



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO 41 OF 2014

KOGO FLATS LTD.....PLAINTIFF

VERSUS

SAMMY CHERUNYA1ST DEFENDANT

JOHN ROTICH.....2ND DEFENDANT

JUDGMENT

By a plaint dated 12th February 2014 and subsequently amended on 9th June 2015, the plaintiff sued the defendants jointly and severely seeking for the following orders:

- 1) Issuance of vacant possession of the suit property by the defendants to the plaintiff.
- 2) Mesne profits earned by the defendants while in illegal occupation of the suit property from the date of such illegal entry to the date of vacant possession.
- 3) Rent payable to the plaintiff on the premises occupied by the defendants from the date of such illegal entry until date of vacant possession.
- 4) General damages for trespassing on the suit property.
- 5) General damages for causing nuisance on the suit property
- 6) Costs of the suit and interest thereon.
- 7) Such further or other orders as to the court may deem fit.

The plaintiff pleaded that he was the proprietor of all that parcel of land known as Eldoret Municipality /Block 15/1857. The plaintiff further stated in his pleadings that on or about the 3rd November 2013 he discovered that the defendants had taken possession of his land without his permission and his attempts to evict them resulted to the current suit in court.

The defendants filed an amended defence and Counter-claim on 9th October 2017 and prayed for the dismissal of the plaintiff's suit with costs and entry of judgment as per the counterclaim whereby they sought for the cancellation title No. ELDORET MUNICIPALITY/BLOCK 15/ 1857 and rectification of the register to read the name of original proprietor together with costs and interests.

Plaintiff's Case

PW1 SAMMY BOIT ARAP KOGO adopted his statement and stated that he is the director of KOGO FLATS the plaintiff herein. He produced the certificate of incorporation of the plaintiff which was incorporated on the 9th May, 1995 as company no. C. 64802. He also stated that the plaintiff is the proprietor of all that parcel of land known as ELDORETMUNICIPALITY/BLOCK 15/1857 measuring approximately 1.000 Hectares.

PW1 also produced a sale agreement showing that it had acquired the land from Philip Koech the previous proprietor on 8th May, 2013 for a consideration of Kshs. 2,000,000/-. He further stated that the vendor had duly executed a transfer of lease dated 1st July 2013 in favour of

the plaintiff and the same was registered at the lands office on 16th July, 2013. He stated that a certificate of lease was issued by the Land Registrar to the Plaintiff on the 16th July, 2013 which he produced as an exhibit.

PW 1 also testified that he inspected the suit land and confirmed that it was vacant. He produced a survey map, a copy of the Registry Index Map (RIM) rates clearance certificate and an official search. It was his evidence that the defendants had taken possession of the suit land and erected illegal structures without the plaintiff's consent or approval.

On cross-examination PW1 confirmed that he bought the suit land from Philip Koech and not Cherunya. He stated that he did due diligence before buying the land and that he was not aware that the government had compulsorily acquired the land.

PW1 was shown entry No. 9 on the title record which indicated that LR No. 8148 was transferred to Kiptalam Arap Cherunya and that he was seeing the title for the first time. On re-examination he denied knowing the late Kiptalam Cherunya and the head title that he was shown by Counsel for the defendants. PW1 also stated that he was not aware of the judgment of the court in a Nairobi case. PW1 therefore closed his case.

Defence Case

DW1 Sammy Kipkurui Cherunya testified that the suit land belonged to his late father William Kiptalam Cherunya who died on 14th April 2013 who had the original title measuring 617 acres as L/R No. 8148 which title deed has not yet been surrendered. DW1 produced a copy of the title as an exhibit before the court.

DW1 further stated that they filed a Succession Cause and got letters of administration in respect of the estate of his late father on 30th August 2017. DW1 further testified that there was a request from the government to compulsorily acquire 400 acres out of the 617 acres of which they were left with 217 acres, situated at Ndalat- Salient road.

DW1 produced a map showing the subdivision of the 400 acres by the government, a letter of conversion by the Land Registrar and a letter from the Commissioner of Lands dated 17th May 2007 showing the conversion and subdivision of the 400 acres and 217 acres respectively.

