

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELCA CASE NO. E003 OF 2023**

**RICHARD KIBET TONUI.....**  
**.....APPELLANT**

**VERSUS**

**PAUL KIMUTAI LABOSO.....**  
**.....RESPONDENT**

*(Being an appeal arising from the judgement of Hon. E. Muleka on  
5<sup>th</sup> September, 2023 in Sotik CM ELC Case No. 110 of 2021)*

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**JUDGEMENT.**

**INTRODUCTION.**

1. By a Memorandum of Appeal dated 3<sup>rd</sup> October, 2023 the Appellant challenges the decision of **Hon. E. Muleka** in Sotik CM ELC Case No. 110 of 2021.

**FACTUAL BACKGROUND.**

2. In the subordinate Court, the Appellant filed the Complaint dated 29<sup>th</sup> January, 2020 against the Respondent and sought the following orders;

- a. The Plaintiff (sic) vacates the Plaintiff's property land parcel LR No. Kericho/Silibwet/1886 and in default an eviction order do issue.**
- b. A permanent injunction restraining the Defendant as well as his servants, agents and employees from interfering with, trespassing, cultivating, destroying fences, defacing boundaries, destruction of the land and trees, disposing, alienating or in any other manner whatsoever dealing with the land parcel LR No. Kericho/Silibwet/1886 to the detriment of the Plaintiff's proprietary interests.**
- c. General damages to be assessed by the Honourable Court for trespass to his property LR No. Kericho/Silibwet/1886.**
- d. Costs of this suit as well as interests (sic) at Court rates.**
- e. Any other relief this Honourable Court may deem fit and just to grant.**

3. The Respondent filed his Statement of Defence and Counterclaim dated 8<sup>th</sup> September, 2020. It was subsequently amended on 8<sup>th</sup> September, 2022.

4. In the Amended Statement of Defence and Counterclaim, the Respondent sought the following prayers;

**a. Plaintiff's suit be dismissed with costs.**

**b. Counter-claim be allowed with costs.**

5. The Learned Trial Magistrate delivered judgement on 5<sup>th</sup> September, 2023 and held as follows;

***"I will not belabor myself so much but clearly the transactions that led to the acquisition of land title Kericho/Silbwet/1886 were illegal. There is no way the Plaintiff Could have acquired title without the consent being given by the Defendant herein.***

***I have carefully considered the submissions by Counsel for the***

***Defendant and I have no doubt in my mind that the same was obtained fraudulently and therefore it's bad title.***

***I hereby entered (sic) judgement in favour of the Defendant and his counter-claim as drawn in the defence and counter claim.***

***The Plaintiff's suit is hereby dismissed with costs to the Defendant."***

6. The Appellants being aggrieved by the said judgement approached this Court by way of Appeal.
7. The appeal was admitted for hearing on 10<sup>th</sup> March, 2025 and the Court issued directions that it be heard by way of written submissions.
8. The Appeal was mentioned on 30<sup>th</sup> April, 2025 to confirm filing of submissions and was reserved for judgement on 12<sup>th</sup> May, 2025.

## **THE APPEAL.**

9. The grounds of appeal are as follows;

***a. That the Learned Trial Magistrate erred in law and in fact when he held that the transactions between the Plaintiff (sic), the Defendant (sic) and Christopher Koech was tainted with illegalities whereas the evidence on record clearly indicates the transactions on land parcel LR Kericho/Silibwet/1886 was conducted voluntarily by the concerned parties.***

***b. That the Learned Trial Magistrate erred in law and in fact when he held that the title deed being held by the Plaintiff (sic) was acquired illegally when the green card clearly shows that the Defendant (sic) transferred the suit property to the Plaintiff (sic).***

***c. The Learned Trial Magistrate erred in law and in fact by failing to consider that the Plaintiff (sic) has been in occupation of the suit land since the year 2001.***

- d. That the Learned the Learned (sic) Trial Magistrate erred in law and in fact by ordering for the cancellation of the title deed to land parcel LR Kericho/Silibwet/1886 without indicating in the number it should revert to. (sic)**
- e. That the Learned Trial Magistrate erred in law by making a declaration that the title deed to land parcel LR Kericho/Silibwet/1886 was fraudulently obtained yet fraud was not pleaded.**

**10.** The Appellant prays that the appeal be allowed, the judgement delivered in Sotik ELC Case No. 110 of 2021 be set aside and a verdict be entered in his favour. He also prays that he be awarded costs.

