

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC CASE NO. 550 OF 2012
(FORMERLY HCC NO. 145 OF 2009)

ALICE KAPKIYAI
PLAINTIFF

-VERSUS-

HELLEN JEPTANUI RONGOEI
DEFENDANT

-AND-

KIBWAMBOK KIRWA **THIRD**
PARTY

JUDGMENT:

1. The Plaintiff instituted the instant suit vide a Plaint dated 27th July, 2009, against the Defendant, seeking the following orders: -

a) **A Declaration that the suit parcel of land NANDI/MUTWOL/43 exclusively belongs to the plaintiff, and that by virtue of its ownership the plaintiff has the sole and exclusive use of the same.**

b) **An order of eviction do issue against the defendant to remove her from the property and thereafter, a permanent injunction do issue against the defendant and any other person(s) claiming through them, barring them from trespassing or from further encroachment, or from doing any**

**constructions in the said parcel of land No. NANDI/
MUTWOL/43.**

c) Costs of the suit and interest.

Plaintiff's Case:

2. The plaintiff stated that she is the registered owner of Land Parcel No. Nandi/Mutwot/43 measuring 8.52 Ha or thereabout and she has been in actual possession of the said parcel of land.
3. It was her claim that the defendant has purportedly laid claim on a portion of the said suit parcel and has further trespassed thereon.
4. It is her contention that the defendant's actions are not justifiable at all, as the defendant has no equitable rights and/or legal rights, or permission of the plaintiff to set upon the said land or construct structures thereon.
5. Consequently, she urged the court to allow her claim and grant the orders sought in the plaint.

Defendant's Case:

6. The plaintiff's case was opposed. The Defendant filed a Statement of Defence and Counter-Claim dated 03.09.2009, wherein she denied all the allegations raised in paragraphs 3,4,5,6,7 and 8 of the plaint and put the plaintiff to strict proof thereof.
7. She further stated that the suit land known as Nandi/Mutwot/43 originally belonged to Kirwa Arap Birir, who

- sold a portion measuring 16 1/2 acres to Kinyor Arap Cherwon and who then became registered as the owner of the whole parcel on 10.03.1966.
8. It was her contention that at the time when the land was sold to Kinyor Arap Cherwon, the family of Kipkosgei Kipkeino was already settled on portion of the said land parcel.
 9. Thus, as a result of the sale above, Kinyor Arap Cherwon was registered as a trustee for Kipkosgei Kipkeino who had been living on the land since the year 1958.
 10. Further, she averred that the said Kinyor Arap Cherwon later sold his section of the subject land parcel measuring approximately 16 1/2 acres to Alice Kapkiyai, the plaintiff herein. That subsequent to the said sale, the title deed for the entire land parcel was transferred to the plaintiff, who acknowledged that she was registered as a trustee for the family of Kipkosgei Kipkeino whom she found settled on part of the land.
 11. It was the defendant's contention that sometimes on 17.12.1982, the plaintiff signed an application to the land control board for consent to subdivide and transfer 1. 20 hectares of the subject land parcel to Kipkosgei Kipkeino.
 12. It was the defendant's claim that she purchased a portion measuring 2 acres of the said land parcel from Abraham Biwott and Joshua Metto who are the administrators and/or beneficiaries for and of the estate of the late Kipkoskei Kipkeino.

13. In her Counter-claim, she reiterated that she purchased a portion measuring 2 acres of the suit land parcel from Abraham Biwott and Joshua Metto, who are the administrators and or beneficiaries for and of the estate of the late Kipkoskei Kipkeino.
14. It was therefore her claim against the plaintiff to subdivide the land parcel and transfer to her the 2 acres which she purchased from the family of Kipkoskei Kipkeino.
15. In conclusion, she urged the court to dismiss the plaintiff's suit with costs, that judgment be entered in her favour in terms of paragraph 13 of her statement of defence together with costs and interests of the suit.
16. The plaintiff filed a Reply to Defence and Counter-Claim dated 08.09.2009 wherein she denied the contents of paragraphs 1,3, 4, 5, 6, 7, 8, 9, 10, 11,12, 14, 15 and 16 of the defence.
17. The plaintiff further in reply to the defence and counter-claim denied all allegations in the defence and counter-claim, and reiterated the plaint in its entirety.
18. The plaintiff further denied the defendant's claim in the counter-claim as pleaded in paragraph 13 of the defence, and the plaintiff reiterated that the defendant is a trespasser in the suit land.
19. In addition, it was her claim that the defendants' counter-claim is statute barred by the law of limitation, and further that the defendant has no claim or cause of action against

the plaintiff at all, and further that there was/is no privity of contract between the plaintiff and the defendant.

