



Sirgoi Tea Estate Limited v Paul Kibii Cheriro [2021] eKLR

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Neutral citation: [2021] KEELC 964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 169 OF 2013**

MAO ODENY, J

NOVEMBER 10, 2021

BETWEEN

SIRGOI TEA ESTATE LIMITED PLAINTIFF

AND

PAUL KIBII CHERIRO DEFENDANT

JUDGMENT

1. By a plaint dated 15th March 2011 the plaintiff herein sued the defendant seeking for the following orders:
 - a. A permanent injunction do issue against the defendant, his agents, servants, agents and family members and any other person whom may act against trespassing, destroying, fences, uprooting beacons, ploughing, planting, harvesting, grazing animals, transferring, selling, leasing and /or in any other way dealing with land parcels NOs Nandi/Kaboi/857 , Nandi/Kaboi/858, Nandi/Kaboi/859 and Nandi/Kaboi/861.
 - b. The defendant be and is hereby ordered to meet the costs of replacing the uprooted beacons and to compensate the plaintiff for the damaged fence and posts as more particularly set out in paragraph 12 of the plaint.
 - c. The defendant be and is hereby ordered to pay to the plaintiff mesne profits from January 2008 till vacant possession and in the alternative the plaintiff to compensate for loss of use of the lands since January 2008.
 - d. General damages.
 - e. Eviction order be and is hereby issued against the defendants to vacate the land parcels NOs Nandi/Kaboi/857 , Nandi/Kaboi/858, Nandi/Kaboi/859, and Nandi/Kaboi/861 with all



his belongings, family, servants, agents and/or for and on behalf of the defendant personal belongings.

- f. Costs of this suit.
 - g. Any other and further relief that this honourable court shall deem just and expedient to grant.
2. The defendant entered appearance and filed a defence and counterclaim dated 17th May 2011 seeking for an order that the land register pertaining to land parcels L.R NOS Nandi/Kaboi/857, 858,859 AND 861 be rectified by cancelling the name of the plaintiff and substituting it with that one of Fredrick Kimngeny Cheriro being the sole legal owner of the said parcels. That the plaintiff's suit be dismissed with costs
 3. This matter was transferred in 2013 from the High Court to the Environment and Land Court for hearing and determination pursuant to the establishment of the Environment and Land Court under Article 162(b) of *The Constitution*, 2010.

Plaintiff's Case

4. PW1 Bethuel Kipkemboi Kemei, a Director of the plaintiff company adopted his witness statement and testified that he knows the defendant as the son of the late Fredrick Kimngeny Cheriro whom he has sued because he has encroached on the suit land by cultivating and grazing animals.
5. PW 1 stated that the suit land belongs to Sirgoi Tea Estate which was registered on 15th May 1998. He produced the Articles of Association as PEX1 and the Certificate of Incorporation as PEX2. It was PW1 's evidence that they are two directors of the plaintiff company namely Susan Koech and himself who hold equal shares.
6. PW1 testified that he reported the defendant to the Chief and D.O but no action was taken even after he issued demand notices and produced the two demand notices and that the company has titles to plot NOs Nandi/Kaboi/857, 858,859 and 861 which he produced as exhibits and added that the parcels were registered on 26th July 1999 but which the defendant avers that they were fraudulently acquired.
7. PWI further testified that he has the green cards for the suit parcel of land which show that the land is registered in the plaintiff's name of which he produced as exhibits 5(a) up to (d). and further stated that he did not have any dealings with the defendant and also with the defendant's late father Fredrick Cheriro Kimngeny.
8. It was PWI's evidence that he was not involved in any fraud and that land parcels Nos 860 and 862 are registered in the name of the late Fredrick Cheriro Kimngeny who was the defendant's father. It was further his testimony that there was a case filed in Kapsabet No 35 of 1998 between him and the late Fredrick Cheriro Kimngeny but the same was dismissed while the one filed in Eldoret never proceeded.
9. On the cross examination PWI testified that initially parcel Nos 857, 858, 859 and 861 were originally registered in the name of Fredrick Kimngeny Cheriro and that there was an agreement between the late Fredrick Cheriro and himself to purchase the land dated 27th March 1997. PW1 was also referred to paragraph 9 (a) of the agreement which stated that he was to pay Kshs.2.8 million shillings to the National Bank of Kenya as a condition to take possession of the suit land but stated that he has no evidence to show that he paid the whole purchase price to the original proprietor Fredrick Kimngeny Cheriro.
10. PWI was also referred to a letter dated 27th March 1997 from the late Fredrick Cheriro addressed to the Manager of National Bank of Kenya Limited Nakuru Branch concerning parcels numbers Nandi/Kaboi/860 and 862 stating that PWI was required to pay Kshs. 2,840,000 in full before transferring



the suit parcels to him. He testified that he gave Fredrick Cheriro the money for purchase of land and that is why the parcels were transferred to him.