**ISSUES FOR DETERMINATION.**

**11.** The Appellant filed his submissions on 29<sup>th</sup> April, 2025 while the Respondent filed his submissions on 30<sup>th</sup> April, 2025.

- 12.** The Appellant submits on whether the Memorandum of Appeal has merit.
- 13.** The Appellant relies on the judicial decisions of **Selle & Another versus Associated Motor Boat Co. Ltd & Others (1968) EA 123, Jabane Versus Olenja (1968) KLR 661, Mbogo & another versus Shah (1968) EA 93** and submits that this being a first appeal, this Court has a duty to reconsider the evidence, evaluate it and draw its own conclusions.
- 14.** The Appellant submits that he is the indefeasible owner of the suit parcel and that he moved the Court after his right to property was infringed by the Respondent.
- 15.** The Appellant also submits that a copy of the green card for land parcel **No. Kericho/Silibwet/1886** was produced before the trial Court and it contains the chronology of ownership.

- 16.** The Appellant further submits that the suit parcel was initially registered in the name of **Sawe Lasoi**.
- 17.** It is the Appellant's submissions that in the year 1999, the Respondent was registered as the owner of the suit parcel.
- 18.** It is also the Appellant's submissions that in the year 2005, the Respondent transferred the said parcel of land to him.
- 19.** It is further the Appellant's submissions that he obtained title to the suit parcel six years after the Respondent was registered as the owner.
- 20.** The Appellant submits that the Respondent approached him and told him that he was selling the suit parcel. The Appellant further submits that he conducted a search which confirmed that the suit parcel was registered in the

Respondent's name and that is when he decided to purchase it.

- 21.** It is the Appellant's submissions that a copy of a land sale agreement was produced which showed that he purchased the suit parcel in the year 2001.
- 22.** It is also the Appellant's submissions that the Respondent was settled on another parcel of land and he reiterates that in the year 2005, the Respondent transferred the suit parcel to his (Appellant) name.
- 23.** It is further the Appellant's submissions that the Respondent in his witness statement stated that he exchanged his parcel of land with one **Christopher Koech**. He submits that this was an acknowledgement of the contents of the sale agreement dated 12<sup>th</sup> July, 2001.

- 24.** The Appellant submits that the Respondent also stated that he was surprised to learn that **Christopher Koech** had registered land parcel **No. Kericho/Silibwet/1886** in his (Respondent) name before transferring it to his (Appellant) name.
- 25.** The Appellant also submits that contrary to the Respondent's assertions, the green card shows that it is the Respondent who transferred the land to him (Appellant) and he cannot therefore be said to have acquired the suit parcel fraudulently.
- 26.** The Appellant further submits that the Respondent contends that the suit parcel initially belonged to a deceased person and that succession was yet to be done.
- 27.** It is the Appellant's submissions that as per the green card, the suit parcel was first registered in the name of the Respondent and not in the name of any deceased person.

28. It is also the Appellant's submissions that he has gone above and beyond to demonstrate that he acquired the suit parcel legally, formally and free from any encumbrances.
29. The Appellant reiterates that the Respondent in his pleadings claimed that succession proceedings were not done and therefore the Appellant fraudulently transferred the said parcel of land to his name.
30. The Appellant relies on **Sections 24, 25 and 26** of the **Land Registration Act**, **Sections 107 (1), 109 and 112** of the Evidence Act, the judicial decisions of **Munyu Maina vs Hiram Gathiha Maina [2013] eKLR**, **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**, **Nguruman Limited vs Ian Bonde Nielsen & 2 Others [2014] eKLR** and submits that the Respondent's actions of disrupting his (Appellant) possession of the suit parcel when he had already sold the land is treacherous.