It was his evidence that the suit land was acquired for public use but they were not fully compensated leading to the filing of a Nairobi Case Judicial Review No. 191 of 2008 where the acquisition of the land was nullified and the family got back the entire 617 acres as the land was not used for the purpose for which it was compulsorily acquired.

DW1 testified that Industrial and Commercial Development Corporation filed an application to be enjoined in the suit and the setting aside of the judgment of which Judge Mumbi Ngugi allowed the application and transferred the matter to the Environment and Land Court for hearing and determination on 29th November 2012. He confirmed that the case is still pending before the court. He further stated that he has been paying land rent and that there is encroachment on the 217 acres (Block 2365) by 7 people amongst them the plaintiff herein.

DW1 therefore prayed that the plaintiff's suit be dismissed with costs and the titles in respect of parcel No. Eldoret Municipality Block 15/1857 be cancelled as they were acquired fraudulently as he still has the original head title.

On cross-examination by Counsel for the plaintiff DW1 confirmed that the plaintiff got his title after the setting aside on the Nairobi Judgment in 2013 and that the plaintiff was not a party to that suit. He also stated that the plaintiff is on part of the 217 acres which was not part of the land acquired by the government.

DW2 John Kiptarus testified and stated that he has been staying on the suit land since 1962 with his late parents and that some people encroached on the land and claimed ownership of the same. He stated that the land was owned by the late Cherunya and that the plaintiff had destroyed 2 acres of maize which led him to report the matter to Yamumbi Police station. On cross-examination he testified that the plaintiff had fenced off the parcel of land and he was cultivating the same.

DW3 Samwel Kipyegon Koech testified and stated that he is a Land Surveyor based at the Survey office in Uasin Gishu County. He further stated that he carried out a survey on L/R No.8148 as the Director of Surveys was authorized to subdivide it into two portions measuring 400 acres and 217 acres respectively in 2005. He stated that this was vide a letter dated 29th April 2005. That the government was to take 400 acres and 217 acres was to remain with the owner Mr. Cherunya.

DW3 further testified that a new number was issued for the said parcel of land and the Block measuring 400 acres was given Eldoret Municipality Block 15/2366 and the 217 acres was given Block 15/2365. It was his evidence that the titles for Kogo Flats the plaintiff herein (7 titles) are within Block No. 15/2365 but ought to have been in Block 15/ 2366 which was an anomaly. He therefore stated that those titles ought to be cancelled and erased from the map. On cross-examination he confirmed that no report on the map was made and that he was authorized by the Director of Surveys who is the custodian of the Data book.

DW 4 WILSON KIBICHIY testified that he worked with the Ministry of Lands in the Survey Department in Ruaraka in Nairobi. He was under the Director of Surveys. That he was aware of ELDORET MUNICIPALITY/BLOCK 15. LR NO. 8148 which comprised of 617 acres in total. He stated that in the process of preparation of the RIM amendments it was discovered that some parcels of land had been created and titles issued as 1809, 1838, 1857,2050,2024,1855 and 1856, 1857 which belongs to the plaintiff. That the office of the Director of Surveys wrote to the Commissioner of Lands to expunge these titles which letter was produced in court as an exhibit. He further produced an amendment to parcel No. Block 15/2365 that had overlapped. The defence therefore closed their case.

Plaintiff's Submission

Counsel for the plaintiff reiterated the plaintiff's evidence and submitted that the plaintiff having been registered as an owner of the suit land on 16th July 2013 is the indefeasible title holder. That the plaintiff got registered after purchase for valuable consideration from one Phillip Koech. Counsel cited the provisions of Section 25(1) of the Land Registration Act No. 3 of 2012 which provides as follows:

"the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration, by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all the privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:

- a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register and*
- b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register."*

Counsel further relied on Section 26 (1) of the Land Registration Act which 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, restriction 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, un procedurally or through a corrupt scheme "

It was Counsel's submission that based on the law, the plaintiff's title is protected as a bona fide purchaser for value without notice of fraud and as such the title cannot be impeached. He relied on the case of David Peterson Kiengo & 2 others v Kariuki Thuo, (2012) eKLR in which Ngugi J, **observed**,

"13. Where, then, does this leave us? There is no elegant way to resolve this issue. There is only a pragmatic way of doing so. It is in keeping with the objectives of the Registered Lands Act, and, indeed, the entire system of registration of land in Kenya. The Registered Lands Act is based on the Torrens' System. Under this system, indefeasibility of title is the basis for land registration. The State maintains a central register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interests in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the State guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealing with the land in question before acquiring an interest. That this is the essence of the Torrens System was stated as early back as 1891 in the case of

Gibbs v. Messer (1891) AC 254: .

