



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

ELC NO. 114 OF 2015

LAWRENCE KIPLANGAT MOSONIK.....PLAINTIFF

VERSUS

PAULINE C. CHUMO.....DEFENDANT

JUDGMENT

1. The Plaintiff in his Complaint dated the 18th day of November 2011 seeks for an order of permanent injunction restraining the Defendant by herself, agents, servants, employees or any other party to whom they may be acting, from interfering with, subdividing, selling, plucking tea that may be growing thereon, assigning, erecting thereon structures and/or doing any other act which is prejudicial to the Plaintiff's proprietary interest in LR Kericho/Roret/1758. He further sought for costs as well as interests and any other relief that the court may deem fit and just to grant.

2. The matter was heard on the 19th March 2018 upon compliance with the provisions of order 11 of the Civil Procedure Rules wherein the Plaintiff, Lawrence Kiplangat Mosonik testified as PW1 to the effect that he came from Roret in Kericho County. That he was a primary school teacher and that he knew the Defendant as a wife of the person who had sold him a parcel of land known as No. Kericho/Roret/239 in the year 2006.

3. The Plaintiff produced the sale agreement as exhibit Pf ex 1 and went on to testify that he had bought the land measuring 1.2 acres for Kshs 628,000/=. That he had bought the land with tea bushes thereon from one Charles Kipkorir Chumo and after purchasing the land, he had obtained the Title deed in that respect in the year 2011, the Title which he produced as Pf ex 2. That unfortunately, the vendor had refused to give him vacant possession of the land which prompted him to file the current case. He also produced a copy of the search certificate as Pf ex 3.

4. The Plaintiff further testified that at the time he wanted to fence the land, the Defendant started screaming and told him to seek a refund from her husband. That he then served the Defendant with a demand notice herein produced as Pf ex 4 and that he only managed to occupy the suit property after the court had issued an injunction against the Defendant. That he had now fenced the land and had built two houses. That he had also put up a poultry house and a store for his cattle and chicken feed. That what he now sought from the court was to restrain the Defendant from interfering with his peaceful occupation of the suit property.

5. Upon being cross-examined, the Plaintiff reiterated that the original sale agreement was with the vendor who had said that he was conducting some investigations in regard to the suit property. That the sale agreement was drafted by the Chief on 11th December 2008 wherein the Defendant was not involved at the time of the sale. That he had known that the vendor had a wife and family and had asked him to involve his family in the sale.

6. The Plaintiff confirmed that the Criminal Investigations Department (CID) had taken his finger prints and specimen signature and further that the original parcel number of the suit land was No. Kericho/Roret/239 and that it had been registered in the name of Sofia Chepkemoi Bett.

7. That he had conducted an official search in July 2011 before he bought the land and that the search had indicated that the property was registered in the names of John Kipngeno Chumo and Charles Kipkorir Chumo. He confirmed that in the year 2008 Charles Chumo was not the registered owner of the suit land. That the original Title was to be divided into two equal portions.

8. That after purchasing the land, he had taken a surveyor there in the year 2012 and that although Charles was present, he did not know whether he had signed the sketch map or not, but that Charles and John Chumo had signed (thumb printed) the mutation form. That the mutation form was from presentation book No. 03926806 which was dated the 19th July 2011 and which was in relation to parcel No. Kericho/Roret/239. That the mutation form showed that the land was subdivided into 3 portions because Charles had sold to him his portion. He also confirmed that the search certificate he had produced showed that the land was to be divided between two persons in accordance with the grant.

9. That according to the mutation form, Kericho/Roret/1756 measured 1.27 acres, Kericho/Roret/1757 measured 0.55 Ha and Kericho/Roret/1758 measured 0.48 Ha. That the mutation form did not correspond with the grant issued on 12th April 2011 in Kericho High Court in Succession Cause No. 37 of 2009.

10. The witness further stated that of the 3 parcels of land, John Kipngeno Chuo's portion was No. 1756 measuring 1.27 acres whereas it was supposed to measure 2.85 acres as per the grant. That his parcel of land was a direct subdivision of parcel No. Kericho/Roret/239 which had measured 2.85 acres.

11. The Plaintiff's evidence further was that his land measures 0.48 Ha an equivalent of 1.2 acres, that Kericho/Roret/1757 which belonged to John and Charles Chumo measures 0.05H and Kericho/Roret/1756 in the joint names of John and Charles Chumo measures 1.2Ha.

