced a letter dated 5 February 1996 addressed to Mr Soi by Dr Walter Kilele (PW Exh.2). He did not comply. He had been requested to surrender the title for the 15 acres that was issued to him. He had titles for the 15 acres and the 30 acres. That the intention of Agricultural Development Corporation was to allocate one parcel of land per beneficiary.
  18. She stated that the Managing Director told her not to move out of the suit parcel. The Managing Director spoke to the District Officer. Keringet Division, to restrain Mr Soi from interfering with the farm. A letter dated November 9, 1998 by one Mr Mwaita, Assistant Director of Land Adjudication and Settlement, addressed to the District Officer Keringet Division showed that she had been allocated the suit parcel of land (PW Exh.4). By that time, she was in occupation of the farm and she had a letter from Lands Limited, a subsidiary of Agricultural Development Corporation. dated 9th June 1999 showing that the title for the Suit Property had erroneously been allocated to Mr Soi as it had been allocated to her (PW Exh.5).
  19. She said that she would like to have a title for plot No 171, she will make payment to Agricultural Development Corporation. Her letter addressed to Director of Lands Adjudication dated January 8, 2004 is in proof of her farming activities on the land.
  20. The Plaintiff maintains that, the Defendant did not acquire the title lawfully, he got the title for the land when she was in possession of the same, and he was not officially allocated the land. She prayed that the defendant, be restrained from interfering with her land as she has nowhere else to go.
  21. On cross-examination, she stated that she has never seen the Defendants title deed, she was shown a copy of the title in Court. The Suit Property is 15 acres or thereabouts. According to the transfer and the title deed the land is 12.54 hectares. That she had initially been given a parcel of land measuring about 8 acres but she was moved and shown plot No 171 in 1991.



22. Charles Odhiambo, PW2, stated that he became the estate manager of the Agricultural Development Corporation in 2004. He stated that, through several correspondences the Defendant was to return the title for the fifteen acres for cancellation as he had already been offered thirty acres.
23. He stated that the Defendant registered thirty (30) acres of land instead of fifteen (15) acres. The title reads, thirty (30) acres but the actual size on the ground is fifteen (15) acres, that the Defendant was to surrender the fifteen acres in exchange for the processing of a title deed of thirty acres.
24. Samuel Thiong'o, PW 3, told the Court that ADC had done the allocation of the parcels of land and it was their role to give letters of Settlement Fund Trustees. The allottees pay to them and they process the title. He stated that the allottees were given five acres each.
25. He stated that Samuel Soi was given parcel No 228 which is fifteen acres and Rebecca Cheronno was given parcel No 229 measuring fifteen acres or thereabouts. He produced a list of beneficiaries for Nyota Pendle Tregana Scheme No 613 where according to him the Defendant was allocated No 229. He stated that they processed the title for Samuel Soi for parcel 229 amalgamated. He also stated that parcel numbers 228 and 229 were consolidated into one of 30 acres and a title deed issued.
26. According to the Plaintiff, the only substantive issue herein is as between the plaintiff and the defendant who is the rightful owner of the suit property
27. In *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal held as follows: -
 

' We state that when registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this beyond Instrument of title that is in challenge, and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register'.
28. To resolve the issue herein, the plaintiff urges the Court to adopt the approach it enunciated in *Hubert Vartin & 2 Others v Margaret J Kamar & 5 Others (2016) eKLR*, where the Court opined as follows:-
 

' A Court when faced with a case of two or more titles over make an investigation so that it can upheld. This investigation must start at the root of the title e two titles should be n be discovered which offi same land has to and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace and follow all processes its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.'
29. It is submitted that the approach above applies to competing claims for land. Further to the above approach, it is submitted that while the events herein took place in the early 1990s the hearing of the suit took place in the year 2022. How should the Court approach the evidence herein? In *National*



*Union of Mineworkers v IEMO [2019] EWHC 1359 (Comm)*, the UK High Court of Justice, his Honour Judge Eyre QC, opined as follows: -

28. In assessing contentious factual evidence I am entitled to take account of the Demeanour and the impression I formed having seen that witness give Oral evidence. However, in doing so I have to be conscious that by itself demeanour can be an untrustworthy guide to the reliability of a witness's evidence. Thus, what might appear to one judge to be evasion and a reluctance to answer questions indicative of unreliability in the evidence of a particular witness might to another judge be seen as commendable caution and care in giving evidence indicative of the reliability of the same witness's evidence'.