The main object of the Act, and the legislative scheme for the attainment of that object, appear to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed or transfer of mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

14. Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu's fraud, their titles will be secure and guaranteed by the State. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the State for recovery of damages but not for possession or ownership of the property.

15. In my view, this statement of the law suggests the prima facie resolution of the case: In as long as, at this stage, it cannot be demonstrated otherwise, the assumption is that David Peterson Kiengo; Nkiiri Victor Michuru; and Kenakena Investments Ltd on the one hand; and Fountain on the other are bona fide purchasers for value without notice. They had no obligation to go beyond the register to investigate Njendu's title and satisfy themselves of its validity. They did their bit.

Mr. Mogambi submitted that the defendants have not established fraud or misrepresentation of which the plaintiff was a party to in the acquisition of the title. The plaintiff also based on the evidence it was confirmed it had possession of the land as it cultivated and had fenced. The defendants occupied only a portion and it is from that the plaintiff sought to evict the defendants, Counsel submitted that Section 80 of the Land Registration Act which gives the court powers to cancel the registration or rectification of a title does not apply in this case as per the provision that the register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land or lease for valuable consideration unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or fraud.

Counsel further submitted that the nature of the fraud was equally not expressly pleaded by the defendants in their counterclaim. Further that the defendants mentioned Mr. Philip Koech in the pleadings but they did not enjoin him as a party if at all he was accused of having colluded with the plaintiff and that his joinder as a co-defendant or as a third party was necessary. Counsel cited the case of Bruce **Joseph Bockle —v- Coquero Limited, (2014) eKLR** in which it was observed,

"In our view the appellant's assertion that the respondent's acquisition of the suit premises smacked of fraud and illegalities cannot stand scrutiny. In the case of Koinange & 13 others v Koinange [1968] KLR 23 it was held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities. Counsel for the appellant seems to be laying their obligation to strictly prove the fraud allegedly committed by the respondent on the court by calling upon it to investigate the issue whether pleaded or not. Parties ought to know that they have an obligation to present a prima facie case of fraud or illegality before the court can investigate the issue. Mere mention of fraud or illegality in passing will not do. In the case of Westmont Power (Kenya) Limited v Westmont Power (Kenya) Limited [2003] eKLR the court in addressing the issue of pleading fraud as a defence stated that: "Setting up one's case or defence is to compose, propound, posit, or begin to develop and show the structure of the case of defence. One is required to place in view the line of case or defence and show the structure of the case of defence intended to be pursued....."

Counsel submitted that a general allegation of fraud or illegality and misrepresentation as was the case here was not sufficient to infer liability on the part of those who are said to have committed it.

Counsel faulted the non-joinder of one Phillip Koech who sold the land to the plaintiff. He further questioned the letter dated 30th May, 2007 by the Director of Surveys indicating that the titles should be expunged from the map as they had encroached on the defendant's parcel of land .

On the issue of the pending case in Nairobi in respect of the suit land Counsel submitted that the same would not bar the plaintiff from obtaining a valid title to the suit land and that the doctrine of lis pendens does not apply as the defendants did not expressly plead it. Further that the pending proceedings did not involve the plaintiff in any way. For the doctrine to apply, the parties must be litigating over the subject matter.

Counsel relied on the case of Nairobi HCCC. NO. 430 of 2002 — **Ruaha Concrete Co. Limited v Paramount Bank Limited**, in which the ingredients of the doctrine of lis — pendens were summarized as, firstly, there should be an active prosecution of a suit relating to the disputed property, secondly, a contentious suit must be in existence between the parties and thirdly, that a right to immovable property must be specifically in question.

Counsel therefore prayed that judgment be entered as per the plaint for the plaintiff, general damages of Kshs, 1,500,000/ plus costs of the suit. He also prayed that the defendants; counterclaim be dismissed with costs.

