



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT ELDORET**

**E & L NO. 279 OF 2016**

**REBECCA CHEPKEMBOI SOY**

*(suing on behalf of the estate of*

**EDWARD KIPLANGAT SOY.....PLAINTIFF**

**=VERSUS=**

**GEOFREY TENAL.....1<sup>ST</sup> DEFENDANT**

**GEORGE NGUGI KERU.....2<sup>ND</sup> DEFENDANT**

**RICHARD KEMEL.....3<sup>RD</sup> DEFENDANT**

**STEPHEN KEMBOI.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 8<sup>th</sup> June 2012 and amended and filed in Court on 28<sup>th</sup> April 2014 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A declaration that the title documents purported to be registered and in possession of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant was obtained through fraudulent means and therefore fictitious.
- b) An order for revocation and/or cancellation of the title documents registered and in possession of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant.
- c) An order that the 4<sup>th</sup> defendant does not have a legitimate claim over ELDORET MUNICIPALITY/BLOCK No. 14/653 and therefore the caution registered thereon should be revoked.
- d) Permanent injunction be issued against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants themselves or anybody acting on their behalf from interfering, subdividing, alienating, transferring, leasing or selling the said property amongst themselves or any other third party.

The Defendant on their part filed their defence and Counter Claim dated 22<sup>nd</sup> August 2013. The Defendants alleged legitimate entitlement and argued that they obtained ownership of the property through due process.

**PLAINTIFF'S CASE**

PW 1 Rebecca Soy testified that she was married to the late Edward Soi and produced a copy of her identity card as pexb1. She stated that her late husband was the owner of Eldoret Municipality Block 14/653 and produced a copy of a grant of letters of administration as pexbt 2 where the property was listed in the amended grant as part of the deceased property.

PW1 further testified that in 2011 she realized that the property had been registered in the names of the 4 defendants when she already had a grant of letters of administration and produced a copy of certificate of lease as exhibit No. 3. She stated that she wrote a letter to the Commissioner of Lands complaining about the same which letter she produced pexb 4 and a letter by the Municipal Council of Eldoret to the Director of Survey of Kenya as pexb 5.

It was PW1's evidence that her deceased husband used to pay the land rates and produced a copy of the demand for rates as pexbt 6. That when the defendant attempted to enter the suit land, she obtained injunction stopping them hence the defendants have never occupied the suit

land.

PW1 further testified that her husband was given plot Nos 61 to 653 and that she has been ploughing the suit land and paying rates in the name of her late husband. She produced receipts and demand notices as pexb 7. She further stated that her late husband got 41 plots from plot No 11383 which was the original parcel bought by the partners and that the defendants were not partners in the purchase of the parcel of the land and that she did not sell to them any land. PW1 also stated that the land was not government land as it had not been compulsorily acquired.

On cross examination, she stated that she did not have any document showing that the suit land belonged to her husband but she was aware that the suit property was bought by her late husband and his partners from a white settler. She denied being aware that the suit land belonged to the government and that the same was allocated to someone else.

PW 2 Jackson Kibor testified that him together with his partners bought 421 acres of land which was subdivided and each partner paid survey fees and were given the title deeds. That plot numbers 653 and 604 were swampy and the surveyor did not subdivide it and produced a letter from the surveyor as pexb 3. On cross examination, he stated that plot No. 653 was for all the 6 partners

PW 3 Stephen Soi testified that he was aware that his father left behind a property plot no. 653 situated in upper Elgon view and that they have been ploughing the suit land and that it has never been sold out. On being cross examined he stated that he has never seen a title document in respect of the suit land.

PW4 Emmanuel Kipkirui a government surveyor testified that he knows plot No. Eldoret Municipality Block 14 and that there was a letter written by Jackson Kibor for subdivision of L.R No 11383 whereby a survey was done and the beneficiaries of the property were:

- a) Daudi Kipkorir
- b) Edward Kiplagat
- c) Elisha Busienei
- d) Jackson Kibor
- e) Paulo Sirma
- f) Agnes Rop

PW4 also testified that the suit land was private land. That was the close of the plaintiff's case and urged the court to enter judgment as prayed and dismiss the defendants' counterclaim.