- 31.** It is the Appellant's submissions that the Respondent alleged in his Counterclaim that the suit parcel initially belonged to his deceased father **Sowe Maritim**.
- 32.** It is also the Appellant's submissions that even though the Respondent produced a copy of his deceased father's death certificate, he did not produce any Letters of Administration Ad Litem to show that he had the capacity to sue on behalf of the estate of his deceased father.
- 33.** It is further the Appellant's submissions that the Respondent should have sued **Christopher Koech** for non-performance of their agreement instead of trespassing on the suit parcel.
- 34.** The Appellant relies on the judicial decision of **Republic -vs- Rosemary Wairimu Munene; Ex parte Ihururu Dairy Farmers Co-operative Society Ltd [2014] eKLR** and

urges the Court to allow the appeal by granting the prayers sought in the Plaint dated 29<sup>th</sup> January, 2020.

**35.** The Respondent submits on the following issues;

**a. *Whether the transaction between the Plaintiff/Appellant (sic), the Defendant/Respondent (sic) and Christopher Koech was tainted with illegalities.***

**b. *Whether the title deed being held by the Plaintiff/Appellant (sic) was acquired illegally.***

**c. *Whether the Plaintiff/Appellant (sic) has been in occupation of the suit land since 2001.***

**d. *Whether the Appellant has satisfied the test for the judgement entered against the Plaintiff/Appellant (sic) by the trial Court on 5<sup>th</sup> September, 2023 to be set aside. (sic)***

- 36.** On the first issue, the Respondent submits that the transaction between him, the Appellant and **Christopher Koech** was tainted with illegalities.
- 37.** The Respondent also submits that firstly, there was no agreement between him (Respondent) and the Appellant herein over the suit parcel of land.
- 38.** The Respondent further submits that an agreement dated 12<sup>th</sup> July, 2001 was produced before the trial Court and it was between the Appellant and **Christopher Koech**.
- 39.** It is the Respondent's submissions that **Christopher Koech** alleged to have entered into an agreement with him (Respondent) in the year 1998 where they verbally exchanged their respective parcels of land.

- 40.** It is also the Respondent's submissions that no evidence was produced to demonstrate any such agreement and therefore **Christopher Koech** had no capacity to sell the suit parcel to the Appellant.
- 41.** The Respondent relies on **Section 3(3)** of the **Contract Act** and submits that the said **Christopher Koech** did not perform his part of the oral agreement.
- 42.** The Respondent submits that **Christopher Koech** in his witness statement stated that he had a discussion with the Respondent's wife and they allegedly agreed that instead of **Christopher Koech** paying the purchase price of the suit parcel, he would purchase for them another parcel of land. He also stated that he purchased land in Suswondo, Bomet County where the Respondent allegedly moved his family after transferring the suit parcel to his name.

- 43.** The Respondent also submits that **Christopher Koech** admitted that he did not pay the purchase price and further submits that his (Respondent) wife was not a party to their alleged agreement.
- 44.** The Respondent further submits that the assertions that he (Respondent) transferred the suit parcel to **Christopher Koech's** name are not true because the green card shows that the land has never been registered in the name of **Christopher Koech.**
- 45.** The Respondent relies on **Section 45(1)** of the **Law of Succession Act,** and submits that as per the green card produced during the hearing as **Exhibit 4,** the suit parcel was initially registered in the name of **Sowe Maritim** his deceased father.

- 46.** It is the Respondent's submissions that his deceased father was registered as the owner of the suit parcel on 23<sup>rd</sup> July, 1999.
- 47.** It is also the Respondent's submissions that on 28<sup>th</sup> July, 1999, the said parcel of land was transferred to his (Respondent) name.
- 48.** It is further the Respondent's submissions that he produced a copy of his deceased father's death certificate which showed that his father died in the year 1972.
- 49.** The Respondent submits that any transaction done on the property of a deceased person before succession amounts to intermeddling with the estate of a deceased person which is an offence under **Section 45** of the **Law of Succession Act**.