20. In the end, the plaintiff sought the dismissal of the defence and counter-claim, and urged the court to enter judgement in her favour as prayed for in the plaint.
21. In response to the Defence to Counter-claim, the Defendant (and counter-claimant) filed a Reply to the Defence to Counter-claim dated 23.09.2009, wherein she denied all the allegations raised in the defence to counter-claim and she reiterated the contents of the counter-claim and put the plaintiff to strict proof as to the contrary.
22. Consequently, she urged the court to dismiss the Defence to counter-claim for raising no triable issues and judgment be entered in favour of the defendant in terms of the counter claim.

Third Party's Case:

23. The Third Party filed a Statement of Defence dated 01.12.2015 in response to the plaint, wherein he denied the allegations made by the plaintiff and urged the court to dismiss the plaintiff's suit with costs and to allow his defence.
24. He denied the contents of paragraph 3, 4 & 5 of the plaint and invited the plaintiff to strict proof thereof. It was his claim that the suit land Nandi/Mutwot/43 originally belonged to his father Kirwa Arap Birir, who sold 16.5 acres to Kinyor

Kutuny arap Cherwon and who subsequently sold the same to the plaintiff.

25. It was his contention that at the time the said suit land was sold to Kinyor Kutuny in 1963, the family of Kapsirgoi was in occupation of their land of about 2 acres as shown by the 1964 map. That the plaintiff acknowledged being registered on behalf of Kipkeino (of Kapsirgoi family) and applied to the Land Control Board in the year 1982 to transfer about 3 acres into his name, but has now changed her story.
26. It is therefore his contention that the plaintiff's claim against the defendant is statutory barred and the same ought to be dismissed.
27. The Plaintiff filed a reply to the Third Party's statement of Defence dated 04.12.2015. The plaintiff reiterated the contents of the plaint in its entirety and prayed for dismissal of the 3rd party's defence with costs. In the alternative, she urged the court to enter judgment in her favour as sought in the plaint.
28. In addition, she reiterated the contents of paragraphs 3,4 and 5 of the plaint in response to paragraph 3 of the Third Party's Defence and invited the Third Party to strict proof of the contrary.
29. Paragraphs 4, 5, 6, 7, 8 and 9 of the Third Party defence was denied in toto and the plaintiff put the third party to strict proof thereof.

Trial:

30. The Plaintiff's case proceeded for hearing on 20.02.2017. The plaintiff testified as PW1. She adopted her witness statement dated 18th May, 2015 as her evidence in chief.
31. It was also her testimony that she bought the suit land in the year 1975 from Kinyor Cherwon at a consideration price of Kshs. 8,000. She explained that they went to the Land Control Board to obtain consent to transfer. That subsequently, the land was transferred and registered in her name and she produced the title deed of the suit land as PEX.1 and the Application for Consent before the Land Control Board as Pexh.2. She also produced a copy of the Certificate of Official Search as Pexh. 3.
32. She maintained that she purchased the entire suit parcel and have lived thereon since the year 1975. She further stated that at the time of purchasing the suit land, the defendant was not on the suit land.
33. It was her testimony that sometimes on 22.02.2006, she received a letter from the County that someone was claiming the land. She produced the said letter as PEX.4. That the matter was heard before the area Chief who found that the suit land belonged to her.
34. She also produced the following documents as Exhibits in support of her case: -
 - Minutes for LDT case No 29 of 2007 as PEXh 5.

Decree of Kapsaret LDT Case No. 83/08 as P.Exh 6; Demand letter dated 5/5/2009 as P.Exh 7, and Reply to Demand dated 12/6/2009 as PExh. 8.