29. I also have to be conscious of the fact that any witness is inevitably recollecting matters from a particular viewpoint. I have regard to the common human capacity and tendency for a witness genuinely but mistakenly to recollect past events as having actually happened in the way in which the witness now with hindsight believes they would, or indeed should, have happened. In that respect I have also had regard to the cautionary note sounded by Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & another (2013) EWHC 3560 (Comm)* at [15] -[22] as to the unreliability of human memory.

30. ....

31. In many cases the difficulties inherent in relying on the recollection of Witnesses cause the Court to say that the witnesses' evidence must be viewed through the prism of the contemporaneous documents and that the safest course LS for findings of fact to be based on inferences drawn from such documents.

30. It is submitted that, it is not in dispute that the Suit Property was initially government land held by Agricultural Development Corporation. The Plaintiff and the Defendant applied for allocation of land.

31. Vide a letter dated December 23, 1988, the Defendant was allocated 18 acres at Nyota complex.

32. The Plaintiff was displaced from her plot and allocated 15 acres that had been allocated to the defendant (PW Ex 1). The defendant was allocated 30 acres elsewhere on condition that he was to surrender the 15 acres. There are letters by Agricultural Development Corporation dated February 5, 1996 (PW, Exh, 2), 2<sup>nd</sup> September 1996 (PW, Exh, 3) and June 9, 1999 (PW Exh.5) issued to the Defendant in error as the land was allocated to the plaintiff see letter dated that the Grant LR, 52481 for LR 8327/171 (the Suit Property) was June 9, 1999. In that letter, Agricultural Development Corporation wrote 'Mr Soi was confirmed and allocated 30 acres at Treganna being LR No 17691/228 and 229. This is further confirmed and same is supported by the list of beneficiaries in the plaintiff's further list of documents page 6. This fact was confirmed by the testimony of Mr Charles Odhiambo, the estate manager of ADC and one Mr Thiongo, the District Land Adjudication and Settlement Officer. Mr favor of Mr Soi for parcel number 228 and 229 amalgamated.



33. It is the Plaintiff's submission that, as the allocation entity, the evidence of Agricultural Development Corporation should not be taken lightly. In [\*James Njoroge Gitau Vs Lucy Chepkurui Kimutai\* \[2018\] eKLR](#), this Court held as follows: -

' That what is before me is a straight contest over who between the plaintiff and the Defendant ought to own the land. For either litigant to succeed, they demonstrate to the Court, the root of their title, and the root of their title must originate from the shares held at Kalenjin Enterprises. I have already outlined that the plaintiff purchased shares from Mr Chumo who had in turn purchased shares from Mr Morogochi. This is affirmed by the company through its director, Mr Chelaite who testified as PW-2. Mr Chelaite produced a register of the company, and I have absolutely no register. The register shows the name of the plaintiff and as eton to doubt that him the plot No 7. This evidence is coming from the company itself, and cannot be taken lightly. It is the company which knows its members and which knows what land it has assigned to the members. If the company refutes that one is a member, then that person needs to rebut this, through cogent evidence'.

34. The Plaintiff produced letters Reference MD/68/C/JDO of September 2, 1996, (Plaintiff exhibit 3) MD 68/C/WKK of February 5, 1996 (Plaintiff exhibit 2) and letters dated October 29, 2001 (Plaintiff exhibit 1 ) letter dated November 9, 1998 (Plaintiff exhibit 4) and June 9, 1999 (Plaintiff exhibit 5) from the managing director Agricultural Development Corporation clearly indicating that she was allocated the suit parcel of land and that the defendant was required to surrender the suit parcel of land to the Plaintiff.