11. On further cross examination PWI was referred to a letter dated 12th November 1997 which was addressed to National Bank and he said that he wrote the letter to the Bank asking for time to pay the money by installments and that he gave Fredrick Cheriro the money after transferring the suit parcels to him in 1998.
12. It was also PWI's testimony that he did not amend the agreement made and that by the time they went to the land board in Nairobi he had already paid Fredrick Cheriro his money.

Defendant's Case.

13. DWI Paul Kibii Cheriro adopted his witness statement and stated that he does not know the plaintiff but knows it's directors who are Bethuel Kemei and Susan Koech of which the former had dealings with his late father Fredrick Cheriro over five parcels of land.
14. DW1 testified that his late father intended to sell parcel Nos, 856, 858, 859 and 861 to Bethuel Kemei to settle a loan with National bank of Kenya and produced an agreement dated 27th March 1997. He stated that there were special conditions that Bethuel Kemei offsets the outstanding loan of Kshs 2,840,000/ to National Bank of Kenya Nakuru branch and was to pay Kshs 500,000/ to Fredrick Cheriro.
15. It was DWI evidence that his late father did not take any further loan but he ended up paying Kshs. 7,000,000/= to the bank and that Bethuel Kipkemboi had written to the bank that he would fulfill the terms of the agreement but he failed to do so of which he produced a letter dated 12th November 1997. That the bank wrote back on 23rd January 1998 acknowledging the letter and in 2005 the banks wrote demanding an outstanding loan arrears of Ksh614,848/=.
16. DW1 stated that he renegotiated with the bank on how to pay the loan arrears which he paid as per the plan and testified that the transfer of his father's land to Bethuel Kipkemboi and eventually to Sirgoi Tea Estate was done fraudulently as Bethuel Kipkemboi did not pay the loan to the bank as agreed and therefore Bethuel did not have the authority to transfer.
17. DW1 therefore urged the court to dismiss the plaintiff's suit with costs and his counterclaim for the cancellation of titles and be registered in the name of the original owner Fredrick Kimngeny Cheriro.
18. On cross-examination by counsel he stated that Bethuel paid Ksh. 1.3 million against the 7.6 Million claimed by the bank. That case No 38 of 2007 was in respect of land parcel Nos.860 and 862.

Plaintiff's submissions

19. Counsel for the plaintiff reiterated the parties evidence and submitted that it is trite law that the Plaintiff is a Limited Liability Company whose legal status is separate and distinct from its Directors and that the plaintiff company did not have any dealings with the defendant's late father one Fredrick Kimngeny Cheriro.
20. Counsel submitted that the defendant seems to have issue with the directors of the plaintiff company hence he was supposed to pursue his claim against the directors and not the plaintiff as it is a separate entity according to the law and unless the corporate veil is lifted he cannot assume that the parties are the same.



21. It was counsel's submission that the plaintiff is the registered owner of the suit parcels and there was no evidence of fraud in the transfer further that the defendant admitted that he filed a counterclaim without letters of administration hence the counterclaim is incompetent.
22. Counsel relied on the case of Trouistik Union International Ingrid Ursula Heinz vs. Jane Mbeyu & Alice Mbeyu [1993] eKLR and urged the court to allow the plaintiff's claim and dismiss the defendant's counterclaim with costs.