12. This evidence was that although he had gone to Kapkatet Land Control Board in the company of Charles, yet he did not have the minutes in court. He confirmed that the transfer forms had been signed by John and Charles. That in the year 2008 he had been summoned to the Roret Land Disputes Tribunal upon a dispute having been lodged by the Defendant and her husband against him. That the Tribunal had decided that he had a right to be allocated the 1.2 acres. His evidence was that the application for consent to sub-divide the original parcel of land had then been signed by both Charles and John.

13. The Plaintiff also confirmed to having sued Charles Chumo in a criminal case for malicious damage to property after he had damaged his fence in the year 2012. And that in December of 2017, he had filed yet another case against Charles for arson, which case was still on going. These were not the only cases filed for there was yet another assault case he had filed against Charles after he threw an object at him which object had injured his leg. That case was also still pending.

14. The Plaintiff confirmed that he had fenced his parcel of land whilst in the company of police officers, pursuant to having obtained an order of injunction on 3rd May 2012 which order he also confirmed, did not mention that the police were to provide him with security.

15. He confirmed that he knew that Charles had been arrested following the report he had made, but that he did not know why he was being investigated. He also confirmed that Charles's wife did not consent to the sale of the land and that the Administrator in the Succession Cause was Joseph Chumo who was in apposition to distribute the land among the beneficiaries.

16. On being re-examined, the Plaintiff reiterated that at the time they went to the Land Control Board, Charles had been present and had not objected to the land being divided into 3 portions. That Charles was a beneficiary of the registered owner of parcel No. 239 and that the cases he had against Charles were over the land he had sold to him. He further confirmed that had Charles not sold him the land, there would not be issues. He also confirmed that the portion he had bought formed part of Charles' matrimonial home where he (Charles) lived with his family.

17. The second witness, Benjamin Kipyegon Chumo also from Roret testified as PW2 to the effect that he knew the parties to this suit. That Pauline (Defendant) was his sister in law, as she had been married to his brother. He stated that he was not related to Lawrence (Plaintiff). That his brother Charles and his wife (Defendant) sold land to the Plaintiff. That the reason as to why Charles sold the land was because the Defendant and her son used to assault him to the extent that at one time when he woke up, he had found thorns placed at his door step, which traditionally was an abomination. That Charles had confided in him of the incidence and had told him that he wanted to sell his land and buy land elsewhere because his wife (Defendant) and son wanted to harm him. Thereafter, Charles had sold 1.2 acres to the Plaintiff wherein he had bought 2 acres in a place called Koiwa. He had then moved to Koiwa and married another wife. That after a short while, his 2nd wife had died wherein he had returned to Roret.

18. He testified that his two brothers, Charles and John live on their ancestral land in Roret while he and his other brother Joseph Chumo lived in Tebesonik. That their mother had informed them that Charles was to get 1(one) acre in Tebesonik in addition to the 2.6 acres in Roret.

19. That after the passing away of their mother, they had applied for letters of administration wherein subsequently they had divided the land in Roret and Tebesonik. That Charles had sold the land to the Plaintiff before the completion of the Succession Case. That before he sold the land, Charles had sent away his wife (Defendant) for reason that she had been mistreating him.

20. Upon being cross-examined the witness stated that although neither the Defendant nor he had not been present when Charles sold the land to the Plaintiff, yet he had witnessed the Plaintiff paying Charles the last instalment of Kshs. 50,000/= for the land, but that he did not remember the witnesses who had been present.

21. He also could not remember when the Defendant beat up her husband but stated that the clan had agreed to send her away because of her bad behavior and violence. That the Succession Cause they had filed had been in respect of the Estate of their late mother and the properties (land) in Roret and Tebesonik had been shared out as follows:

- i. Joseph Chumo 4.7 acres Tebesonik
- ii. Charles Kipkorir Chumo 2.85 acres Roret
- iii. Benjamin Chumo 4.3 acres Tebesonik/Roret
- iv. John Chumo 2.85 acres

22. That the land in Roret had been divided between Charles and John wherein Charles, John and Joseph had gone to the land board. He

confirmed that they all did not have a Title deed for their respective parcels of land in Tebesonik because they lacked money, but that the Plaintiff managed to get his Title because he had the money.