35. The Plaintiff produced a letter dated 8<sup>th</sup> January 2004 (Plaintiff exhibit 6) which explains the history of the dispute and also confirms that the Plaintiff is in occupation of the said parcel.

36. That Section 26 of the [\*Land Registration Act\*](#) provides as follows:-

' Certificate of title to be held as conclusive evidence of proprietorship.

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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 party; or
- b. Where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme'

37. From the foregoing provision, title can only be nullified on the ground of fraud or misrepresentation, to which the title holder is proved to be a party, or where the certificate of title has been acquired illegally, procedurally, or through a corrupt scheme.

38. That the Defendant misrepresented to Agricultural Development Corporation that he is the lawful allottee of the Suit Property; he obtained title to more than one parcel of land whereas he was only entitled to one parcel; he misrepresented to Agricultural Development Corporation that LR No 8327/171 was unoccupied whereas he knew that the Plaintiff was in occupation; he failed to surrender documents relating to the Suit Property, even after he was asked to do so and instead hurriedly



proceeding to cause himself to be the registered as the owner. In the circumstances, the title held by the defendant was obtained fraudulently and without due process.

39. The *Land Registration Act*, 2012 vests this Honorable Court with jurisdiction to rectify the register in the following terms: -

' 80.

- (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'

40. The Plaintiff prays that the Defendant should not be allowed to keep the suit parcel of land which he never paid for in addition to the 30 acres which he paid for and were allocated to him.

41. The Plaintiff pray, that the Court allows the plaintiff's suit and dismisses the defendant's counterclaim.

42. The Plaintiff pray for costs of the suit reliance is placed, on the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR* the Supreme Court has expressed itself as follows:-

' (18) It emerges that the award of costs would normally be guided by the principle that 'costs follow the event': the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.'

43. That had it not been for the defendant's conduct, the plaintiff would not have brought this suit. She thus urges the Court to uphold the principle that costs follow the event and award costs of the suit to the Respondent.

### **The Defendant's Case & Submissions**

44. The Defendant testified that he was given parcel IR No 8327/171 by a letter dated July 9, 1988, he applied to the Director of Agricultural Development Corporation for land. He was given a letter of allotment dated December 23, 1988. On February 18, 1992, he was advised to pay. On February 15, 1992, he paid Kshs 50,363.65 by cheque and was given receipt by Agricultural Development Corporation. He found the plaintiff in the shamba. He reported to the chief who summoned the Plaintiff and they went to the District Officer. The shamba was transferred to him. He has a transfer dated December 10, 1990. He was given the title and he is asking for eviction.