1st & 2nd DEFENDANTS' SUBMISSIONS

Counsel for the defendants' reiterated their evidence and gave a background to the suit land stating that the defendants are the owners of the suit land which belonged to their late father Kiptalam Cherunya. He further submitted that the original leasehold certificate is still with the family of the late Cherunya.

Mr. Mitei submitted that it is trite law that no person has legal capacity or authority to transfer to another person a registered proprietor's interest in a parcel of land without the participation or knowledge and consent of the registered proprietor. If a transfer is purportedly made by a person who has no proprietary interest or right in a parcel of land, such transfer is unlawful and a nullity.

Counsel further submitted that the plaintiff admitted in cross examination that he did not know the original and lawful owner of the suit land and instead stated that he bought it from one Philip Koech. PW1 also added that he did not have any title indicating the name Philip Koech. It was Mr. Mitei submission that this clearly shows that the plaintiff did not acquire the suit property from its owner but instead from a third party who had no real title to pass therefore had no legal effect.

Counsel cited the case of **Samuel Kamere vs= Lands Registrar, Kaijado [2015]Eklr, Archibold Karanja Kagai** who had filed suit in the High Court against the appellant and respondent therein seeking rectification of the register at the lands offices. He had asserted that at all material times he was the registered owner of the suit property, and that on or about 5th April, 1991 the Land Registrar, Kajiado wrongfully and unlawfully registered Samuel Kamere as the owner of the suit property and issued him with a certificate of title. Upon hearing both parties, the Learned Trial Judge found that the suit property had indeed been unlawfully transferred to the appellant, and ordered the rectification of the register to reinstate Archibold Karanja as the rightful owner. The appellate court in that case agreed with the findings and holding of the Learned Trial Judge and held that the appellant could not claim proprietary rights over the suit property it held thus:

"like the trial court, we are satisfied that, had the appellant carried out thorough investigations into the ownership, as he was obligated to, he would have established that the Plaintiff was the rightful owner. We take the view that, the appellant's misadventure was of his own making, and he cannot now turn around and claim that the acquired proprietary rights from imposters who were incapable of passing on such rights in the first instance.

Counsel therefore submitted that in the current case, the plaintiff did not buy land from a person who had authority or legal interest in the parcel of land. Counsel further relied on the above case where the Trial judge stated as follows.-

"No person has legal capacity or authority to transfer to another person a registered proprietors interest in a parcel of land registered under the Registered Land Act without the participation or knowledge and consent of the registered proprietor.

Notwithstanding the fact that the transaction was or may have been blessed with consent of the relevant Land Control Board, was or may have been registered, that transaction was null and void ab initio in so far as it purported to transfer the suit parcel of land to the first defendant as there could be no valid transfer where the transferor has no title to transfer That transfer was unlawful. "

Counsel cited Section 24 (a) of the Land Registration Act (Act No. 3 of 2012) which provides thus:-

"The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. "

Section 25 of the said Land Registration Act provides:-

The right of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register"

Section 26 (i) of the said Land Registration Act (Act No.3 of 2012) goes on to provide as follows

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 proprietors of the land is the absolute and indefeasible owner subject to the encumbrances, easement, restrictions and conditions contained and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party to or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme"

Mr. Mitei therefore submitted that it follows that a holder of a title of land whose acquisition is tainted by fraud, misrepresentation, a corrupt scheme, illegality and/or procedural impropriety cannot be allowed to stand and plead the principle of the indefeasibility of title. He stated that it has been demonstrated by the defendants in the present case, that the title to the suit land purportedly held by the plaintiff fails the test of indefeasibility and sanctity of title and must be cancelled and the register rectified in the interest of justice. Counsel relied on the case of **Arthi Highway Developers West End Butchery Limited & 6 others [2015] eKLR**, the court in deciding on the issue of transfer of land by a vendor possessing a fraudulent title held as follows.

"It is our finding that as between West End and Arthi, no valid title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof....."

Counsel submitted on the issue of original title and relied on the case of **Beatrice Wairimu Githii vs= Peter Gachenga Kimuhu & 2 others [2018] eKLR** where the court noted that the plaintiff was initially proprietor of the suit land therein, that she had not sold the suit land as she still held the original title deed which had not been surrendered. In conclusion Counsel submitted that the plaintiff has not proved his case against the defendants and should be dismissed with costs. He urged the court to allow the defendants' counterclaim with costs.