23. He also confirmed that they had all been summoned to the Police Station where his finger prints had been taken. He also confirmed that his land in Tebesonik measured 4.3 acres, whereas Joseph's parcel measured 4.7 acres. That the land in Roret was divided between Charles and John in the presence of a surveyor. He refuted a question put to him that he and his other brothers and isolated Charles wherein he and went on to state that although there was no dispute between Charles and the Plaintiff, yet he was aware that there was an ongoing criminal case between them. He also confirmed that the Plaintiff had fenced this land under police protection.

24. The third witness Joseph Kiprono Chumo's statement was that he came from Tebesonik in Kericho County and that he knew the parties to this case. He confirmed that the Plaintiff bought land from his brother Charles who then bought another land in Koiwa and married a second wife who later died. That the Defendant was his sister in law and that the land that Charles had sold which measured 1.2 acres, had belonged to their late mother and that they had filed a Succession Cause with money given to them by the Plaintiff, in order to distribute the same.

25. He confirmed to having been in the company of John when they accompanied Charles to the Land Control Board at the time when Charles wanted to sell the land to the Plaintiff. That the land in Roret had been divided between Charles and John and that although John's portion was bigger than Charles' portion, yet Charles had been compensated with one acre in Tebesonik. That Charles' land in Roret was about 2.6 acres and that he himself did not have any land in Roret. His testimony was that Charles had consulted him and Benjamin when he wanted to sell the land to the Plaintiff, but that he had not been present when he actually sold it. That he also did not know if the Defendant was present at the time of the sale since his home was far in Tebesonik. He testified that he had accompanied Charles to the Lands office to ensure that everyone, including the Plaintiff had got their share. That Charles had affixed this thumbprint to the forms at the Lands office. His evidence was that the Plaintiff had bought land from Charles and did not steal it.

26. When the witness was cross-examined, he testified that he was the administrator in the succession case. That after he obtained the grant, he did not transfer the land to himself, but had distributed the same to the beneficiaries immediately. That he could not remember if he had signed any documents transferring land to the beneficiaries. He also confirmed that his name did not appear on the application for consent to the Land Control Board. That although he did not know how much Charles was paid for the land he sold to the Plaintiff, yet he was sure that Charles had sold his land.

27. He confirmed to having gone to the land's office, Kericho with his 3 brothers; Charles, Benjamin and John. That Charles and the Plaintiff had later gone to Kapkatet and that he did not know if Charles' name appears on the application forms. That as the administrator of his late mother's estate, he knew that the Roret land had been divided into 3 portion in the names of John, Charles and Lawrence (Plaintiff) and that only the Plaintiff had his Title deed.

28. He also confirmed that it had been the Plaintiff who had financed the Succession Cause, but that he did not know how much he had paid but that he had also got for them an advocate. He confirmed that the Defendant was Charles's wife and that the Plaintiff had to fence his portion of land in the company of police officers for security purposes because Charles had already turned hostile. That he too had been summoned by the DCIO, Kericho where his finger prints had been taken. That all this was because Charles had alleged that he had not sold his land. He confirmed that there were cases in court between Charles and the Plaintiff. That they were unhappy because after Charles had sold his land, he was now disputing it. That at the time Charles sold his land, he had disagreed with the Defendant.

29. Upon being re-examined, the witness was candid enough to state that because Charles was now trying to deny that he sold land to the Plaintiff, they could not allow it as they did not want curses.

30. The 4th witness, John Kipngeno Chumo corroborated his brothers' evidence and during cross examination confirmed that the Defendant was his sister in law and that his brother Charles had sold land to the Plaintiff in the year 2013. He confirmed that he had been a witness to the sale agreement of the land which Charles had inherited it from their mother and that the Defendant was not present when the agreement was signed. That the parcel of land was No. L.R NO. Kericho/Roret/239. That the same had been divided between Charles and himself wherein each was to get 2.85 acres, that the Plaintiff got a Title for 1.2 acres out of Charles' share. That his land was No. Kericho/Roret/1756 while his brother's parcel was Kericho/Roret/1757. That the land had been sub-divided by a surveyor from the original land parcel No. Kericho/Roret/239 which had been divided into 3 portions on the 19th July 2011. He conceded that neither of them had Title to their respective parcels of land. He confirmed that the administrator of their mother's estate was Joseph Chumo and that the transfer to Lawrence (Plaintiff) had been signed by Charles Chumo. He also denied having knowledge of other cases against Charles or whether the Plaintiff had paid for the Succession Cause, but confirmed that the Defendant and her children had been living on her share of land ever since she got married and that the Plaintiff had an access road which was not blocked.