Defendant's Submissions

23. Counsel for the defendant reiterated the defendant's testimony and submitted that land parcels in question were fraudulently registered and transferred by Bethuel Kipkemboi a director of the plaintiff to himself since there was a risk of the parcels being sold over an outstanding loan and that all the exhibits produced by the plaintiff i.e. copies of titles, official searches, and the respective green cards, are fake.
24. It was counsel's submission that the defendant is not a trespasser on to the suit and parcels as he has been in occupation of the suit parcels even before his parents died and he has neither destroyed any fence nor has he wasted any property.
25. Mr Chepkwony submitted that since one of the plaintiff company directors had dealings with the defendant's late father there was privity of contract between one of the directors of the plaintiff and the defendant's late father therefore the defendant being a dependant to his father has a right to sue on behalf of his father. Counsel mentioned the following cases which are pending in court being:
 - a. Kapsabet PMCC NO. 35 Of 1998 Fredrick Kimngeny Cheriro –vs Bethuel Kipkemboi Kemei
 - b. Eldoret High Court Misc. Civil Application NO. 147 of 1998 Fredrick Kimngeny Cheriro -vs- Bethuel Kipkemboi KemeI
 - c. Eldoret HCCC NO. 25 of 2003 FRedrick Kimngeny Cheriro –vs Bethuel Kipkemboi Kemei.
26. submitted that these are the several cases pending for determination between the late Fredrick Kimngeny Cheriro and one Bethuel Kipkemboi Kemei in respect to the suit parcels of land.
27. On the issue of competency of the counterclaim, Mr Chepkwony submitted that the defendant's counterclaim is competent as he acquired letters of administration of his late father's estate.
28. The counterclaim as pleaded is competent and defendant has acquired letters of Administration Counsel relied on to the estate of his late father which was produced as D Exh No. 12.
29. Section 26 of the [Land Registration Act](#) which provides for indefeasibility of title and protection of title holders but it also provides for impeachment of titles that have been procured fraudulently, by mistake or by misrepresentation.
30. Section 26 (1) of the [Land Registration Act](#) provides that,

"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 the 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; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
31. Counsel further cited Section 80 of the *Land Registration Act* (a replica of section 143 of the Registered the *land Act* cap 300 (repealed) empowers this Court to order the rectification the register. The said section provides that'
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, 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.
32. Mr Chepkwony relied on the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 Munyao J stated as follow:
- "..it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title { was obtained illegally, unprocedurally or through a corrupt scheme.. The heavy 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, unprocedurally or through a corrupt scheme. The title holder need not have contributed t(.) these vitiating factor.⁹ The purpose of Section 26 (1) (h) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.
33. Counsel also cited the case of *Munyu Maina Vs Hiram Gathiba Maina, Civil Appeal No.239 of 2009* , where the Court of Appeal held that
- "We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register?"
34. Mr Chepkwony further cited the cases of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others*, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR and *Kenya Anti-Corruption Commission vs. Online Enterprise Limited Kisumu ELC number 708 of 2015* where it was stated that
- "the court is also empowered under section 80 (1) of the *Land Registration Act*, to order the rectification of the register by directing that any registration be cancelled or amended if its satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the defendants irregularly, fraudulently and un-procedurally registered the suit land in their names and the same should not be allowed to stand."



35. In conclusion counsel urged the court to dismiss the plaintiff's case and enter judgment for the defendant as prayed in the counterclaim with costs.