#### **DEFENDANT'S CASE**

DW1 Geoffrey Tenai testified that the suit land belongs to him and his partners who are his co-defendants. It was his evidence that they were given an allotment letter by the Commissioner of Lands on 27<sup>th</sup> November 1998 which he produced the letter as dexb 1. He stated that he paid Kshs 1,278,750 on 18<sup>th</sup> February 2011 and was issued with a receipt which he produced as dexbt 2. He was also issued with a lease for registration in Eldoret which was marked as DMFI 3 and produced a letter forwarding the lease to Eldoret lands registry was as dexbt 4.

DW1 testified that he was later given a title for Eldoret Municipality Block 14/653 which he has since subdivided and sold out. He produced copies of 31 titles as dexbt 5, rates clearance certificate as dexbt 6, receipts for rates clearance dexbt 8, rent clearance certificate dexbt 9 respectively.

It was DW1's evidence that when he was allotted the land, it was a grazing area and it is still grazing land and that the plaintiff lied to the court to give her a grant of letters of administration in respect of the suit land.

On cross examination, he stated that he was neither aware that Eldoret Municipality Block 14/653 belonged to the plaintiff nor that the plaintiff had reported a loss of the title. He was also not aware that the land was 421 acres belonging to six partners. He confirmed that the demand for rates payment for 1994 and 2006 were issued to Edward Soi. He also admitted that Dexb 6 had indicated that Plot No. Block 14/653 was land liable to flooding.

DW2 Robert Simiyu a Principal Land Administration Officer testified that from the records in file No 176288 in respect of Eldoret Municipality Block 14/653 was allocated in 1998 to Geoffrey Tenai, George Ngugi and Richard Kemei. They paid Kshs 1,278,750 and a receipt was produced as Dexb 2.

That upon payment, a lease was prepared and sent to Eldoret Lands Registry for registration and a lease was prepared and issued. Later there was an application for subdivision which was approved and the land was subdivided into 57 plots. A valuation was done on individual plot to determine the new rents for plots and produced a certified copy of the file as Dexb 13.

On cross examination he stated that there was a letter of complaint by the plaintiff. He further stated that if this had come to their notice, they

could not have allocated the land since there was an existing register. He confirmed that plot No. 653 was indicated to be liable to floods and the acreage was about 421 acres.

DW3 Sarah Chelimo Maina the Land Registrar in Uasin Gishu testified that on 19<sup>th</sup> May 2011 a lease in respect of Eldoret Municipality Block 14/653 was registered in favor of Geoffrey Tenai, George Ngugi Ken and Richard Kemei and forwarded on 5<sup>th</sup> September 2011.

That on 13<sup>th</sup> September 2011 a certificate of lease was registered and later a certificate of lease was issued. She stated that she is not aware whether the plaintiff's husband was the registered owner. It was DW3's evidence that for them to gazette a lost title, the owner must prove that there was a title to enable replacement.

On cross examination, she stated that before a loss of title is gazetted, a person must satisfy the Registrar that there was a lease and an affidavit of loss. That the land registry must have been satisfied before the loss was gazetted.

DW4 Tom Chepkwesi testified that a request was made by the plaintiff after presentation of the documents. The parcel of land records was missing and they had to do a gazette notice for replacement. He stated that he forwarded the documents for gazette as it had been done but he did not give a title to her as it was found out that the records were inexistent.

### **PLAINTIFF'S SUBMISSIONS**

Counsel for the plaintiff gave a summary of the evidence adduced by the plaintiff and the defendants and listed issues for determination by the court.

- a) Whether the Plaintiff has sufficiently proved that she has an interest in ELDORET MUNICIPALITY BLOCK 14/653?
- b) Whether the Plaintiff was fraudulently dispossessed off the suit parcel?
- c) Whether the Defendants played a role in the wrongful dispossession of the suit land?
- d) Whether the Plaintiff has sufficiently proved incidences of fraud?
- e) Whether the court can issue orders for cancelation of title and rectification of the register?
- f) Whether the Defendants' can be condemned to pay costs?