31. He also confirmed having been summoned by the DCIO, to confirm whether they had signed the transfer form and sale agreement in respect of the suit land. That Charles was not present when they went although he had been there earlier. That at the police station, it had been confirmed that Charles had been the one who signed the transfer. The Plaintiff thus closed their case.

32. The Defendant Paulina Chelangat Chumo, testified as DW1 to the effect that she lived in Roret within Kericho County. She confirmed that Charles Chumo was her husband and that she knew the Plaintiff when he went to the suit land with police officers which then resulted to her arrest. Her evidence was that she lived on their land and that she did not know who had sold the same to the Plaintiff because she had come back home after 1 year, she had found him on their land. She confirmed that the Plaintiff had built on the land, had also fenced it with barbed wire but had not planted tea on the same.

33. On being cross examined, the Defendant testified that the land was registered initially to Sofia Chumo and that she did not know whether there was a Succession Cause or not. That further she did not know whether her husband and his brother had subdivided the land or whether he had sold land to the Plaintiff.

34. The witness then confirmed that she had earlier recorded another statement dated the 19th November 2012 in which she had confirmed that her husband had sold land to the Plaintiff. She went on to recant her evidence and to state that she did not know how the Plaintiff bought the land but that her children were suffering.

35. The witness was examined by the court to which she responded that the Plaintiff was in occupation of 1.3 acres of land upon which she had planted tea, pineapples, coffee and had also buried her six children and land which the Plaintiff had fenced. She confirmed that the Plaintiff had been living on the land for about 10 years and that she had been left with a small upon which she lived.

36. The second defence witness Charles Kipkorir Chumo also testified that he lived in Roret within Kericho County. That he had known the Plaintiff for a long time and that the suit was filed against his wife. The witness confirmed that he had called the Plaintiff to buy land, which had belonged to his parents, in the absence of the Defendant, wherein he had sold to him a small piece measuring 0.6 hectares at Ksh 100,000/= per point making it Kshs. 600,000/=. That although he could not remember the year of sale, the Plaintiff had paid him in slow instalments which he had not finished paying.

37. The witness confirmed that although he did not have the Title to his parents' land, yet the Plaintiff had a Title to land parcel No. 1758. He confirmed that they had conducted a Succession Cause to the estate of their mother Sofia Kipkemoi Bett wherein they had been issued with a Grant after which he had inherited 2.85 acres. He produced the letter of Confirmation of Grant as Df Exh 1. He further testified that the Plaintiff had paid for the land in instalment although slowly wherein he had forcefully entered onto the same using the police. That he had then had proceeded to fence it and to pluck the tea thereon. That the plaintiff kept cows and has planted coffee and build a house on the land.

38. His evidence was that the Defendant had neither stopped the Plaintiff from accessing the land nor had she destroyed the Plaintiff's crops. He confirmed that the Plaintiff had filed a suit against them in another case where he had been charged with assault and which case had been dismissed. That the current case was based on lies as he had initially asked the Plaintiff to wait for his children to come so that they could all talk before giving him the land. The Plaintiff had disappeared.

39. During his cross-examination, he confirmed to having sold to the Plaintiff land although he did not know when. He refuted to having signed any agreement, but confirmed that the Plaintiff used to write small notes whenever he paid him, upon which notes he would append his thumb-print. He also confirmed that they had filed a Succession Cause in relation to parcel of land No. 239 which land was subdivided into two parts between him and his brother John. That although no surveyor went to subdivide the land and neither did he subdivide his share of land, yet he had not reported anywhere that somebody had illegally sub-divided his land. That although he was aware that the Plaintiff had Title, yet he was not the one who had given it to him.

40. He confirmed that although the Plaintiff lived on the land, yet they were not friends and did not even greet each other because the plaintiff had used force to remain on the land. That he did not go to school and did not enter into any agreement with the Plaintiff. He confirmed Paul Langat, Marcel, Benjamin Chumo, Johana Chumo and Joseph Chumo were all his brothers, and went on to state that although he had sold 0.6 acres, yet the Plaintiff had taken 1.2 acres of land by force. He further testified that he had only gone for the Succession Cause but not to the Land Control Board and that he did not know who did the transfer.