Analysis and determination

This is a case where the plaintiff prayed for 7 reliefs in the plaint which included mesne profits, general damages for trespass and nuisance, vacant possession and rent payable in the premises plus costs and interest. The prayers were a mouthful and some were a duplication.

The issues for determination that arise in this suit are as follows:

- a) Whether the suit is competent as filed in court without a board resolution.
- b) Whether the plaintiff's title was acquired procedurally.
- c) Whether defendants are the rightful beneficiaries of the suit land.
- d) Whether the defendants have proved their counterclaim.

On the issue as to whether the plaintiff's suit is competent, the plaintiff is a Limited Liability Company as was described in the plaint. PW1 also described himself as a director of the plaintiff company. He went further to produce a copy of the incorporation certificate. What he failed to do was to prove that there was a board resolution authorizing the filing of this current suit. Further there was no Board resolution that appointed the advocate on record to represent the company. This case has been fully heard and only awaiting judgment. There is no time left for regularizing or ratifying what had not been previously done.

In the case of **AFFORDABLE HOMES AFRICA LIMITED Vs IAN HENDERSON & 2 OTHERS, HCCC NO. 524 of 2004, Njagi J.** found that the Board of Directors had not passed a resolution to authorize the institution of the suit. In the circumstances, the learned Judge said;

"The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the

company, the company is not before the court at all. For that reason, the preliminary objection succeeds, and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff”.

Further in the case of **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000** as follows:

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect. As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

The issue of lack of a board resolution to file a suit does not qualify as a procedural technicality which flies on the face of the provisions of section 1A and 1B of the Civil Procedure Act and the provisions of Article 159 (2) (d) of the Constitution that justice shall be administered without undue regard to procedural technicalities.

In the case of **Joshua Werunga v Joyce Namuyak (2013) eKLR** it was held that the provisions of Article 159(2)(d) should not be used by litigants as a panacea to all irregularities and procedural technicalities. The provisions are supposed to be applied with caution taking into account that there has to be predictability and order in administration of justice. Evidence having been concluded in this case without rectifying the anomaly, I find that we do not have a case before the court. Even though this was not raised as an issue, it is important to put the record straight.

This takes me to the 2nd issue as to whether the plaintiff's title was acquired procedurally, it is on record that the plaintiff bought the suit land for a consideration of Kshs. 2,000,000/ from one Phillip Koech who signed a transfer form for purposes of acquisition of the certificate of lease. He also produced rates clearance certificate and an official search showing that the plaintiff was the registered owner.

The plaintiff admitted that he did not know the original owner of the parcel of land the late Kiptalam Cherunya and further that he was not aware that the government had compulsorily acquired 400 acres of the suit land.

It should be noted that the plaintiff admitted that he did not know the history of the suit land especially that the same belonged to the late Cherunya who is the father of the defendants. It is important to note that the plaintiff was not aware that the government had compulsorily acquired 400 acres of the suit land and that subdivisions had been done to that effect. This is very crucial information that should have been within the knowledge of the plaintiff having confirmed that he had carried out a search and due diligence in respect of the property.

The documents that the plaintiff produced were after its registration as an owner, there is scanty information from the documents of acquisition by one Phillip Koech who purportedly sold the land to the plaintiff. The court was only shown a sale agreement, a transfer of lease, map and official search. This information did not reveal how the vendor acquired the land as there was no title document registered in his name.

The defendants had the original title deed for the whole 617 acres which had not been surrendered for cancellation of which the plaintiff was not able to challenge. Why would the defendant still have the head title which was supposed to be surrendered to enable issuance of other titles.

The other issue is that the plaintiff faulted the defendant for not enjoining one Phillip Koech who had sold to the plaintiff the suit land. The question is whose interest it would be to either call Phillip Koech either as a witness or a party to the suit. The only answer to this question would be the plaintiff who had dealings with the said Phillip Koech. He should have called him to shed light on how he got the title while the head title was still with the defendant. Whether he was aware that the land belonged to the late Cherunya, whether he was aware that the government had compulsorily acquired 400 acres and whether he was aware that the portion that he sold was part of the parcels that had overlapped in the defendants parcel No Eldoret Municipality/Block 15/2365. These are answers which if the plaintiff called the vendor as a witness or a party who had been paid the purchase price could have highlighted the issues that the plaintiff wanted answered. This was not to be because the plaintiff decided that his evidence was sufficient to prove his case.