On the first issue on interest in the suit plot counsel submitted that the plaintiff had proved that before the demise of her late husband Edward Soy, the suit property was registered in his name and that it later formed part of the Estate that was available for distribution among his beneficiaries.

Counsel further submitted that among the documents produced by the plaintiff were allotment letter dated **7<sup>th</sup> November 1990** in respect of file No. **176288** for **LR NO. 11383**, which indicated that the beneficiaries were six persons; Agnes Rop, Elisha Busienei, Jackson Kibor, Rebecca Soy, Stephen Kemboi and Elizabeth Sirma. Counsel submitted that the Plaintiff had successfully showed that by virtue of **HCPA 49/1991**, she had succeeded the Estate of her late husband Edward Soy one of the original partners in the purchase of the larger parcel of land measuring 421 Acres.

Counsel relied on the case of **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR** where the court held that

*"... 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".*

It was counsel's submission that Edward Soy's share of land survived the Estate of the plaintiff's late husband and that the list of properties as shown by the documentary evidence HCPA 49/1991 parcel No. 653 is listed as item No. 19 and therefore as one of the parcels which the Plaintiff was entrusted to receive.

Mr Bitok submitted that before the distribution of the Estate, it is trite law that the court satisfied itself under **Section 71 of the Law of Succession Cap 160** that the beneficiaries of the estate were legitimate beneficiaries. Further that the land in question did comprise the deceased estate and was available for distribution Counsel relied on the case of **Mpatinga Ole Kamuye Vs Neliyo Tipacrgo & 20 Others [2017] eKLR** counsel also relied on **Sec 3 of the Law of Succession Act** defines estates as free property of a deceased person.

*" the property of which that person was legally competent freely to dispose using his lifetime and in respect of which his interest has not been terminated by his death"*

Counsel therefore stated that from the evidence on record it was clear that the suit land formed part of the estate of the deceased which was further corroborated by the production of rates demand notices and payment receipts in the name of Edward Soy.

It was counsel's submission that a caution was registered against the suit land by the 4<sup>th</sup> Defendant on **7<sup>th</sup> July 2011** claiming to be legal representative of the Estate of her late father David K Chumo(Deceased), who was among the original owners of the subject parcel.

Counsel therefore urged the court to find that the title had been acquired in favour of the late Edward Soy as supported by the gazette notice and the oral evidence from the Land Registrar TOM CHEPKWESI who himself confirmed that he had seen a copy of the title for **Eldoret Municipality Block 14/653**.

On the second issue as to whether the defendants 'acquired the suit land fraudulently, counsel submitted that the Plaintiff successfully proved that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants with the assistance and connivance of the 5<sup>th</sup> Defendant did fraudulently cause the illegal deregistration of parcel Eldoret Municipality Block 14/653 which was forming part of the Estate of Edward Soy (deceased).

Counsel submitted further that the Plaintiff had produced requisite documents at the time of reporting the loss of title and was keen in obtaining a replacement which documents that the registrar reported to have seen included death certificate, grant and copy of the title in the name of the late Edward K. Soy. That the Land Registrar confirmed that the said documents formed a basis for the Gazette Notice No. 894 dated 15<sup>th</sup> February 2008.

Counsel cited Black's Law Dictionary, which defines **fraud** as;

*"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another".*

Mr. Bitok submitted that the Plaintiff's pleadings conforms to the requirement of specifically pleading the particulars of fraud. Counsel relied on **Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> 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"* (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308. See also R.G Patel vs. Lalji Makani cited in the case of Gladys Wanjiru Ngacha vs. Theresa Chepsaat & 4 Others (2013)e KLR

Mr. Bitok also relied on the case of **Esther Ndegi Njiru & Another vs Leonard Gatei (2014) eKLR**; where the court held that:

*"The law is extremely ..... of title and provides only for instances for 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 through corrupt scheme".*

Counsel relied on Article 40(6) of the Constitution which gives a rider that "the rights under this Article do not extend to any property that has been found to have been unlawfully acquired" does not protect any innocent purchaser for value without any notice of fraud.