35. In conclusion, she prayed that she be given the entire suit land as contained in the Title Deed since the same belongs to her.
36. On cross-examination by Mr. Nyachiro for the defendant, the plaintiff stated that the defendant entered the suit land in the year 2006 and still stays on the land. She further admitted that there is a boundary between her land and the defendant's land. When referred to the Pexh. 2, a copy of the Application for Consent to LCB, she stated that the size of the land in the map is shown as 16 Acres and she maintained that she bought the entire suit land.
37. She thus maintained that her claim is in respect to the whole suit land as contained in the title deed. She reiterated that she went to the LCB and obtained the requisite consent. She however conceded that there were people buried on the suit land although she did not attend the burials.
38. On cross-examination by Mr. Mitei for the Third Party, it was her testimony that one Kipmambuk Kirua sold land to Kituny Arap Cherwon, who later sold the entire suit land to her. She denied knowing Kirua Birir. It was however her testimony that the land originally belonged to the father of Kipmambuk.
39. When shown the Application for consent dated 7th December, 1982, she denied knowledge of the document

- and maintained that she has never intended to give back any portion of the suit land.
40. On Re-examination, she reiterated that she bought the entire suit land. That there were people on the land but they left upon purchase. She further stated that her claim is in respect to the entire parcel of land as registered in her name and maintained that she is not holding the land as a trustee.
 41. The plaintiff thereafter closed her case.
 42. The Defence case and the Third Party's case also proceeded for hearing. The Defendant testified as DW1. She adopted her witness statement dated 18.07.2014 as her evidence in chief. It was her testimony that in the year 2004, she went to Mutwot to look for land and she met the plaintiff who offered to sell her a parcel of land measuring 16 Acres.
 43. When referred to Pexhibit 2, she confirmed that LCB Consent indicated that the plaintiff's land was 16 Acres. She then produced a copy of the consent dated 22.12.1975 as Defence Exhibit 1.
 44. It was further her testimony that the title deed which the plaintiff showed her was for a portion of land measuring 20.5 Acres. That the portion above the 16 Acres from the 20.5 Acres had been given to Kipkosgei Keino as a gift.
 45. When referred to the Application for Consent dated 7.12.1982 and signed by the plaintiff and the said Kipkosgei Keino, it was her testimony that the application was for subdivision of the land into two portions measuring 7.32Ha

- and 1.20 Ha. She produced the application for consent as Defence Exhibit 2
46. She further explained that she bought addition portions of land measuring 0.7 Acres from Joshua Kibwambok Metto and 1.3 Acres from Jeremiah Kirwa. She produced the agreement dated 04.03.2005 as DExhibit 3 and the agreement dated 12.04.2007 as DExhibit 4.
 47. That in total she purchased 2 Acres from the plaintiff's land, where she has been residing on for the past 17 years even though she does not have a title. It was her claim that she wants the plaintiff to give her the title to the suit land in respect to the portion where she resides.
 48. On cross-examination by counsel for the plaintiff, it was her testimony that the plaintiff showed her the land which she purchased and at the time of purchase, the title of the land was in the name of the plaintiff.
 49. She maintained that the plaintiff told her that she was entitled to a portion of the subject land measuring 16 Acres. She however admitted that the plaintiff was not involved in the 2 agreements that she had entered into.
 50. When referred to DExhibit 2, she stated that she did not know whether the plaintiff did not sign the said document. She further stated that Mr. Kibwambok Kirwa sold to her 0.3 of an acre.
 51. When referred to Plaintiff exhibit 2, she stated that the Plaintiff was subdividing her land into two portions. When