50. The Respondent also submits that no succession proceedings were commenced with respect to his deceased father's estate and neither did he transfer the suit parcel to the Appellant.
51. The Respondent relies on the judicial decision of **Re Estate of Charles Gungu Gwiyanga (Deceased) (Succession Cause 44 of 2021) [2022] KEHC 10300 (KLR)** in support of his submissions.
52. The Respondent further submits that it was the Appellant's evidence that the parcel of land **Christopher Koech** gave him (Respondent) belonged to **Daniel Mosonik**.
53. It is the Respondent's submissions that the said **Daniel Mosonik** was not called as a witness.
54. It is also the Respondent's submissions that the Learned Trial Magistrate correctly observed that the transaction

between him, the Appellant and **Christopher Koech** was tainted with illegalities.

- 55.** On the second issue, the Respondent relies on the judicial decision of **Milankumar Shah and 2 Others vs City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05))** and reiterates that **Christopher Koech** had no capacity to sell the suit parcel as it was not registered in his name.
- 56.** The Respondent submits that no explanation was given as to why the sale agreement was between the Appellant and **Christopher Koech** and yet the green card shows that the land was transferred from him (Respondent) to the Appellant.
- 57.** On the third issue, the Respondent relies on **Sections 107, 109 and 112** of the **Evidence Act** and submits that no evidence was produced before the trial Court to show that

the Appellant has been in occupation of the suit parcel since the year 2001.

- 58.** On the fourth issue, the Respondent relies on the judicial decision of **Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR)** and submits that this Court can only set aside the judgement of the trial Court if the trial Court acted on the wrong principles of the law and/or exercised its discretion injudiciously.
- 59.** The Respondent concludes his submissions by relying on **Section 27 (1)** of the Civil Procedure Act, the judicial decision of **Republic -vs- Rosemary Wairimu Munene; Ex parte Ihururu Dairy Farmers Co-operative Society Ltd [2014] eKLR** and urges the Court to dismiss the Appellant's appeal with costs.

### **ANALYSIS AND DETERMINATION.**

- 60.** The issues that arise for determination are as follows;

**a. Whether the Learned Trial Magistrate erred in law and in fact in finding that the Appellant acquired land parcel No. Kericho/Silibwet/1886 illegally.**

**b. Whether the Learned Trial Magistrate erred in law and in fact in failing to consider that the Appellant had been occupation of the suit parcel since the year 2001.**

**c. Whether the Learned Trial Magistrate erred in ordering for the cancellation of the title deed for land parcel No. Kericho/Silibwet/1886.**

**d. Whether the Learned Trial Magistrate erred in law and in fact in finding that the title deed for land parcel No. Kericho/Silibwet/1886 was fraudulently obtained and yet fraud was not pleaded.**

**e. Who should bear costs of the appeal.**

**A. Whether the Learned Trial Magistrate erred in law and in fact in finding that the Appellant acquired land parcel No. Kericho/Silibwet/1886 illegally.**

**61.** The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. It was held as follows;

***“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”***

(Emphasis mine)

**62.** In **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court held as follows;

**“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”** (Emphasis mine)

**63.** This question for determination addresses grounds **1** and **2** of the Appellant’s Memorandum of Appeal.

**64.** The Appellant contends that the Learned Trial Magistrate erred in finding that the transactions between him, the Respondent and one **Christopher Koech** was tainted with illegalities.

**65.** The Appellant also contends that from the evidence on record, the transactions over land parcel **No.**

**Kericho/Silibwet/1886** were voluntarily conducted by the parties.

66. The Appellant submits that it is the Respondent who transferred the suit parcel to his (Appellant) name.
67. The Respondent submits that the transactions over land parcel **No. Kericho/Silibwet/1886** were tainted with illegalities.
68. It is the Respondent's submissions that the suit parcel was initially registered in his deceased father's name and it was transferred to the Appellant before succession proceedings were commenced.
69. It is also the Respondent's submissions that there is no agreement between him and the Appellant over the suit parcel and instead, there is an agreement for sale of the suit parcel between the Appellant and **Christopher Koech**.

**70.** It is further the Respondent's submissions that the said **Christopher Koech** has never been the registered owner of the suit parcel.