Counsel cited the case of Nairobi **HCC No. 2 of 2004 Dr. C.O Okere vs Esther Kiiyukia & 2 others, Elijah Makeri Nywagwara vs Stephen Mungai & 2 others ELC No. 609 (B) 2012**, where the Court was convinced that the title had been obtained by fraud or misrepresentation under Section 26 (1) (b) where it is not necessary that the title holder is party to the vitiating factors. i.e title obtained illegally, procedurally or through corrupt scheme.

Counsel therefore urged the court to find that whereas the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Defendants knew that they had no legitimate claim against the suit land, they connived with the 5<sup>th</sup> Defendant to fraudulently register them as proprietors whereas they had full knowledge that a previous registration had been made in the name of Edward K. Soy. That the Land Registrar who issued the gazette notice acknowledged that indeed the Plaintiff was in occupation and possession of the suit land.

Mr. Bitok relied on a related case of **Elisha Kare Busienei & 3 Others vs Japhet Kipyego Chepkwony & 2 Others ELC (Kt) No.131 of 2013. The Court observed thus ;**

*"It may be true that L.R No. Eldoret Municipality Block 14/653 is not in her name but the fact remains as at the time this suit was filed, she was the one in possession of it and actually had promised to return it. The registration of the said property in the names of three individuals came much later in the year 2011. These three individuals are not partners of the six original partners or purchasers of the said property from any of the partners. What the second Defendant is saying is that she is fighting to have the registration of the property in the names of the three cancelled so that it can revert to her. On 20/6/2011 the second Defendant received an amended confirmation of grant which shows that LR.No.Eldoret Municipality Block 14/653 is one of the properties she inherited from her late husband Edward Soy. These documents are contained in Kitale ELC.No. 132 of 2013 which is still ongoing.*

*A search in respect of LR. No. Eldoret Municipality Block 14/653 was produced as exhibit 19. This search was done on 30/7/2013. It shows the property in the name of Geoffrey Tenai, George Ngugi Keru and Richard Kemei who hold it as tenants in common in equal shares. It is strange whereas the search shows that the property was intact as at 30/7/2013, evidence from PW6 Francis Wilson Ojunju shows that the same property was subdivided on 13/7/2011 and it yielded 8 plots ranging from Nos.2332 to 2339. These subdivisions were done notwithstanding that there were orders in place restraining any dealings on this and other disputed properties. It appears there is something wrong which is going on.."*

Counsel further relied on the case of *Alberta Mae Gacci – vs – Attorney General & 4 Others (2006) eKLR* where the court held that :

*“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...”*

On the issue of revocation and cancellation of title, counsel cited the case of *Kuria Greens Ltd vs Registry of titles & Another, Nairobi Petition No.107 of 2010*, where it was held that;

*“It was only the Court that had authority to cancel a title which has been obtained through fraud or mistake and only where it is not a first registration”.*

Counsel therefore urged the court to enter judgment as prayed in the plaint as the plaintiff had proved her case on a balance of probabilities.

### **DEFENDANTS’S SUBMISSIONS**

Counsel for the defendants also gave a summary of the pleadings and the submissions and listed the following issues for determination which were also captured in the plaintiff’s issues.

- a) What are the applicable legal regimes to this case.
- b) What is probative value of copies produced
- c) Whether the plaintiff on behalf of the deceased holds and or produced ownership of documents over suit land capable of convincing the court to grant the orders sought.
- d) Whether the plaintiff has established sufficient evidence of facilitate and or enable the court impeach the 1<sup>st</sup> ,2<sup>nd</sup> and 3<sup>rd</sup> defendants title on grounds of fraud, misrepresentation and or illegality.
- e) Whether due process was followed in respect to 1<sup>st</sup>-3<sup>rd</sup> defendants acquisition of the suit land and thus worth being protected by the court.
- f) Whether the 1<sup>st</sup> -3<sup>rd</sup> defendants are entitled to award of damages for trespass.
- g) Who ought to bear costs of the suit.