- referred to defence exhibit 3, she conceded that she did not have a consent which arose from the application for consent.
52. She was also referred to green card attached to application dated 18th July,2011. She stated that on 19.09.1959, the land was in the name of Kirwa arap Birir. That the land was transferred to Kinyor Arap Cherwon on 10th March,1966. That the land was transferred to the Plaintiff on 18th April, 1980. She maintained that she carried out a search before she purchased the suit property and admitted that the property was in the name of the Plaintiff. She thus asserted that she purchased the suit property based on trust. She stated that she has never pursued Joshua and Jeremiah for selling to her non-existent land.
53. On Re-examination, she stated that Plaintiff told the court that she purchased 16 acres. The witness referred to defence exhibit 2. The acreage shown is 16 acres. That one has to obtain Land Control Board consent before transfer is effected. That the title deed for Plaintiff is 8.52 hectares. That the application for consent shows 16 acres.
54. When shown Plaintiff exhibit 1, she acknowledged that the title was issued on 28th April, 1980. She further maintained that did not buy a non-existent land and that she has been in occupation of the two acres for 17 years.
55. Jeremiah Kibwambok Arap Kirwa testified as DW2. He adopted his witness statement dated 01.12.2015 as his evidence in chief. It was also his testimony that the plaintiff

bought the suit land known as Nandi/Mutwot/43 from Kinyor measuring 16 acres.

56. He further explained that the original land measuring 21 Acres belonged to his father. That the land was then sold to Kinyor, who later sold the same to the Plaintiff. He stated that he is the Administrator of the estate of his late father.

57. He produced the following documents as exhibits in support of his case: -

A copy of the Limited Grant as Dexhibit 1.

Proceedings before the Land Disputes Tribunal Board as Dexhibit 2.

Application for consent of the Land Control Board as Dexhibit 3.

Minutes of a family meeting as Dexhibit 4.

Decree in the case in Kapsabet Chief Magistrate court as Dexh. 5.

Copy of death certificate of his father as Dexhibit 6.

Proceedings in Land Disputes Tribunal Case No. LDT 83 of 2007 as Dexhibit 7.

Application for Land Control Board in which Kinyor Cherwon transferred the land to the Plaintiff as Dexhibit 8.

58. He further testified that the plaintiff's title encompasses the land which is owned by the defendant. That there is a surveyor's report which shows that the 16 acres belonging to the plaintiff are intact. He added that they sold a portion of land measuring 1.3 acres to the defendant and the

defendant later bought an additional 0.3 acres from the family of those who had settled on the land.

59. On cross-examination by counsel of the plaintiff, he stated that his late father sold 16 acres to Kinyor Cherwon while he sold 1.3 acres to the defendant upon obtaining the grant in respect of the Estate of his father.
60. When referred to Pexhibit 3, it was his testimony that he was not in the meeting of 07.12.1982 when sub-division was being done. Further stated that he did not know about the disputed signature and admitted that there was no consent which was obtained pursuant to the application for consent to sub-divide.
61. On cross-examination by counsel for Third Party, he stated that there was no written agreement when his father sold land to Kinyor. He however maintained that the Plaintiff only purchased 16 acres.
62. He stated that he had not been shown a consent which the Plaintiff was given pursuant to the application for consent produced as Plaintiff exhibit 2. That the Plaintiff told the court that she purchased 16 acres. When referred to Plaintiff exhibit 2, he confirmed that the application stated that the Plaintiff bought 16 acres. The witness was also referred to the Survey report done pursuant to the court order. That according to that report, the Defendant is occupying 3.8 acres.
63. He however stated that the swamp area covers about 1.5 acres. That the Plaintiff on the other hand occupies 15.8

acres. It was also his claim that he had not been shown any consent in which the Plaintiff was directed to have the entire land registered in her name.

64. Joshua Kibwambok Meto testified as DW3. He adopted his witness statement dated 27th June, 2016 as his evidence in chief. In addition, it was his testimony that they were staying at Tanning near the Airport but their houses were burned. As a result, they we were forced to move to Nandi/Mutwot/43 belonging to Kirwa Birir in the year 1955, where Kirwa Birir gave them two acres.
65. He went on to explain that Kirwa Birir sold his land to Kinyor Kutuny and at the time of the said sale, they were residing on their two acres. That even when the plaintiff purchased the suit land, they were still in occupation of the portion of 2 acres of the suit land and that the Plaintiff even went to the Land Control Board and applied for subdivision into two portions;
66. He acknowledged a survey report having been carried out by County Surveyor of Nandi in which the Surveyor found that the suit land was measuring 8.284 Ha. That the Plaintiff was occupying about 16 acres whereas the defendant was in occupation of the portion he sold to her measuring 2 Acres of arable land and one acre of marshland.
67. In concluding his evidence in chief, he maintained that The Plaintiff should occupy 16 acres and the defendant should occupy the remainder, where she has been staying since 2005.