**71.** The Learned Trial Magistrate in his judgement held as follows;

***"Having heard the testimonies for both the Plaintiff and the Defendant must say I (sic) am appalled by what happened here.***

***These are three old men who were involved in illegalities from the beginning.***

***Christopher Koech and Paul Laboso kicked off the chain of events by entering into verbal agreements of sale of land then through again the instructions of Laboso's wife the deal changes and they decide to exchange parcels instead of money.***

***This gets worse when the Defendant herein realizes that the parcel Christopher Koech purported***

**to exchange with him land that belongs to someone else one Daniel Musonik and no transfer could be done. (sic)**

**He rushes back and finds that his parcel had been sold by Christopher to the Plaintiff herein and transfer done and a title deed issued. Hence this suit.**

**I will not belabor myself so much but clearly the transactions that led to the acquisition of land title Kericho/Silbwet/1886 were illegal. There is no way the Plaintiff could have acquired title without the consent being given by the Defendant herein.**

**I have carefully considered the submissions by counsel for the Defendant and I have no doubt in my mind that the same was obtained fraudulently and therefore it's bad title.**

**I hereby enter judgement in favour of the Defendant and his counter-**

***claim as drawn in the defence and Counter claim.***

***The Plaintiff's suit is hereby dismissed with costs to the Defendant."***

- 72.** A perusal of the Court record shows that the Appellant testified as **PW1**. He produced a copy of the title deed for land parcel No. Kericho/Silibwet/1886 (**Exhibit P1**) which showed that he was registered as the owner on 29<sup>th</sup> December, 2005. He also produced a copy of a handwritten land sale agreement dated 12<sup>th</sup> July, 2001 as **Exhibit P2**.
- 73.** The said sale agreement is between **Christopher K. Koech** (seller) and **Richard K. Tonui** (Purchaser). It states that **Christopher K. Koech** was selling a portion of a parcel of land whose particulars are not legible, measuring 0.83 Ha for Kshs. 380,000/=. It states that the purchase price was paid on 12<sup>th</sup> July, 2001 which was the date the agreement was entered into.

- 74.** The agreement further states that the said parcel of land was initially owned by **Paul Kimutai Laboso** who was given another parcel of land in exchange. The parcel of land given in exchange measured 1.65 acres and was part of a parcel of land whose particulars are also not legible.
- 75.** The Appellant also produced a copy of the green card for land parcel **No. Kericho/Silibwet/1886** as **Exhibit P4**. It states that the said parcel of land measures 0.83 Ha and that it is a subdivision of Plot No. 257.
- 76.** Entry No. **1** is dated 23<sup>rd</sup> July, 1999 when **Sowe Arap Maritim** of P.O Box 13, Bomet was registered as the owner. Entry No. **2** is dated 28<sup>th</sup> July, 1999 when **Paul Kimutai Laboso** ID No. 0734793 P.O Box 13, Bomet was registered as the owner.
- 77.** Entry No. **3** is also dated 28<sup>th</sup> July, 1999 when the title deed was issued.

- 78.** The said green card has two entries stated as No. **4**. The first entry stated as No. **4** is dated 28<sup>th</sup> December, 200 (sic) when a restriction was registered prohibiting any dealings over the said parcel of land until the determination of Civil Case No. 36 of 2001.
- 79.** The second entry stated as No. **4** is dated 29<sup>th</sup> December, 2005 when **Richard Kibet Tonui** ID No. 15233898 was registered as the owner. Entry No. **5** is also dated 29<sup>th</sup> December, 2005 when the title deed was issued.
- 80.** The green card is certified as a true copy of the original by the District Land Registrar, Bomet on 26<sup>th</sup> August, 2020.
- 81.** Upon cross examination, the Appellant confirmed that at the time he was purchasing the suit parcel, it was registered in the name of the Respondent.

- 82.** He also admitted that the sale agreement he produced was between him and **Christopher Koech**. The Appellant confirmed that he did not pay the Respondent the purchase price.
- 83.** This was also the evidence of **Christopher K. Koech** who testified as **PW2**. During cross examination, he admitted that at the time he was selling the suit parcel to the Appellant, the land was not registered in his name.
- 84.** He confirmed that he had purchased the suit parcel from the Respondent and admitted that he did not finish paying the purchase price because he had no money.
- 85.** He stated that since he had no money, he gave the Respondent a parcel of land known as Kericho/Kapsembini (sic) in exchange of the suit parcel. He admitted that Kericho/Kapsembini (sic) was not registered in his name but was registered in the name of **Daniel Mosonik**.