Counsel submitted that the legal regime of this case is the Registered Land Act Cap 300 (repealed) and the retired Constitution and cited the case of *MUNICIPALITY OF MOMBASA Vs NYALI LIMITED (1963) EA 371* where the Court of Appeal stated;

***“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules is that if the legislation affects substantive rights, it will not be constructed to have retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained is only one of the factors to which regard must be had in order to ascertain that intention”.***

Further, that section 23(b) of the repealed Registered Land Act provides for interest conferred by registration where it provides;

***b). The registration of a person as the proprietor of lease shall vest in that person the leasehold interest described in the leasehold, together with all implied and expressed rights and privileges belonging or appurtenant there to and subject to all implied or expressed agreement, liabilities or incidentals of the lease.***

It was counsel’s submission that in the absence of registration documents showing the deceased to be proprietor of the suit land, the Succession documents are not capable of conferring the plaintiff the suit property. That the plaintiff had admitted on cross examination that she had nothing to show that the deceased was the owner of the suit land. Further that P.W. 2, Jackson Kibor testified that plot No. 653 had neither been surveyed nor subdivided and was left because it was a swampy area.

Mr. Korir submitted that it is trite law that allegations of fraud must strictly be proved based on evidence more than on a balance of probability and relied on the case of *KOINANGE & 13 OTHERS Vs KOINANGE* on the issue of fraud observed;

*“Allegations of fraud must specially plead and strictly proved on a standard below reasonable doubt but above the usual standards in civil proceedings that is on the balance of probabilities”.*

It was counsel's submission that the defendants successfully demonstrated how they acquired their title by producing all documents that must be in place before a lease could be issued and registered in their favor. That the plaintiff did not adduce sufficient evidence to prove that the acquisition by the defendants was obtained illegally to justify cancellation of their titles as sought.

On the probative value of production of photocopies counsel submitted that the court should find that photocopies are of no probative value as per section 67 of the Evidence Act which provides that documents must be proved by primary evidence except in the cases herein after mentioned. Section 67 is the basis of what is called the best evidence rule which provides that documents must be proved by the best evidence rule.

Counsel relied on the case of **Embu Environment and land case Appeal No. 3 of 2017 between Chrispin Kienyu Kangethe Vs Ephantrus Njiru Mbogo** where the court observed;

*“.....The trial magistrate simply acted with caution in replying upon photocopies which were not certified or properly certified. On the basis of section 33 of the Evidence Act (Cap 80), the purported sale agreement was for rejection since no proper evidence on basis was laid for its production as secondary evidence. It was not sufficient for the appellant that the original was lost. As scrutiny of the said document, which is barely legible reveals that it not actually a sale agreement but a faded copy of something similar to a cash sale receipt purporting to acknowledge receipt of Kshs 10,000/=. The other details thereon are unclear. In those circumstances, the probative value of such unclear document must be very low. The learned magistrate cannot therefore be faulted for the manner in which she handled the exhibit. There is a big difference between a certified true copy of a public document and a copy of a certified true copy of such document. The former is admissible under section 69 of the Evidence Act where as the latter is not. The copy of the minutes of the land control Board which the appellant produced as exhibit D3 was merely a copy of certified true copy. It was not admissible in the first instance, but having been admitted, the trial court was at liberty to assign an appropriate level of probative value depending on the authenticity of the document. Again the trial court cannot be faulted for assigning such low probative value to the copy of the minutes. The court does not agree with appellant's submission that documents whose production is not objected to, for whatever reasons, should be admitted in evidence regardless of the rules of evidence or that once admitted they should be accorded maximum probative value. A court of law is obligated to ensure that uniform rules of evidence apply regardless of whether a party is represented by an advocate or not a technical objection is raised to the violation of the law.*

Counsel also cited the case of **High court succession case No. 420 of 2013 in the matter of the estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu**, on the issue of secondary evidence, where Justice John M. Mativo observed;

*“.....further in the said case, the court held that where a party wishes to lead secondary evidence, the court is obliged to examine the probative value of the document produced in the court or its contents and decided the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally settled that mere admission of secondary evidence, does not amount to its proof”.*

On the issue as to whether succession cause documents can confer an interest in land counsel referred to the case of **MARGARET WAIRIMU KARIUKI (suing as the administratrix of the estate of KARIMONI KARIUKI (deceased) Vs GEORGE WAHINYA MACHARIA (2019) eKLR** where the question of whether letters of administration can confer an interest of land to administration where ownership by deceased could not be proven or established. The court observed that:

*“Section 26 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 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 be subject to challenge except.....There was no evidence of fraud on the part of the defendant. The court would not hesitate to cancel a title if it is proven that it was acquired fraudulently.*

*This is a case where the plaintiff woke up and remembered that there was a plot that the husband previously owned and thought that she should claim through succession and transmission etc....I find that the plaintiff's claim for the suit land is an afterthought and cannot be allowed to flourish. I have considered the pleadings evidence adduced and submission by parties and come to the conclusion that the plaintiff has not proven her case against the defendant and is therefore dismissed with costs”.*

Counsel therefore submitted that in the absence of registration documents showing the Mr. deceased to be proprietor of the suit land, the succession documents is not capable of conferring the plaintiff the suit property. That the plaintiff wrongfully incorporated a third party's property into the estate and hence the court should disregard the succession proceedings as they are of no consequence.

Mr. Korir relied on the case of **ELDORET ELC No. 186 OF 2017, GABRIEL S. CHEPWONY Vs GIDION NZIOKI MBILI & ANOTHER (2018) eKLR** where the court in dismissing the plaintiff's claim observed:

*“The issues for determination in this matter are whether the plaintiff is the bonafide owner of the suit land, whether the defendant fraudulently acquired the suit land, whether the plaintiff is entitled to the orders sought.....On the 1<sup>st</sup> issue as to whether the plaintiff is the bonafide owner of the suit land, it is not in dispute that the plaintiff produced a letter of allotment which was issued on the same year as the one that the defendant produced. From the onset and from the evidence on record together with the documentation produced, it seems that the plaintiff slept on his rights after allocation of the suit land. The allotment letter indicated that the allocation of the plot was subject to written acceptance of the terms and conditions stipulated and payment of the prescribed charges.”*

Mr. Korir submitted that that the defendants had proved that they had procedurally acquired the suit land and their registration was first registration hence the court lacks jurisdiction to order rectification or cancellation of their titles.

Counsel relied on the case of **NAIROBI CIVIL APPEAL No. 30 OF 2013, SAMMY MWANGANGI & 10 OTHERS VS COMMISSIONER OF LANDS & 3 OTHERS (2018)KLR** where the Court of Appeal upheld the decision of the Superior court where the judge of the superior court had found that the 3<sup>rd</sup> and 4<sup>th</sup> respondents had proved that two titles were rightfully registered in their names and that the appellants had failed to establish the said titles were fraudulently obtained or that they have any registered or unregistered interest in the two properties and therefore issued injunctive orders restraining the appellants ,their families servants or agents from continuing in occupation of the suit properties and they be evicted henceforth.

Mr. Korir further submitted that in the same case the court delved into the issue and rights of persons in occupation of unalienated Government Land which is subsequently allocated where the Court of Appeal observed;

*“in a similar situation to what the appellants the appellants are now claiming, this court in the case of Michael Githinji Kimotho – Vs- Nicholas Murathe Mugo,Nairobi Civil a Appeal No. 53 of 1995 where it was held that if the appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour ,he was obviously in no position to resist the respondent’s claim .Though the appellant had be in occupation of the suit land which was Government land before it was allocated to the respondent ,this could not have helped him in resisting the respondent’s claim where the latter is registered as owner of the land. Similar if he the appellant had carried out any developments on the suit land ,he did so at his own peril and he could not expect any compensation in that respect. Even if for argument sake the suit land had been erroneously allocated to the respondent, the appellant as a squatter in the suit land had no locus standi and the so called erroneous allocation could not be an answer to the respondent’s claim for eviction. His position as trespasser could not have given him any protection against the respondent’s claim as the registered owner of the suit land”.*

Counsel therefore urged the court to dismiss the plaintiff’s case and award the defendants Kshs. 1.5million as damages for trespass.

### ANALYSIS AND DETERMINATION

This is a case that was initially filed in Kitale Environment and Land Court in 2013 but was later transferred to Eldoret for hearing and determination. The issues for determination in this case are as to whether the plaintiff’s late husband was the proprietor of the suit land, whether the defendants fraudulently registered the suit land in their names, whether the court can order for revocation and cancellation of the titles to the suit land, whether the defendants acquired the suit land procedurally and whether they are entitled to damages for trespass.

The evidence on record shows that six partners got together and purchased a property known as LR No. 11383 measuring 421.5 acres or thereabout, The partners were Elisha Busienei, Jackson Kibor, Daudi Chumo, Job Rop, Paul Sirma and Edward Soy who was the late husband of the plaintiff herein. It is also on record that the process of subdivision was coordinated by Jackson Kibor PW2 and 2 blocks were unsurveyed due to the fact that they were flood prone.

It is not in dispute that the plaintiff’s deceased husband was among the 6 partners, and that he contributed towards the purchase of the suit land. It also not disputed that the demand notices for payment of rates had been sent through the deceased’s name and that the plaintiff has been paying for the rates through the deceased’s name.

The plaintiff gave evidence to show that her late husband was the proprietor of the suit land and that she has been in occupation of the suit land. DW4 Land Registrar Tom Chepkwesi admitted that he issued a gazette notice for the loss of the title in respect of the suit land and that the basis for such gazette was after the plaintiff produced a death certificate, grant of letters of administration and a copy of the title registered in Edward Soy’s name. This is a testament that at one point the land belonged to the late Edward Soy. What would be the explanation for the gazette if there was no reason to believe that there existed such a title or a register? The only probable conclusion was that there existed a title in the name of Edward Soy before the same could be gazetted

DW2 Robert Simiyu a Principal Land Administration Officer testified that there were records in file No 176288 in respect of Eldoret Municipality Block 14/653 and that there was a letter of complaint by the plaintiff. He further stated that if this had come to their notice, they could not have allocated the land since there was an existing register. He confirmed that plot No. 653 was indicated to be liable to floods and the acreage was about 421 acres. What would be the explanation of the coincidence about the acreage of plot No 653 and the evidence of subdivision by the six partners.

The Land Registrar also confirmed that for them to gazette a lost title, the owner must prove that there was a title to enable replacement and further that a person must satisfy the Registrar that there was a lease and an affidavit of loss. It was her evidence that the land registry must have been satisfied before the loss was gazetted.

I find that the evidence on record proves that the plaintiff’s late husband was a registered proprietor of the suit land. This is corroborated by the finding in Kitale ELC No 132 of 2013 which is related to this case involving the six original partners. The court found that the plaintiff had filed a case against the defendants in respect of the suit land but alluded to the fact that this land involved the six partners and not the defendants.

On the second issue whether the defendants had fraudulently acquired the suit land, it should be noted that the registration of the defendants’ titles was done while ELC No 131 of 2013 was pending before the court. The plaintiff filed this case and the defendants were enjoined from interfering with the suit land. There is evidence that this land was private land and not public land that was unalienated.

The Land Administration officer explained how government land is allocated and registered. It has been consistent that the land was bought

by six partners hence it was not available for allocation by the Commissioner of Lands. There are procedures that must be followed in allocation of land by the Commissioner of Lands.

The Government would advertise its intent to alienate particular parcel of land. An interested party would then make an application to the Commissioner of Lands expressing interest in the said parcel of land, state the development to be put up there and demonstrate that they had ability and capacity to develop the land.

The expression of interest would be subjected to assessments and if found prudent and in public interest, approved and the Commissioner of Lands would issue an allotment letter to the identified party. The allotment letter would spell out the terms of the allotment and prescribe the fees to be paid, and duration within which the payments are to be made. Once the prescribed fees are paid, a Lease Agreement would be entered into and signed between the Government and the party allotted, the lessee. The Lease Agreement would then be forwarded to the District Land Registrar where the parcel is located, for preparation and issuance of a Certificate of Lease. The Commissioner of Lands only issues a lease and not a certificate of lease which is dispatched to the District Land registry with a covering letter copied to the lessee with the RIM informing him that the lease is ready.

The following procedures would only be applicable in respect of government land which has not been alienated. Once the land is alienated, then it is not available for further alienation. The procedures that were followed in alienating public land were flawed even if the defendants claimed that they complied with the procedures. (note that this was private land)

The process of allocation of government land was stated by Angote J in the case of **Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR** as follows:

*“It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.*

*It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of African Line Transport Company Limited vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013.”*

The defendants did not follow the laid down procedures for alienation of government land having believed that the suit land was government land as there was no evidence that the government had advertised its intention to alienate the suit parcel and further that there was no evidence that the defendants had ever applied to be allotted the suit parcel, or any other parcel.

The Land Administrator who gave evidence confirmed that there was a letter of complaint from the plaintiff and if they had been aware of it they would not have issued a letter of allotment to the defendants.

The fact that the titles were issued to the defendants does not make them valid owners of the suit land because the root of their title was tainted with illegality. There existed another title which had been gazetted as lost and that it was proved that the land had been purchased by the six partners. The defendants have also not proved how they got to be allocated private land that had already been alienated.

The standard of proof required for a party to prove fraud and forgery are well laid by the court of appeal in the case of **Dennis Noel Mukhulo Ochwada & Another vs Elizabeth Murungari Njoroge & Another [2018] eKLR** where the court held as follows:-

*“As regards standard of proof of fraud, the law is quite clear. In R. G. Patel vs Lalji Makanji (Supra) the former Court of Appeal for Eastern Africa stated thus;*

*“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.*

**Section 26(1)** of the Land Registration Act 2012 provides as follows:-

26(1)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 a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The defendant claimed that their registration was a first registration and that the court could not cancel the title. Section 26 is very apt in situations where a party has procured a title unprocedurally and or through misrepresentation or fraud. First registration is not a bar to rectification or cancellation if the root of the title reeks of fraud. This is what is true to this case. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to

do is to manufacture a Lease or Certificate of Title, claim to be the rightful proprietor of the land indicated therein.

In the case of ***Elijah Makeri Nyang'wara –vs- Stephen Mungai Njuguna & Another (2013) eKLR*** the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

*“the law is extremely protective of title and provides only two instances for 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 through a corrupt scheme.”*

Further in the case of ***Republic vs Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563 Maraga J (as he then was)*** expressed himself as follows:

*“Courts 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...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution.”*

Further in the case of ***Dr. Joseph Arap Ngok vs Justice Moijo ole Keiwua & 5 Others, Civil Appeal No. Nai. 60 of 1997*** the court stated thus that:

*“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”*

The court cannot be used to sanitize illegalities in acquisition of land. In the case of ***Paul Nderitu Ndung'u & 20 Others –V- Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996)*** the court held that the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated. This is similar to this case where the land was not available for allocation as it had been alienated to a white settler who sold the land to the six partners.

Further in the case of ***Nelson Kazungu Chai & 9 others vs. Pwani University College (2017) eKLR***, the Court of Appeal dismissed the appellants 'case' and held as follows:

*“Worth noting as well is that no Part Development Plan was produced to back the Appellants' claim that due process had been followed as alleged.”*

*The defendants did not produce a PDP with the letter of allotment.* The court is empowered under Section 80 (1) of the Land Registration Act, 2012 to 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.

*I have considered the pleadings, the evidence and the judicial authorities and find that the plaintiff has proved her case on a balance of probabilities against the defendants. The defendants have failed to prove that they were bona fide owners of the suit land and their counterclaim is dismissed with costs to the plaintiff. I therefore make the following orders:*

- a) A declaration is hereby issued that the title documents purported to be registered and in possession of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant was obtained through fraudulent means.
- b) An order of revocation and/or cancellation of the title documents registered and in possession of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant is hereby issued.
- c) The Land Registrar Uasin Gishu County is hereby ordered to cancel the titles in respect of **ELDORET MUNICIPALITY/BLOCK No. 14/653** or any resultant titles from the suit land within 30 days.
- d) An order for removal of caution lodged by the 4<sup>th</sup> defendant over **ELDORET MUNICIPALITY/BLOCK No. 14/653**
- e) An order of Permanent injunction is hereby issued against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants themselves or anybody acting on their behalf from interfering, subdividing, alienating, transferring, leasing or selling the said property amongst themselves or any other third party.
- f) Defendants to pay costs of the suit to the plaintiff.

**DATED and DELIVERED at ELDORET this 28<sup>TH</sup> DAY OF October, 2020**

**DR. M. A. ODENY**

**JUDGE**