41. The defence closed their case and parties filed their written submissions

Plaintiff's submission

42. The Plaintiff's case is hinged on the fact that he is the registered proprietor of parcel of land No. Kericho/Roret/1758 measuring 0.48 hectares, by virtue of a locally made sale agreement. That subsequently, the suit land was transferred to him on the 12th September 2011 as per the Title deed herein produced in evidence. That the evidence adduced in court was that the subject suit property was as a result of the subdivision of the mother Title No. Kericho/Roret/239 which gave rise to No. Kericho/Roret/1756 and No. Kericho/Roret/1757 which land was distributed between the Defendant's husband and his brother John Kipngeno Chumo. That Kericho/Roret/1757 was further divided into two resulting into Kericho/Roret/1757 and Kericho/Roret/1758 wherein the latter was sold to the Plaintiff.

43. That the Defendant and her husband have now reneged against the sale agreement wherein the Defendant has been unfairly interfering with the Plaintiff's portion of land, which had fully been paid for and despite the fact that she was given parcel No. Kericho/Roret/1757 measuring 1.65 acres. That indeed DW2 in his evidence admitted to having sold a portion of the land to the Plaintiff and therefore the interference by the Defendant against the Plaintiff's peaceful occupation of the land was unwarranted.

44. The Plaintiff further submitted that from the evidence adduced, it had been clear that the Defendant and her husband, DW2 had colluded to deprive the Plaintiff off he is legally acquired parcel of land. That DW2 ought to have sought to be joined to the suit so as to rise any claim against the Plaintiff, if he had any. That the execution of the transfer of the suit parcel was executed by DW2 and the joint Administrator PW4-John Kipngeno Chumo and therefore the suit land had been legally transferred to the Plaintiff.

45. The Plaintiff relied on the provisions of Section 26 of the Land Registration Act to submit that unless it could be proved that the certificate of Title had been acquired by means of fraud, misrepresentation or through a corrupt means to which the Plaintiff was proved to be a party, the certificate of Title could not be challenged. That the registration of the Plaintiff as the proprietor of the suit land vested in him absolute ownership with all the rights and privileges and therefore he was entitled to the orders sought. That further, since evidence of Title was prima facie evidence of ownership to land, the same could only be challenged on the grounds stipulated above, which facts the Defendant had failed to adduce.

46. That the Defendant in her testimony, while seeking that the Plaintiff's Title be revoked, only seemed to be relying on the defense of lack of consent to sell the land. That the details of the present suit were not part of the evidence and in any case if there was evidence seeking for cancellation of the Plaintiff's Title, the court would make the appropriate orders, but the case should not be used to deny the Plaintiff the use and occupation of the land.

47. That the Defendant lacked locus standi to challenge the Plaintiff's Title as the mother Title was not in my name. That further, the mother Title No. Kericho/Roret/239 had been registered under the Registered Land Act, now repealed, which had no requirement for spousal consent as per Section 28 of the said Act. Equally the Land Registration Act which succeeded the said Act has no provision for spousal consent. That had the Defendant sought to defend her case by raising an objection to the effect that no spousal consent had been obtained and that the suit land was matrimonial property, nothing stopping her from raising the same in her defence.

Defendant's submission

48. The Defendant submitted that it was the duty of the Plaintiff to prove their case to the balance of probability. That in the present suit, the Plaintiff had sought a permanent injunction against the Defendant in respect to parcel of land number No. Kericho/Roret/1758. That the issue of the genuineness of the Title in favour of the Plaintiff was a subject of a different court case between the Plaintiff and DW2.

49. That for the Plaintiff to seek permanent injunctive orders, there were three pillars to which the relief was premised to wit;

- i. A Prima facie case
- ii. Demonstrate irreparable loss/injury
- iii. That the balance of convenience favors the party seeking the injunction.

50. That it was not in dispute that the Plaintiff herein was the registered owner of land parcel No. Kericho/Roret/1758 and that the various acts of interferences and/or trespass by the Defendant were the cause of action of the suit. That it was therefore incumbent upon the Plaintiff to demonstrate and prove that the Defendant had committed the acts complained of, a result of which he had suffered loss and damage. That the Plaintiff's testimony was that in the year 2012 he had taken possession, built the house and store on the suit land, he however did not itemize specific acts that the Defendant had committed on the suit land that impeded him from enjoying the sole possession.