**86.** The Respondent testified as **DW1**. It was his evidence that the suit parcel belonged to his deceased father one **Sowe Maritim** who died in September, 1972. Upon cross examination, he stated that he sold the suit parcel to **Arap Koech**. Upon re-exam, he stated that the agreement for sale of land produced in Court was between **Christopher** and the Appellant. He also stated that he was not involved in the said sale.

**87.** From the evidence adduced before the Learned Trial Magistrate, it is evident that at the time the Appellant purchased the suit parcel, it was registered in the name of the Respondent.

**88.** It is also evident that the Appellant did not purchase the suit parcel from the registered owner who was the Respondent but purchased it from one **Christopher Koech**.

**89.** The said **Christopher Koech** admitted that at the time he sold the suit parcel, it was not registered in his name.

**90.** It is important to note that the Appellant produced a copy of the title deed for land parcel No. Kericho/Silibwet/1886 (**Exhibit P1**) which shows that he was registered as the owner on 29<sup>th</sup> December, 2005.

**91. Section 26** of the Land Registration 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.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”**

92. In the judicial decision of **Meli v Rop [2025] KEELC 609 (KLR)** the Court while considering the provisions of **Section 26** of the Land Registration Act held as follows;

**“From the above statutory provision, a certificate of title is to be taken as prima facie proof that the person**

**named is the indefeasible proprietor of the land. However, such a title can be challenged on grounds of fraud, misrepresentation or that it was acquired illegally, unprocedurally or through a corrupt scheme. The Court must therefore examine the title held by the Defendant to determine whether it was acquired by mistake or fraud as alleged. In ascertaining this, the Court must interrogate the root of title and the documentary evidence presented by the parties.”** (Emphasis mine)

**93. In *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR the Court of Appeal 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.** (Emphasis mine)

- 94.** Before the trial Court, the Appellant was seeking to assert his rights as the registered owner of the suit parcel. The Respondent in his statement of Defence and Counterclaim challenged the root of the Appellant's title.
- 95.** In the judicial decision of **Meli v Rop** (supra) cited above, the Court held that a certificate of title can be challenged on the grounds of fraud, misrepresentation or that it was acquired illegally, unprocedurally or through a corrupt scheme.

- 96.** An analysis of the evidence adduced before the Trial Court shows that the Appellant acquired the suit parcel illegally as he did not purchase it from the registered owner.
- 97.** It is therefore this Court's view that the Learned Trial Magistrate did not err in finding that the Appellant acquired the suit parcel illegally.
- 98.** Grounds **1** and **2** of the Memorandum of Appeal therefore fail.

**B. Whether the Learned Trial Magistrate erred in law and in fact in failing to consider that the Appellant had been occupation of the suit parcel since the year 2001.**

- 99.** The Appellant contends that the Learned Trial Magistrate erred in failing to consider that he had been in occupation of the suit parcel since the year 2001.

**100.** The Respondent submits that the Appellant did not produce any evidence before the trial Court to demonstrate that he had been in occupation of the suit parcel since the year 2001.

**101.** Upon perusal of the judgement of the trial Court delivered on 5<sup>th</sup> September, 2023, it is evident that the Learned Trial Magistrate did not address the issue of whether or not the Appellant was in possession of the suit parcel.

**102.** It is important to note that the prayers sought by the Appellant before the trial Court were that;

**a. *The Respondent be evicted from the suit parcel.***

**b. *A permanent injunction be issued restraining the Respondent from dealing with the suit parcel.***

**c. *General damages for trespass and costs of the suit.***

**103.** The Respondent on the other hand contended in his Statement of Defence and Counterclaim that the exchange of the suit parcel between himself and **Christopher Koech** was null and void and that the Appellant acquired the suit parcel fraudulently.

**104.** Essentially, the Appellant was seeking that the Respondent be evicted from the suit parcel. On the other hand, the Respondent challenged the root of the Appellant's title.