68. On cross-examination by the plaintiff's counsel, he was referred to the application for consent of the Land Control Board. It was his testimony that he was aware that the Plaintiff disputed the signature on the application. He confirmed that there was no consent of the Land Control Board which was obtained.
69. When referred to the application for consent, he maintained that the application made in 1982 was signed by both his father, Kipkeino and Plaintiff. When referred to Plaintiff exhibit 2, he stated that from the same, the Plaintiff was given 16 acres.
70. With regard to the to the Surveyor's report, it was his testimony that the same showed that the Plaintiff was occupying about 16 acres while the defendant was occupying 4.8 acres. He however clarified that the Defendant is occupying two acres whereas the balance of 2.8 acres is swampy area which belongs to the government.
71. He further conceded that they ought to have instituted Succession proceedings in respect to his late father's estate before selling the 2 acres' portion belonging to the estate.
72. On re-examination, he restated that suit land belonged to Kirwa Birir who was their relative and he gave them a place to stay since they were landless at the time.
73. Elly Ndalut testified as DW4. He adopted his witness statement dated 20th February,2017 as his evidence in chief. He was the secretary of the elders who sat down to

deliberate on land which was originally owned by Kirwa Birir and was later sold to Kinyor Kutuny.

74. He further stated that in 1958, the family of Kipkosgei Keino came into the land. That their family name is Kapsingoi. That the elders ruled that the family of Keino should be given 1.7 acres. It is this portion of land that was later sold to the defendant.
75. On cross-examination by the plaintiff's counsel, he admitted that he was not present when the plaintiff purchased the suit land. That the family of Kipkeino were given 0.7 acres and Kirwa Birir was given 1.3 acres. That he was not aware that the Plaintiff disowned the signature on the letter of application for consent of the Land Control Board. That the family of Kirwa Kibwambok should be given 0.7 acres. That there is no one utilizing the marshy area.
76. On cross-examination by counsel for the Defendant, he was referred to application for consent of the Land Control Board. He stated that he had not seen any report of the document examiner. That there is no OB which shows that the Plaintiff's signature was forged. That the family of Kirwa Birir were given 1.3 acres, and the family of Kipkeino was given 0.7 acres. That the Plaintiff is occupying about 16 acres. That the Defendant is staying on 4.8 acres. That the 2.8 acres is swampy. That the Defendant should be given 2 acres.
77. The third party thereafter closed his case.
78. Upon close of the Third-party's case, this court issued directions on the filing of final written submissions. However,

at the time of writing this judgment, only the plaintiff had filed his submissions, which I have read and considered.

Analysis and Determination:

79. I have critically considered and reviewed the plaint and the defences thereto, the respective exhibits and rival submissions in totality and in my view the following issues arise for determination: -

- a. Who is the bonafide, actual and lawful or legal owner of the suit land.*
- b. Whether the defendant's possession and occupation of a portion of the suit land measuring 2 Acres amounts to trespass.*
- c. Whether the plaintiff is entitled to the orders sought of eviction and injunction against the defendant.*
- d. Whether the defendant is entitled to the orders sought in the Counter-claim.*
- e. Who should bear the costs of the suit?*

a) Who is the bonafide, actual and lawful or legal owner of the suit land;

80. The plaintiff has urged this court to make a declaration that she is the bonafide, actual, lawful and registered owner of the entire suit land.

81. It is her claim that she validly purchased the entire suit land sometimes in the year 1975 from one Kitur Arap Cherwon. That they obtained the relevant Land Control Board consent and the suit parcel was subsequently transferred and registered in her name as the sole owner.
82. To support her ownership claims, the plaintiff who testified as PW1, produced a copy of the title deed, Application for the LCB Consent and certificate of official search as Pexhibits 1, 2 and 3 respectively, which exhibits remained uncontroverted.
83. The defendant on the other hand maintained that she is the lawful and rightful owner of a portion of the suit land measuring 2 Acres, having validly purchased a portion measuring 1.7 Acres and 0.3 Acres from Joshua Metto and Abraham Biwott respectively. It was her claim that her portion of 2 acres fell within the suit land registered in the name of the plaintiff. It is therefore her argument that the plaintiff holds the said 2 Acres portion in trust on her behalf.
84. The third party on his part admitted to the sale and registration of the suit land in the name of the plaintiff. He however maintained that the plaintiff did not purchase the entire suit parcel but only purchased a portion measuring 16 Acres.
85. He further averred that the plaintiff was fully aware that she held 2 portion in trust for the family of Kipkosgei Kipkeino and that is why she made an application to the LCB for consent to subdivide the suit land into 2 portions measuring