45. In his Amended Defence and Counterclaim dated March 24, 1999, the Defendant denied that the Plaintiff is the registered owner of Nyota Complex LR 8327/171. He denied that the Plaintiff was allocated the above plot after having been displaced from her original farm. He denied having been asked to surrender plot LR 8327/171 and to move to a new plot allocate to him. He pleaded that he is the lawful owner and registered proprietor of land LR 8327/171 and title No LR 52481 allocated to him in 1991.
46. In his counterclaim the Defendant pleaded that he was allocated leasehold interest in the portion on land title number LR 52481 as the registered proprietor in land LR No 8327/171 in 1991. Pursuant to a transfer executed in his favor by the Director and Secretary of Lands Limited, a Certificate of Title for the Suit Property was issued to him. Sometime in 1991, the Plaintiff trespassed into his land where she has, without his consent, remained, developed and is committing waste thereon by unlawfully farming it.
47. The Defendant prays for the following reliefs: -
- a. A declaration that the Plaintiff is a trespasser on the Defendant's property ie. Land Reference number 832 7/171.
  - b. An Order of Eviction against the Plaintiff to have her evicted from the defendant': property i.e Land Reference Number 8327/171
  - c. A permanent injunction restraining the Plaintiff from entering, remaining working, developing, Farming, transferring or in any Way dealing with Defendant's property Land Reference Number 8327/171.
48. The Defendant's oral evidence as fortified by his witness statement was that he applied for Land Reference Number 8327/171 from the ADC in 1988 and was allocated the same on or about December 23, 1988.
49. That by their letter of February 18, 1992, Lands Limited, a wholly owned subsidiary of ADC wrote to him informing him that his documents for the Suit Property had been dully registered and further requiring the Defendant to pay the sum of Kshs 50,363/65 for various outgoings itemized in the letter.
50. That on December 15, 1992, the Defendant paid for the land as directed by Lands Limited and that the ADC issued receipt No 195734 in his favor upon the receipt of the payment.
51. The Defendant produced as exhibits a bundle as listed in his List of Documents show casing his acquisition of the suit property.
52. The Defendant produced a copy of certificate of title the measurements of the said parcel of land is 12.54 hectares which is about 30.987 acres or thereabouts. However, on the ground LR No 8327/171 is only 15 acres or thereabouts a fact that was confirmed by the Managing Director in his letter dated June 9, 1999.
53. The Defendant has not denied that he was allocated the 30 acres for which he paid elsewhere.
- .
54. The Defendant contends that it is the Plaintiff that invaded the Suit Property after he was issued with the Title Documents.
55. In cross-examination the Defendant admits to owning LR No 17691/228 at Nyota Tegrana that 'the plaintiff has nothing to do with' of receiving a letter asking him to surrender 15 acres and he had not



- been given title and he responded that he did not have 15 acres with a title. That he was told to go and surrender a title with 15 acres whereas the title to LR No 8327/171 is for thirty (30) acres and that he has never taken possession because of the Court Order made February 26, 1999.
56. On cross-examination on the June 26, 2004, the Defendant admitted being allocated thirty (30) acres, receiving a letter dated February 5, 1996 from Mr W Kelele which did not quote the Plot Number requiring him to surrender 15 acres, he went to see Mr Kelele and the issue was resolved later, that the size of the plot is thirty (30) acres although the initial letter of offer indicated eighteen (18) acres.
57. The Defendant has framed the issues in consideration as follows:-
- a. 'Whether the Defendant fraudulently and illegally misrepresented to the Agricultural Development Corporation that he was the lawful Allottee and caused himself to be registered as the owner of LR 8327/171?
  - b. As between the Plaintiff and the Defendant, to whom does the Suit Property belong?
  - c. What orders ought to issue in this matter?
58. On the first issue the Defendant contends that he has clearly traced the root of his Title. He applied for the Land in question from the Agricultural Development Corporation (ADC) in 1988, and was allocated the same by the Corporation letter of December 23, 1988. He paid for the land on December 15, 1992 and receipt to that effect was issued by the Corporation. A transfer of the land was executed and a Certificate of Title issued in favour of the Defendant.
59. The Agricultural Development Corporation which was the body allocating the land, has not sought to revoke the Defendant's Title Deed. None of the activities of the Defendant in acquiring the Title Deed have been proved or shown to be fraudulent. Not a single document produced by the Defendant in these proceedings has been challenged on the basis of fraud and we do submit that all the particulars of fraud set out in the Plaint have not been established or proven. The Plaintiff in her evidence did not in any way revert to any fraud on the part of the Defendant and has therefore failed to discharge that burden which squarely falls on her shoulders.
60. On the second Issue the Defendant contends that allegations of fraud are serious allegations that must be proved on a standard higher than on a balance of probabilities (See the decision of the Court of Appeal in Mombasa Civil Appeal No 312 of 2012 [\*Emfil Ltd -vs- Registrar of Titles, Mombasa and 2 others \(2014 eKLR\)\*](#))
61. That Section 24 of the [\*Land Registration Act\*](#) provides as follows: -
- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto, and
  - (b) The registration of a person as proprietor of lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or indents of the lease.'
62. The Defendant has proven he is the Registered proprietor of the Suit Property. No evidence of fraud on his part has been demonstrated by the Plaintiff.