Analysis And Determination

36. I have considered the pleadings, the evidence and submission by counsel and find that the issues for determination that arise are:
- a. Whether the plaintiff legally acquired the suit parcels and whether due process was followed in the transfer.
 - b. Whether the defendant has proved that the parcels of land were fraudulently transferred by the plaintiff.
 - c. Whether the plaintiff is entitled to the orders sought
 - d. Whether the defendant has capacity to file the counterclaim
 - e. Whether the defendant is entitled to the orders sought in the counterclaim.
37. On the first issue as to whether the plaintiff acquired the suit parcels legally and whether due process was followed, it was the defendant's evidence that Bethuel Kipkemboi Kemei and his late father Fredrick Kimngeny Cheriro entered into a sale agreement dated 27th March 1997 for purchase of the suit properties parcel Nos 857, 858, 859 and 861 .
38. It was a term of the sale agreement that Bethuel Kipkemboi Kemei was to pay a debt of Ksh.2,840, 000/ owed by the late Fredrick Kimngeny Cheriro National Bank. of Kenya but the defendant stated that Bethuel Kipkemboi failed to honour his part of the agreement hence the Sale Agreement was rendered null and void and that Bethuel fraudulently transferred the suit properties to Sirgoi Tea Estates Ltd a company that he has equal shareholding with Susan Koech .
39. It is on record that the completion date of the agreement was 13th April 1997 but Bethuel Kipkemboi the purchaser wrote a letter to the bank dated 12th November 1997 seeking to renegotiate the terms of have him pay the balance of Kshs. 2,840,000/ by instalments having paid Kshs. 576,000/ upon execution of the agreement.
40. The exhibits produced by the plaintiff indicate that vide minutes from Aldai Land Control Board dated 25th November 1998 under minute 23/98 a consent was granted to Bethuel Kipkemboi to transfer land parcel Nos 857, 858, 859 and 864 to Sirgoi Tea Estate Ltd. Further there is a transfer form duly executed by Fredrick Kimngeny Cheriro and Bethuel Kipkemboi Kemei dated 24th April 1997 in respect of land parcel Nos. 857, 858, 859 and 861.
41. The documents were supposed to be held by the Advocate but it is not clear how the transfer documents left the purchaser's advocates office. The defendant alleged that the documents produced by the plaintiff were a forgery and therefore the court should not consider them.
42. The law is clear that he who alleges must prove. Fraud is a grave crime which must be investigated and proof be put on the table for the court to consider. The plaintiff produced title deeds to the suit parcels, green card entries which indicate that the suit parcels originally belonged to Fredrick Cheriro and were subsequently transferred to the plaintiff. All these titles were issued in 1999 and no suit was filed to impeach or question the legality of the titles.
43. The green card shows that there were cautions by Fredrick Cheriro in respect of cases that had been filed in Kapsabet PM's case No 35/98 which caution was later removed by entry No 6. This enabled



the transfer of the suit parcels to Sirgoi Tea Estates Limited. It should be noted that the Kapsabet case was dismissed and no appeal was preferred.

44. There was a clear indication that the defendant's late father entered into an agreement for sale of the suit parcels to clear a loan with National Bank of Kenya. There would not have been a discharge of the titles without payment of the loan. The plaintiff would not have been given the original titles for transfer.

45. Section 24, 25 and 26 *Land Registration Act* No 3 of 2012 provides as follows;

Section 24; Subject thereto: —

- 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 the proprietor of a 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 incidents of lease.

Section 25(1)

' the rights of a proprietor whether acquired on a first registration or subsequently for value, consideration or by an order of court shall not be liable to be defeated except as provided under this Act and shall be held by the proprietor together with all privileges and appurtenances'

Section 26(1) provide that;

' the certificate of title issued by a registrar on registration, or to a purchaser of and upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the proprietor is the absolute and indefeasible owner subject to encumbrances, easements restrictions and conditions contained or endorsed in the certificate and the title of that proprietor subject to challenge except;

- a. On the ground of the fraud or misrepresentation to which the person is proved to be a party; or
- b. When the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.

46. No evidence was tendered before this court to prove that indeed the Plaintiff herein acquired the title through fraud or a corrupt scheme for which the plaintiff was a party and at the same time Bethuel Kipkemboi.

47. The defendant merely claimed that the plaintiff fraudulently acquired the suit parcels of land but did not bring forth any evidence of fraud. Was there any investigation of fraud, or was the Land Registrar called to court to produce the parcel file and explain the entries and their authenticity. This was not done taking into account that the defendant had also filed a counterclaim

48. Section , 107 of the *Evidence Act* Cap 80 of the laws of Kenya provides that; -

"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".



49. It is, therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts.
50. In the case of *Ratilal Gordhanbhai Patel V. Lalji Makanji* [1957] EA 314 And *Ulmila Mahindra Shah V. Barclays Bank International And Anor* [1979] KLR it was observed that;
- "the courts have stated that Fraud has everything to do with one's state of mind and intentions, and not the outcome of actions and that the standard of proof for fraud is very high beyond the usual standard of balance of probabilities in civil cases approaching but below proof beyond reasonable doubt.
51. This is not to say that if a title is fraudulently acquired, it cannot be impeached on account of indefeasibility of title. If there is proof of fraud then the court will not shy away from finding that the title reeks of fraud.
52. In the case of *Kenya National Highway Authority – Vs – Shalien Masood Mughal & 5 Others* [2017] eKLR, Maraga, J (as he then was) expressed himself as follows: -
- "Court should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed..."
53. Further, Justice Onyancha in *Alberta Mae Gacci – vs – Attorney General & 4 Others* (2006) eKLR stated as follows:
- " Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come...."
54. The court cannot therefore turn a blind eye to sanitize irregularity and fraudulently acquired titles all in the name of indefeasibility of title.
55. In the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others* [2015] eKLR, Hon. Sila Munyao, J. held as follows with respect to indefeasibility of title :
- "It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, procedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- "...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained



illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above dictum"