It is incumbent upon a person who alleges fraud to specifically plead and prove that the title was obtained illegally through misrepresentation or by fraud. The process of acquisition of a title is as good as the end result which is the title document. If certain steps are missing there has to be an explanation as to why there is an anomaly in the acquisition. There must be a checklist on the process which must be followed. You cannot be allowed to move from step one skip the other steps and jump to the last step where you get the title and expect eyebrows not to be raised on why certain steps are missing. In the current case it is glaring that something is not adding up on how the plaintiff got his title. There were numerous correspondences between the government representatives and the defendant's deceased father Cherunya in respect of the suit land on compulsory acquisition, subdivision, conversion and amended Registry Index Maps which if the plaintiff had done proper due diligence it could not have passed him. Further if he had done his due diligence properly, he could not have bought the suit land in the first place. He failed to shine his eyes as Nigerians would say.

As Justice Munyao put it in the case of **Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR**

... it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real

title holders from being deprived of their titles by subsequent transactions.

I am in agreement with this view that the import of section 26 is to protect the real title holders and not people who have in one way or another fallen to the schemes of fraudsters. We are living in very precarious times with the digital age where individuals can fabricate documents which can pass without detection from the most diligent officers of the relevant agencies. With this I find that the plaintiff's title was not procured procedurally having analysed the documentary evidence on record together with the corroborated evidence by the witnesses. It is unfortunate that the plaintiff's case must fail with costs to the defendants. Having found that the plaintiff did not acquire the title procedurally, I will not dwell on the issue as to whether the plaintiff is a bona fide purchaser as he would not meet the threshold of being declared as such.

On the last issue as to whether the defendants have proved their counterclaim, I wish to state that from the evidence on record it is clear that the land belonged to the late Cherunya who was the father of the defendants herein. The defendants gave a chronology of events in respect of the suit land and the current state of affairs. The defendant produced a copy of the original title which had not been surrendered for cancellation. The extensive documentary and the paper trail in the correspondence in respect of the land rebutted the plaintiff's allegation of having acquired the suit land vide a sale agreement with one Phillip Koech. There was evidence that the plaintiff's titles were within plot No. 2365 which belongs to the defendants. The court must give sanctity to property ownership to the rightful owners and not sanitize fraudulent transactions which has been a thorn in the flesh for most Kenyans.

In the case of **Alice Chemutai Too vs= Nickson Kipkurui Korir & 2 others [20151 eKLR** (supra) the court held as follows -

"I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists,

The plaintiff fell for the tricks of the con artists who sold to him what they did not have title to and therefore could not legally pass any property in the suit land. The acquisition of the title by the person who sold the land to him was not traceable. There was credible evidence from the defence witnesses who were government officers who confirmed the history of the suit land and its current status. The Surveyor who gave evidence confirmed that the plaintiff's titles were on the defendants suit land plot No 2365 which was not acquired by the government. It is within the 217 acres that was left for the late Cherunya as per the RIM and the documents produced.

The defendant specifically pleaded fraud as required by law and went ahead to prove by documentary evidence that the plaintiff's title was not acquired procedurally. It was obtained in a dubious manner as the defendant still hold the head title which has not been surrendered for cancellation. Further that the defendants are in occupation of the suit land that is why the plaintiff is seeking for vacant possession. I find that the defendants are the rightful owners of the suit land and the land register should be rectified as such.

Section 80 (1) of the Land Registration Act, 2012 empowers the court 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 therefore make the following orders:

- a) That the plaintiff's case is dismissed with costs.
- b) An order is hereby issued for the cancellation of the plaintiff's titles on the suit land and rectification of the register to read the original proprietor of ELDORET MUNICIPALITY BLOCK 15/9.
- c) Costs of the counterclaim

Dated and delivered at Eldoret on this 28th day of May, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ IN OPEN court in the presence of Mr.Warigi holding brief for Kigamwa for Plaintiff and in the absence of Mr.Mitei for Defendants.

Mr.Mwelem – Court Assistant