63. Section 26(1) (a) and (b) of the [Land Registration Act](#) 2012 provides as follows: -

' 26(1) The Certificates of title issued by the Registrar upon registration, or to a purchaser of land upon a 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.'

64. It was the Defendant's submissions that, the Plaintiff has not proven any fraud or misrepresentation, to which the Defendant is a party in the transaction leading to the registration as the owner of the Suit Property. Further, the Certificate of Title has not been proven to have been acquired illegally, unprocedurally or through a corrupt scheme. The authority allocating the land (ADC) has not alleged any acts of fraud, illegality or corruption on the part of the Defendant.

65. Further, the Land Registrar has not disowned the Certificate of Title issued to the Defendant. The Plaintiff did not make any efforts to join the ADC and the Land Registrar in these proceedings.

66. The Plaintiff's claim to the Suit Property also fails for lack of consideration. She has not demonstrated that she paid any consideration for the land, unlike the Defendant who followed the transaction through by the payment of the sums demanded by the allocating authority.

67. The Plaintiff's claim is unsustainable as she claims to have been shown the Suit Property by the Estate Manager of the ADC in 1991. This was long after the Defendant had been allocated the land. The Plaintiff's case is that she was allocated Plot No 120 Nyota Complex. When she could not access the said land, she accepted an offer to take Plot No 171. It is clear in her evidence that when she was allegedly given Plot No 171 (the Suit Property), it was already allocated to Samuel Soi (the Defendant)

68. The Defendant submits that, the Suit Property was not available for allocation in 1991 as it had already been allocated to the Defendant and that It is important to note that on February 18, 1992, the Agricultural Development Corporation wrote to him and the opening paragraph of that letter reads as follows: -

Re: Purchase of Nyota, Lr No 8327/171

We write to inform you that your documents have now been received back from Lands Department duly registered. They will be released to you upon receipt of Kshs 50,363/65 made up as hereunder.

69. If the land had already been allocated to the Plaintiff in the year 1991, why would the Agricultural Finance Corporation make the above demand and eventually accept the payments, execute transfer documents and issue a receipt in acknowledgement in favour of the Defendant? The answer to this question is simple, the land was never allocated to the Plaintiff.

70. Throughout these proceedings, the Plaintiff has not demonstrated that she was ever allocated the Suit Property. Indeed, she has not provided any Letter of Allotment. The letter dated October 29, 1991 does not mention the Suit Property while the letter dated February 5, 1996 refers to Nyota Plot No 229 measuring 15 Acres. This land has nothing to do with the Defendant. Further, whereas the letter



dated June 9, 1999 alleges that the Suit Property measures 15 acres and was allocated to the Plaintiff, no evidence of such allotment was produced.

71. The letters issued in 1996 and 1999 above could not suffice as the process of allocation and payment for the Suit Property had been completed and registration issued in favour of the Defendant.
72. On this issue therefore, it is the submission that the Defendant properly acquired the Suit Property from ADC, paid for the same and had it registered under his name. The land belongs to the Defendant to the exclusion of the Plaintiff and the Plaintiff's recourse, if any, lies with a suit against the ADC and to whom the Plaintiff paid no consideration for the land anyway!
73. It is Defendant's further submissions that the orders which commend themselves in this matter are orders dismissing the Plaintiff's suit with costs and allowing his Counter Claim with costs.
74. The Suit Property LR No 8327/171, was registered under the repealed Registration of Titles Act CAP 281 which is now governed by The Land Act, 2012 and The Land Registration Act, 2012. Indeed, the law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows: -

' The Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a 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 the 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
  - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.'
75. Obviously, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
  76. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.
  77. As a starting point, it is important to restate that, fraud is a serious allegation which must be proven on a standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. Those general principles were reiterated by the Court of Appeal in Arthi Highway Developers Limited Vs West End Butchery Limited & 6 Others [2015] eKLR as follows: -