**105.** From the evidence adduced before the trial Court, it is evident that the issue whether or not the Appellant was in occupation of the suit parcel was not in contention.

**106.** It is therefore this Court's view that in determining the suit, it was not necessary for the Learned Trial Magistrate to consider whether or not the Appellant was in occupation of the suit parcel.

**107.** This ground of appeal therefore fails.

**C. Whether the Learned Trial Magistrate erred in ordering for the cancellation of the title deed for land parcel No. Kericho/Silibwet/1886.**

**108.** The Appellant at ground 4 of his Memorandum of Appeal states that the Learned Trial Magistrate erred in ordering for the cancellation of the title deed for land parcel No. Kericho/Silibwet/1886.

**109.** Neither of the parties addressed this issue in their submissions.

**110.** In **Khetshi Dharamshi & Company Ltd v Obuyumbi (Appeal 10 of 2023) [2023] KEELRC 2664 (KLR) (30 October 2023) (Judgment)** the Court held as follows;

***“4.To answer the 1<sup>st</sup> issue, the Court returns (sic) that the appellant has made no***

**submissions on the issue of want of jurisdiction by the trial Court per Grounds 1 and 2 of appeal and as submitted for the Respondent, the Appellant is deemed to have abandoned the two grounds. The Court returns that the two grounds stand abandoned accordingly.**  
(Emphasis mine)

**111.** In the judicial decision of **Kamonde v Mulonzya & another (As Administrators of the Estate of Paul Vinzi - Deceased) (Civil Case E213 of 2022) [2024] KEHC 5648 (KLR) (9 May 2024) (Judgment)** the Court held as follows;

***“There was no submission on other grounds of Appeal hence they are deemed abandoned.”***

**112.** Similarly, in the present Appeal, the Appellant did not submit on ground 4. I shall deem it as having been abandoned.

**D. Whether the Learned Trial Magistrate erred in law and in fact in finding that the title deed for land parcel No. Kericho/Silibwet/1886 was fraudulently obtained and yet fraud was not pleaded.**

**113.** The Appellant contends that the Learned Trial Magistrate erred in finding that he obtained title to land parcel **No. Kericho/Silibwet/1886** fraudulently and yet fraud was not pleaded.

**114.** The Respondent submits that the Appellant acquired the suit parcel fraudulently as no succession proceedings were conducted with respect to the estate of **Sowe Maritim** (deceased) for the land to be transferred to his (Respondent) and/or the Appellant's name.

**115.** The Learned Trial Magistrate held as follows in his judgement;

***“I have carefully considered the submissions by counsel for the Defendant and I have no doubt in my mind that the same was obtained fraudulently and therefore it’s bad title.***

***I hereby enter judgement in favour of the Defendant and his counter-claim as drawn in the defence and Counter claim.***

***The Plaintiff’s suit is hereby dismissed with costs to the Defendant.”***

**116.** The Respondent at paragraph 14 of his Amended Statement of Defence and Counterclaim dated 8<sup>th</sup> September, 2022 stated as follows;

**“The title deed issued with respect to Kericho/Silibwet/1886 was obtained by fraud”**

**117.** It is therefore evident that the issue of fraud was pleaded by the Respondent.

**118.** Further, the Appellant at paragraph **24** of his submissions submits as follows;

***“The Respondent in his pleadings claims that succession was not done on the said parcel and the Appellant fraudulently transferred the same to his name...”***

**119.** It is evident, from reading the Appellant’s submissions, that he concedes that the issue of fraud was pleaded by the Respondent.

**120.** It is therefore not correct that the Learned Trial Magistrate made a finding on fraud yet it was not pleaded. That being the case, this ground of appeal also fails.

**E. Who should bear costs of the appeal.**

**121.** The general rule is that costs shall follow the event. This is in accordance with the **Provisions** of **Section 27** of the **Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

**DISPOSITION.**

**122.** In the result, I find that this appeal lacks merit. It is hereby dismissed with costs.

**123.** It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO  
THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**L. A. OMOLLO  
JUDGE.**

**In the presence of: -**

**Miss Chirchir for the Appellant.**

**Mr. Koech for the Respondent.**

**Court Assistant; Mr. Joseph Makori**