56. I find that the plaintiff proved that it is the indefeasible title holder of the suit parcels of land having produced the titles, the agreement for sale and Land Control Board consent to transfer.
57. This therefore answers the second and third issues whether the due process was followed in the transfer and whether the defendant has proved that the plaintiff fraudulently transferred the suit parcels.
58. On the fourth issue as to whether the defendant had legal capacity to institute a suit by way of a counterclaim, the plaintiff has contended that the defendant filed his defence and counterclaim in the year 2011 and the letters of grant were issued on 3rd March 2017, a fact that has been admitted by the defendant during his testimony in court.

59. Section 2 of the *Civil Procedure Act* defines legal representative as follows;

"a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".

60. This legal principle was set out in the case of;

Marsabit Hc Civil Suit No.1 Of 2018; Hawo Shanko Vs Mohamed Uta Shanko, where the court cited the case of; Julian Adoyo Ongunga V Francis Kiberenge Abano, Migori Civil Appeal No.119 of 2015, where Justice Mrima had this to say on the issue of a party filing a suit without having obtained a limited grant;

"Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties."

The court further stated as follows;

"the effect of the above cases is that for a party to have locus standi and appear in a case involving a deceased person, he or she must first obtain a grant limited for that purpose.

61. There is no dispute that the plaintiff did not obtain a limited grant allowing her to file this suit. Such a grant is the key which allows the plaintiff access to the Court. Without a limited grant being issued allowing the filing of the suit, the plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the suit or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the plaintiff to go back and obtain a limited grant for that purpose



and then allow him to continue with the suit. The suit as initiated becomes void ab initio and cannot be resuscitated by the issuance of a subsequent limited grant...”

62. Similarly in the Court of Appeal decision in *Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama* (2014)eKLR , where the Court addressed itself on the issue of locus standi in succession matters as follows:-

“... But in our view the position in law as regards locus standi in succession matter is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of Letters of Administration in cases of Intestate succession. In *Otieno v Ougo* (supra) this court differently constituted rendered itself thus;

‘.....an administrator is not entitled to bring any action as administrator before he has taken out Letters of Administration. If he does, the action is incompetent as of the date of inception.”

63. The answer to the question whether the defendant had locus standi to file the counterclaim without first obtaining a limited grant is in the negative. This therefore means that the counterclaim is incompetent and the court cannot dwell further on the merits of the counterclaim.

64. The plaintiff generally pleaded for mesne profits but there were no specifics and amount claimed. The plaintiff did not lead evidence on this limb. In the case of *Mistry Valji V. Janendra Raichand & 2 Others* [2016] eKLR the Court of Appeal stated:

“Mesne profit is defined in section 2 of the *Civil Procedure Act* to mean; - “in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession”. ... Measure for mesne profit was described in the Privy Council decision in *Invergue Investments v Hacketh* (1995) 3 All ER 842 cited with approval in the *Kenya Hotel Property Ltd* case (supra) as follows:

“ This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land.... The question for decision is the appropriate measure of damages.”

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.”

65. The prayer for damages and mesne profits therefore fails.

66. I have considered the pleadings, the evidence and the submissions by counsel and find that the plaintiff has proved his claim against the defendant and therefore enter judgment in the following terms:

- a. A permanent injunction is hereby issued against the defendant, his agents, servants, agents and family members and any other person whom may act against trespassing, destroying, fences, uprooting beacons, ploughing, planting, harvesting, grazing animals, transferring, selling, leasing and /or in any other way dealing with land parcels NOs Nandi/Kaboi/857 , Nandi/Kaboi/858, Nandi/Kaboi/859 and Nandi/Kaboi/861.
- b. The defendant to give vacant possession of land parcels NOs Nandi/Kaboi/857 , Nandi/Kaboi/858, Nandi/Kaboi/859, and Nandi/Kaboi/861 within 45 days failure to which eviction order to issue.
- c. Costs of this suit.



DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF NOVEMBER, 2021

M. A. ODENY

JUDGE