' It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:



‘Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged’

78. The plaintiff’s case is built around the argument that she has a good title to the suit property in that, she was allocated the property by ADC, shown the same, invited to take possession only for the defendant to hurriedly process a title which is tainted by fraud and irregularities. The particulars of fraud pleaded against the defendant are Misrepresenting that he is the lawful allottee, obtaining two titles from the scheme whereas he was only entitled to one, misrepresenting to the ADC that IR No 8327/171 was vacant whereas he knew that the Plaintiff was in occupation, failing to surrender the documents after he was asked to do so and instead hurriedly proceeding to cause himself to be registered as the owner. The defendant has equally asserted that he has a valid title.
79. In essence, the Plaintiff herein has challenged the validity of the defendant’s title while having possession in fact, the ADC supports the Plaintiffs case. In such circumstances, both parties must establish their root of title. The Defendant cannot just dangle the title documents. See *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR. Further, the Plaintiff herein is seeking orders that a title be issued upon payment of the requisite fees and that the defendant’s title be revoked can only succeed on the strength of his case and not on the weakness of the defence. See [Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others \[2019\] eKLR](#).
80. The Court of Appeal in the case of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR, held as follows: -
- ‘We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.’
81. Section 80 (1) of the [Land Registration Act](#) provides that: -
- ‘ Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
82. The [Black’s Law Dictionary Revised 4th Edition Pg 1152](#) defines Misrepresentation as: -
- ‘ Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. AP Landis, Inc, v Mellinger, 116 Pa Super. 167, 175 A. 745, 746.
- An untrue statement of fact. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead. Haigh v White Way Laundry Co., 164 Iowa 143, 145 NW 473, 474, 50 LR A, NS, 1091; Zackwik v Hanover Fire Ins Co, Mo App, 225 SW 135, 138.’
83. The Court finds that no fraud has been proved in this instance however, the plaintiff has cogently demonstrated how the Defendant misrepresented to Agricultural Development Corporation that he is the lawful allottee of the Suit Property; he obtained title to more than



one parcel of land whereas he was only entitled to one parcel; he misrepresented to Agricultural Development Corporation that LR No 8327/171 was unoccupied whereas he knew that the Plaintiff was in occupation; he failed to surrender documents relating to the Suit Property, even after he was asked to do so and instead hurriedly proceeding to cause himself to be the registered as the owner. In the circumstances, the title held by the defendant was by misrepresentation and that the title is tainted.

84. While it is true that the defendant formally applied for allocation on July 9, 1988, in fact he authorises ADC to farm (plant) wheat for him on 15 acres thereupon, which would presuppose he expected land that was more than 15 acres.
85. The Court further notes, that the Defendant was a decorated soldier, diplomat and civil servant who had served for over 35 years by then while on the other hand the Plaintiff has no comparative credentials.
86. A Handwritten Letter from Mr W Kelele to the Defendant dated December 3, 1988, is indicative of his influence, where the ADC Managing Director responds to the Defendant agreeing to operate 15 acres for him and plant wheat and thereafter to review, the acreage before proper allocation is done.
87. The Court finds that the Defendant was not an ordinary applicant -allottee in this scheme, he was extremely close to the ADC management, he was conversant of the scheme, the Allocation letter Dated 23<sup>rd</sup> December 1988 inviting the defendant to take possession by having a Mr Too to show the defendant the suit property would have alleviated this instant dispute as the Defendant has not explained, if he ever viewed the suit property as advised or in fact took possession between 1988 and February 1992.
88. Between 1992 and 1999 the Defendant made one attempt to evict the Plaintiff from the suit property, with the assistance of the chief, he never sought the assistance of the ADC for vacant possession for obvious reason that the ADC has consistently demanded he surrenders the title and do not recognise his legal right.
89. It is a fact that the Defendant is a beneficiary and allottee of LR No 17691/228 at Nyota Tegrana and admits receiving a letter asking him to surrender 15 acres and he did not have 15 acres with a title. That he was told to go and surrender a title with 15 acres whereas the title to LR No 8327/171 is for thirty (30) acres and that he has never taken possession because of the Court order made 26th February 1999. While this is true, he claims not being aware that the settlement scheme was for settling landless persons and that there was a restriction of one beneficiary per property, he has failed to rebut the assertion which would otherwise disqualify him as a recipient of a 2<sup>nd</sup> allocation.
90. On cross-examination on the June 26, 2004, the Defendant admitted being allocated thirty (30) acres, receiving a letter dated February 5, 1996 from Mr W Kelele which did not quote the Plot Number requiring him to surrender 15 acres, he went to see Mr Kelele and the issue was resolved later, that the size of the plot is thirty (30) acres although the initial letter of offer indicated eighteen (18) acres.
91. It is a fact that the LR No 17691/228 at Nyota Tegrana is thirty (30) acres currently occupied by the Defendant is indicative of the assertion by the Plaintiff and her witnesses including the ADC, that the Defendant would be holding forty-five (45) acres while the scheme was averaging 15 acres on a single title and not more than one and that ADC is not supportive of the Defendant.