51. That if indeed the Title to the suit land had been issued on 12th September 2011 wherein the Plaintiff had taken possession of the land, fenced it, built his house and did all the developments aforesaid in his evidence then filed suit in the same year, the question would arise as to when he had planted the tea that had matured so fast so as to enable the Defendant to pluck? That indeed the complaint raised herein was criminal in nature wherein the Defendant could be charged with an offense known as 'stealing of farm produce'. That nothing had been placed before the court that such an offence was ever committed by the Defendant.

52. Further, that the evidence adduced in court was to the effect that the Plaintiff took possession of the suit land in the year 2012 after fencing it. Nothing was placed before the court by either the Plaintiff or his witnesses that indeed the Defendant was selling, sub dividing, building structures or even entering into the suit land without the Plaintiff's consent. Indeed not even a sale agreement had been tabled as evidence to prove that the Defendant was bent on selling the Plaintiff's parcel of land.

53. The evidence that came out was that the Plaintiff was in peaceful occupation of the land which had been well fenced. No evidence had been adduced that indeed the Defendant had either plucked any tea bush from the suit land. Indeed the only evidence that had come out from the defense was the question on the process of how the Plaintiff had obtained Title to the suit parcel of land, which according to the defence, was matrimonial land.

54. That based on the evidence herein adduced the only relief available to the Plaintiff was that of the dismissal of the suit with costs. That the Defendant could not be enjoined on acts she had not committed, would continue to commit or apprehended to have been committed by her. That each party had their own respective parcels of land. That since no evidence of trespass had been submitted, it was clear that the Plaintiff had not established his case on a balance of probability and therefore the same ought to be dismissed.

Determination

55. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law with a lot of anxiety. I have also considered the prayers sought by the Plaintiff and I have reminded myself that parties shall be bound by their pleadings.

56. Indeed in the present suit, the Plaintiff sought for an order of permanent injunction restraining the Defendant by herself, agents, servants, employees or any other party to whom they may be acting, from interfering with, sub- dividing, selling, plucking tea that may be growing thereon, assigning, erecting thereon structures and/or doing any other act which is prejudicial to the Plaintiff's proprietary interest in No. LR Kericho/Roret/1758.

57. I have considered the evidence herein adduced and what I can summaries from the same is that sometime in the year 2006, the Plaintiff had entered into a sale agreement with Charles Kipkorir Chumo-DW2 the husband to the Defendant, who sold to him a portion of the land measuring 1.2 acres for Kshs 628,000/= The said land was to be excised from parcel No. Kericho/Roret/239. That the said land included the tea bushes thereon. That after purchasing the land, and although he had obtained the Title deed in the year 2011, the vendor and the Defendant herein had refused to give him vacant possession. That he had subsequently filed the current case and only after the court had issued interim orders of injunction had he, with the help of the police, managed to take possession of the land wherein he proceeded to put up the developments herein above mentioned.

58. The Defendant's evidence on the other hand was that the suit land in question was their matrimonial land, that there had been no sale agreement between her husband- DW2 and the Plaintiff to sell the same, but that if there had been such an agreement, it had been without her consent. That the Plaintiff had forcefully entered into the suit land with the help of the police.

59. I have also considered the evidence of DW2 who is alleged to have sold the land to the Plaintiff. In summary his evidence was to the effect that indeed he had sold to the Plaintiff a portion of his parents' land measuring 0.6 hectares (equivalent to 1.48 acres) at Ksh 100,000/= per point which was equivalent to Kshs. 600,000/= That the Plaintiff had paid him in slow instalments and of which he had not completed. There had been no written agreement but that the Plaintiff had recorded the payments made on pieces of paper whenever he had paid. That he did not sign any transfer nor appear before any land control board.

60. With the above summary in mind, I find the issue for determination herein as follows;

-Whether the Plaintiff has proved his case on a balance of probability.

61. The Plaintiff's case is that since he had obtained Title to land parcel No LR Kericho/Roret/1758, he was the absolute and indefeasible owner and therefore the Defendant should be enjoined permanently from interfering with the said land.

62. The court is aware of the provisions of Section 26(1) of the Land Registration Act which provide that a Title to land 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. However the court is also aware that such Title shall not be absolute and indefeasible because it can be impeached where it is shown to have been obtained through **fraud, misrepresentation, illegally, un-procedurally or through a corrupt scheme.**

63. Indeed 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.

64. 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.’