7.2 Ha and 1.20 Ha. These averments were however denied by the plaintiff, who maintained that she never signed any application for consent of the LCB with the intention to subdivide the suit parcel.

86. To support their claim, the defendant and the Third Party produced an Application for Consent of the LCB as Dexhibits 3 and 8. They also produced the Decree in Kapsabet Chief Magistrates Court as Dexhibit 5.
87. It is common ground that the plaintiff is the registered owner of the entire suit land and she produced the title deed as Pexhibit 1 as proof of her ownership claims. Section 26 of the Land Registration Act provides that a certificate of title shall be held as conclusive evidence of proprietorship.
88. Section 26 of the Act provides as follows: -

“(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.

89. With regard to the claims that the plaintiff only purchased 16 Acres, I must state that the burden of proof was on the Defendant and the Third Party pursuant to the provisions of section 107, 108, 109 and 112 of the Evidence Act, particularly in proving the allegations that only 16 Acres was sold to the plaintiff, and not the entire land.
90. An application to the LCB for consent to subdivide without any consent duly issued thereto and further evidence in the form of an agreement for sale is not sufficient proof of the alleged claims. No evidence was produced in court to explicitly demonstrate that indeed the portion sold to the plaintiff was only 16 Acres and not the entire suit parcel. In the absence of proof, this court is unable to find in favor of the defendant and the third party on the issue of 16 Acres.
91. In conclusion of this issue, it is the finding of this court that the plaintiff is the bonafide, actual and lawful owner of the entire suit land as registered in the title deed (Pexh. 1) and is consequently entitled to all the rights and interests accruing from such registration as provided under sections 24 and 25 of the Land Registration Act. Further, the

certificate of title has never been impeached on the grounds as outlined in section 26 above.

b) Whether the defendant possession and occupation of a portion of the suit land measuring 2 Acres amounts to trespass;

92. The second issue and which is at the center of the dispute herein is on trespass and/or encroachment and whether the defendant's claim on the suit land is justified.
93. Section **3 (1)** of the **Trespass Act, Cap 294** provides that:
"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."
94. It is the plaintiff's claim that the defendant without any lawful, justifiable excuse and/or legal rights entered into a portion of the suit land and began construction hence the instant suit.
95. The defendant on her part maintained that the portion of the suit land measuring 2 Acres, which she has been occupying for over 17 years lawfully belongs to her even though she has no title registered in her name.
96. It was her claim that she validly purchased the said portion from one Joshua Kibwambok Metto and Abraham Biwott.

That pursuant to the said sale, she took possession of the portion and has been in occupation for over 17 years.

97. Even though she admitted that the suit parcel is registered in the name of the plaintiff, it was her contention that the plaintiff holds the portion measuring 2 Acres in trust for the family of Kipkosgei Kipkeino.
98. The Third Party on his part admitted the sale of the suit land to the plaintiff. It was however his claim that only a portion measuring 16 Acres was sold to the plaintiff and the remaining portion lawfully belonged to their family.
99. It was also his contention that the plaintiff's ownership was only limited to the 16 Acres sold and/or purchased and not of the entire suit parcel which he claimed measured 21 Acres. He thus maintained that the registration of the plaintiff as the owner of the entire suit land was for the plaintiff to hold a portion measuring around 4 Acres in trust for the family and the defendant.
100. I have carefully considered the rival arguments made by the parties herein. From the evidence tendered and the documents produced, it is not in dispute that the plaintiff is the registered owner of the suit land. The plaintiff produced a copy of the title deed and certificate of official search as Pexh. 1 and 3 respectively in support of her claim.
101. Further, it is also common ground that the plaintiff's acquisition and/or purchase of the suit parcel is not contested. Both PW1 and the Defence witnesses gave a

history of the original ownership of the suit land and the subsequent sales thereto and which was ultimately sold to the plaintiff. What however appears to be in dispute is the acreage. However, I have dealt with the said issue at length in the above issue and I wish not to belabor the point.

102. It is further settled that the certificate of title registered and held by the plaintiff has never been impeached on the grounds outlined under section 26 of the Land Registration Act or at all. In addition, no trust has been pleaded and sufficiently demonstrated by either the defendant or the third party herein.
103. Consequently, I find no lawful reason and/or justifiable excuse demonstrated by the defendant herein for her entry into and remaining in occupation of a portion of the suit land measuring approximately 2 acres, without the express permission or consent by the plaintiff.
104. In the case of [Hexmead Investments Ltd v Mcdonald Mariga & 2 others \[2016\] eKLR](#) the court held as follows:-
“In the absence of any evidence from the defendants, the only conclusion this court can make is that the defendants have no justifiable cause for entering and putting up a structure on the suit property and as such they are trespassers thereon.”

105. In the premises therefore, I find that the defendant's possession and occupation of a portion of the suit land measuring 2 acres amounts to trespass and/or forcible detainer.

c. Whether the plaintiff is entitled to the orders sought of eviction and injunction against the defendant;

106. In addition to the declaratory orders sought by the plaintiff, she also sought orders of eviction and injunction against the defendant from the portion of the suit land illegally occupied.

107. Having held that the defendant's possession and occupation of a portion of the suit land measuring 2 Acres amounts to trespass and further having declared that the plaintiff is the absolute, actual and bonafide owner of the entire suit land and being entitled to exclusive rights and privileges thereto, it is my considered view that there is need to issue the eviction and injunction orders as sought in the plaint.

d. Whether the defendant is entitled to the orders sought in the Counter-claim;

108. The defendant in her counter-claim urged the court to direct the plaintiff to subdivide the land parcel and transfer to her the 2 acres which she purchased from the family of Kipkoskei Kipkeino.

109. However, in light of the findings in issues (a), (b) and (c) above, it is the finding of this court that the defendant is not entitled to the orders sought in the counter-claim. The same was not proved to the required standard.
110. As a result, thereof, the counter-claim and the grounds outlined therein are not merited and are hereby dismissed.

e. Who should bear the costs of the suit?

111. A successful party should ordinarily be awarded costs of the suit unless the court, for good reason, directs otherwise.
112. In this case, having held that the Plaintiff has satisfactorily proved her case against the Defendant to the required threshold, I find that she is entitled to costs of the suit and the counter-claim.

CONCLUSION:

113. In conclusion, it is the finding of this court that the Plaintiff has proved her claim against the defendant. Consequently, the Plaint dated 27th July, 2009 is merited and is accordingly **allowed** on the following terms;

a) A Declaration be and is hereby made that the suit parcel of land known as NANDI/ MUTWOL/43 exclusively belongs to the plaintiff, and that by virtue of its ownership the plaintiff should have the sole and exclusive use of the same.

b)The Defendant be and is hereby directed to vacate and/or cede vacant possession of the suit land No. NANDI/ MUTWOL/43 or any portion thereof within a period of 90 days from the date of this judgment. In default thereof, an Order of Eviction shall automatically issue without further reference to this court and to be executed by the Court bailiff.

c)An Order of Permanent Injunction be and is hereby issued against the Defendant, her agents, servant and any other person(s) claiming through her, barring them from trespassing or from further encroachment, or from doing any constructions in the said parcel of land No. NANDI/ MUTWOL/43.

d)The Counter-claim be and is hereby dismissed.

e)Costs of the suit and the Counter-claim are awarded to the Plaintiff to be borne by the Defendant.

114. It is so ordered.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on **13TH day of NOVEMBER, 2025.**

**HON. C. K. YANO
ELC, JUDGE**

In virtual presence of; -

Mr. Nyachiro for the Defendant.

Ms. Isiaho for the Plaintiff.

No appearance for the Third Party.

Court Assistant - Laban

ORIGINAL