92. The Plaintiff on her part contends that, she sought allocation in 1986, that the scheme was to settle landless persons, that all beneficiaries were entitled to one allocation only, that she was shown L.R No 8327/171 Nyota Complex by ADC, it was a bush, she cleared and settled, she was aware that the Defendant had been previously allocated this property but refused because it was small and she was taken there after the defendant was moved to LR No17691/228&229 at Nyota Tegrana that was consolidated into thirty (30) acres.
93. While the Defendant admits, being aware that ADC has consistently demanded he returns the title relating to LR No 8327/171 Nyota Complex, his explanation is unconvincing, he has a title for thirty (30) acres, the suit property is for fifteen (15) acres, the defendant is unperturbed that the size of the property on the title he holds is disputed by both the ADC and the Plaintiff, his ignorance is indicative that he never at any point took possession, otherwise the discrepancy is major enough to warrant rectification, even in the absence of a dispute such as this one. It was expected that the discrepancy would impress the defendant which was not the case.
94. The Court finds that the Plaintiff has presented cogent demonstrating how she applied for allocation, how she was allocated on another property, then moved to the suit property by the ADC, it was a bush and allottees would be allowed to take possession to clear the bush. If the Defendant had gone to Mr Too as advised on the letter, he would have found the vacant possession or the plaintiff or alternatively the Defendant did view the suit property and was unimpressed as the plaintiff has testified and was thus to be allocated a 30acre land elsewhere.
95. Having analyzed the available evidence and the issues above, Defendant loses protection from the law and cannot seek protection under Section 26 of the Land Registration Act thus finds and holds that: -
- a. A Declaration is hereby made that; the Plaintiff is the bona fide owner of all that parcel of land known as LR NO 8327/171 Nyota Complex.
  - b. A Permanent Injunction, is hereby issued against the defendant, restraining him by himself, his agent, and/or servants from evicting the Plaintiff from suit property known as LR NO 8327/171 Nyota Complex.
  - c. An Order of Cancellation of Certificate of Title no IR 52481 for all that suit property, known as LR NO 8327/171 Nyota Complex admeasuring (12.45ha), dated February 1, 1991, directed at the Registrar of Lands Nakuru is hereby issued.
  - d. An Order for rectification and issuance of a Certificate of Title to the Plaintiff, for all that suit property known as LR NO 8327/171 Nyota Complex, admeasuring (6.07ha) directed at the Registrar of Lands Nakuru is hereby issued.
  - e. Costs of this suit are awarded to the plaintiff.

It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF JULY, 2023.**

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**S. MOHOCHI (JUDGE)**

**In the Presence of: -**

**Court Administrator:** Schola\*\*

**Plaintiffs:** Konosi & Co. Advocates\*\*



**Respondents:** Mugambi Nguthari & Co. Advocates\*\*