65. From the evidence herein adduced, it is not in contention that the suit land herein No. LR Kericho/Roret/1758 is a subdivision of the mother Title No LR Kericho/Roret/239 which had been registered in the name of Sofia Chepkemioi Bett who was the mother to PW 2, 3, 4 and DW2.

66. I have noted from the Plaintiff's evidence that he bought the suit land known as No. Kericho/Roret/239 in the year 2006 and also from the undated sale agreement herein produced as Pf exh 1, that the first installment of Ksh 287,000/- was paid on the 22nd December 2006, the 2nd installment of Ksh 288,000/- on the 19th October 2007 while the 4th installment was paid and cleared on the 11th December 2008. Thereafter the Plaintiff herein was registered as its proprietor of No. LR Kericho/Roret/1758 on the 12th September 2011 as was exhibited by the Title deed herein produced as Pf exh 2.

67. I have also noted from the contents in the letter of confirmation of grant dated the 12th April 2011 in regard to the estate of Sofia Chepkemioi Bett, herein produced as Df exh 1, that Charles Kipkorir Chumo-DW 2 inherited 2.85 acres of the deceased estate upon confirmation of Grant.

68. From the sequence of the events as they unfolded, and from the documents herein produced namely Pf Exh 1, Pf exh 2 and Df exh 1 it is clear that the sale agreement in regard to LR Kericho/Roret/239, entered between the Plaintiff and DW2 was in regard to the deceased's estate and that at the time parties entered into the sale agreement, the said Charles Kipkorir Chumo had no Title to pass as at the time he was not the registered owner of the suit property. No evidence was adduced by the Plaintiff to prove otherwise. No succession proceedings had been filed in respect of the estate of the deceased thus her estate had not been distributed. The sale agreement was therefore void ab initio and the same cannot help the Plaintiff in anyway.

69. Indeed as it had been cited with approval by the Court of appeal in in **Jivanji v Sanyo Electrical Company Ltd [2003] KLR 425 at p. 431**.that:

No person has legal capacity or authority to transfer to another person a registered proprietors interest in a parcel of land registered under the Registered Land Act without the participation or knowledge and consent of the registered proprietor. The transfer of the suit parcel of land to the first Defendant on 5th April 1991 was done by a transferor who was not the registered proprietor of that parcel of land. It was done without the knowledge and consent, or participation of the Plaintiff. The transferor had no legal Title in the Plaintiff's said parcel of land. The transferor had no proprietary rights in that parcel of land to pass to the first Defendant. Notwithstanding the fact that the transaction was or may have been blessed with consent of the relevant Land Control Board, was or may have been registered, that transaction was null and void ab-initio in so far as it purported to transfer the suit parcel of land to the first Defendant as there could be no valid transfer where the transferor has no Title to transfer. Documents may

have been prepared, consent of the land control board obtained, signatures appended and attested and the transfer registered. But all those could not give the purported transferor the Title to transfer to the first Defendant. That transfer was unlawful.”

70. The Plaintiff has sought for a permanent injunction to issue against the Defendant. In the case in **Kenya Power & Lighting Co. Ltd -vs- Sheriff Molana Habib (2018) eKLR** the court had held that :-

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected”

71. The principles that guide the court in granting an interlocutory injunction are set out in the celebrated case of **Giella -vs- Cassman Brown & Company Limited 1973. E.A 358** as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”

72. The Plaintiff’s case is founded on the allegation that he was the registered owner of all that parcel of land known as No. LR Kericho/Roret/1758 the **suit property herein** and that the Defendant had trespassed onto the said property and was bent on interfering with it and therefore he sought permanent injunction against her seeking that she be enjoined from sub dividing, selling, plucking tea that may be growing thereon, assigning, erecting thereon structures and/or doing any other act which is prejudicial to the Plaintiff’s proprietary interest.

73. The evidence adduced however did not in any way depict the impugned action that the Defendant has been accused of doing. Indeed the evidence adduced was not in tandem with the pleadings and neither did it meet the threshold for the grant of an injunction.

74. I appreciate that under **Section 107(1)** of the **Evidence Act**, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which (s)he asserts, must prove that those facts exist.

75. Having found that the sale agreement herein was void ab initio, the court is not convinced that the Plaintiff is legally registered as the owner of the suit property and therefore he has not discharged the first condition set out in the **Giella case** (supra).

76. In the circumstances, I find that the Plaintiff has not established his case on a balance of probabilities and the same is herein dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 9TH DAY OF DECEMBER 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE