



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 169 OF 2013**

**FLORA CHERONO.....PLAINTIFF**

**VERSUS**

**MARY NJIHIA.....1<sup>st</sup> DEFENDANT**

**GRACE ABENI .....2<sup>nd</sup> DEFENDANT**

**HAMISI SUMBA.....3<sup>rd</sup> DEFENDANT**

**WAWERU NYAGA.....4<sup>TH</sup> DEFENDANT**

**JOSEPH BARASA NYONGESA .....5<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR TRANS NZOIA.....6<sup>TH</sup> DEFENDANT**

**ABUBAKAR TEMBULA CHANGE.....7<sup>TH</sup> DEFENDANT**

**KESOGON MOSQUE COMMITTEE .....8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**The Plaintiff's Case**

1. In the further amended plaint dated 7/3/2017 the plaintiff seeks the following orders against the defendants:

**(a) A declaration that the defendants' occupation of any of the plaintiff's Land Parcels Nos. Kipsoen/Kesogon Block 2/77 and Kipsoen /Kesogon Block 2/87 amounts to trespass the same is illegal and without any justification in law;**

**(b) The defendants be evicted from the portions of Land Parcels Nos. Kipsoen /Kesogon Block 2/77 and Kipsoen/Kesogon Block 2/87 belonging to the plaintiff;**

**(c) Damages for trespass;**

**(d) Costs of this suit.**

2 In the pendency of these proceedings the plaintiff filed notices of withdrawal of suit against various defendants. She purportedly withdrew the cases against the 1<sup>st</sup>,2<sup>nd</sup>,3<sup>rd</sup> 7<sup>th</sup> 8<sup>th</sup> 9<sup>th</sup> 10<sup>th</sup> 11<sup>th</sup> 12<sup>th</sup> 14<sup>th</sup> 15<sup>th</sup> 16<sup>th</sup> 17<sup>th</sup> 18<sup>th</sup> 19<sup>th</sup> 20<sup>th</sup> 21<sup>st</sup> and 22<sup>nd</sup> defendants vide a notice of withdrawal dated 23/9/2015.

3. There are a few mistakes on the part of the plaintiff in the amendment of the heading in the plaint following withdrawal of suit against various parties but in the final analysis, the plaintiff thus retained the persons now named as defendants hereinabove and this court has dispensed with the original description and assigned them the description of 1<sup>st</sup> - 8<sup>th</sup> defendants consecutively. Another mistake she made appears to be the description of the suit plots. Though the further plaint has described them as **Kipsoen/Kesogon Block 2/77 and Kipsoen/Kesogon Block 2/87** it is clear from the title documents produced by the plaintiff and the documents produced by the Land Registrar as well as from the County Surveyor's Report that the appropriate description should be **Sinyerere/Kipsaina Block 2/Kesogon/77 and Sinyerere/Kipsaina Block 2/Kesogon/87**. This mistake has been attributed to counsel for the plaintiff in her submissions. As this misdescription has not been dwelt on by the defendants as a ground of any significance this court will largely ignore it and the description of

the suit plots as “plot 77” or “plot 87” or as “the suit lands” will be in reference to the latter, appropriate description.

4. The plaintiff claims that she is the owner of the suit lands which she acquired by way of purchase of shares in **Kesogon Farm Ltd** by virtue of which she was allocated **6 acres** and **16 acres** respectively. However the defendants have trespassed on the said suit lands and erected structures thereon and hindered the plaintiff’s utilization and development of the land. They have further invited strangers onto the lands and raised the possibility of the plaintiff being rendered destitute.

#### **The Defendants’ Defence**

5. From the defendants’ side the only pleadings that have been verified by this court to be on record are as follows: The 6<sup>th</sup> defendant’s defence filed on **28/2/2018** and the 3<sup>rd</sup> defendant’s defence filed on **18/11/2015** to which the plaintiff filed a reply on **19/4/2016**.

6. No defence was filed by the rest of the defendants, hence the plaintiff’s requests for judgment against them. The plaintiff filed requests for judgment dated 18/4/2016 and 13/2/2018.

7. In the 3<sup>rd</sup> defendant’s defence dated **13/11/2015** he stated that plot numbers **410** and **411** has never been part of plot No. **87**; that he has never trespassed on plot number **77** or **87**; that he purchased plot No. **667**, being a part of plot No. **410** from one Miriam Wanjiku Shaban; that the 3<sup>rd</sup> defendant’s name was included in the area list as far back as 1997 and his title over plot 411 is lawful and that by virtue of the decision in **Kitale CMCC Land Case Number 227 of 1991** the claim against him is *res judicata*.

8. The 7<sup>th</sup> defendant’s defence dated **21/2/2018** denied that the land parcels **Nos. 77** and **87** belong to the plaintiff or that they were allocated to the plaintiff by Kesogon Farm Ltd; that in the alternative the area list shows that the plaintiff holds **plot No. 87** on behalf of other individuals; that based on the documents submitted for registration, the Director of Surveys instructed that plots 77 and 87 be further subdivided so as to leave them with lesser acreage while creating new plots being **plots 410-420**.

#### **Reply to the 3<sup>rd</sup> Defendant’s Defence**

9. The plaintiff filed a reply to the 3<sup>rd</sup> defendant’s defence on 19/4/2016, reiterating that plots No. Sinyerere /Kipsaina Block 2/Kesogon/411 and Sinyerere /Kipsaina Block 2/Kesogon/668 are wholly within plot No. 77 and thus their title is invalid; that title to plot No. **Kipsoen/Kesogon Block 2/77**, that the plaintiff was in occupation of the 6.6 acres comprising **Kipsoen /Kesogon Block 2/77** since **1973** and that fact is reflected in the area list and the current title; that the 3<sup>rd</sup> defendant can not rely on the judgment in **Kitale CMCC Land Case 227 of 1991** as the same has been extinguished by the **Limitation of Actions Act Cap 22** and the acquisition of title vide that judgment on **12/11/2007** is invalid; that the plea of *res judicata* is not applicable in the instant case; that the **Land Adjudication Act** and the **Government Lands Act** were not properly applied in the acquisition of title by the 3<sup>rd</sup> defendant and that the 3<sup>rd</sup> defendant has no accrued prescriptive rights.

#### **Reply to the 7<sup>th</sup> Defendant’s Defence**

10. The plaintiff filed a reply to the 7<sup>th</sup> defendant’s defence on **13/3/2018**. She reasserted the fact that she is the proprietor of the suit lands and denied holding the titles in trust for any other persons. She further maintained that the subdivisions of the suit lands were not in accordance with the law.

#### **Hearing and Submissions**

11. The plaintiff’s case was heard on the **11/10/2018** and later closed on **16/10/2018** after the plaintiff’s counsel declared that she had no further witnesses.

12. The defendants’ case was heard on **30/10/2018** and on **27/3/2019**. On the latter date, the Surveyor from the County Survey office also testified.

13. Thereafter the court orders parties to file written final submissions and the plaintiff filed his on the **6/5/2019** while the 4<sup>th</sup> defendant filed his on **5/4/2019**.

#### **Evidence of the Parties**

14. **PW1, Flora Cheronu**, the plaintiff, giving sworn evidence testified that she purchased the land from Kesogon Farm and paid for it in instalments in 1971; that the land was 16.5 acres (Plot No. 87) and 6.6 acres (Plot No. 77) respectively; she produced receipts in proof of purchase and survey; she produced a certificate (**PEXh 2**) for plot No. 87. She averred that she purchased the second plot from a neighbour, **Zachariah Towett** whose membership certificate was number 17 and produced an agreement to that effect. After that she was issued with a certificate from Kesogon Farm dated **2/11/1976 (PEXh 4)**. Subsequently the lands were surveyed and titles were issued in her name. However the defendants invaded her land in 1991. The matter was taken before the Land Disputes Tribunal which decided that the land be shared out as family land. The elders’ decision was brought to the court for adoption. After 12 years she sent her daughter to check on the title deeds. She was given the title deeds in **2005 (PEXh 5 and 6)**. She also produced certificates of official search for the suit lands dated **28/5/2015 (PEXh 7(a) and PEXh 7(b))** which showed the two parcels are in her name and that they reflect the measurements contained in the title. She produced the map for the area as **PEXh 9**. She averred that she now resides on the land that remained after the defendants took away the rest but her titles reflect the full sizes of the land. She prayed that the defendants be ordered to return the land they had taken. She denied holding the land titles in trust for any person. She averred that she was not informed that there would be a survey of the land and that the survey was conducted by force in the presence of the chief and policemen.

15. However on cross examination by Mr. Onyancha she admitted as follows: that she lodged a claim before the Land Disputes Tribunal in **1991** against *inter alia* one **Joseph Kibor**, his brother, the suit against whom was earlier on withdrawn in these proceedings; that the tribunal ordered her to share the land with the respondents; that she had also sold parts of her land to several persons but had not processed titles for them; that she has sued the Land Registrar as there are other people, besides those whom she sold part of the land to, who have occupied her land; she maintained that plot no 411 is located within plot number 77 and that after the excisions she was left with only 3 acres.

16. **DW1, Hamisi Sumba**, the 4<sup>th</sup> defendant gave sworn evidence in the matter. He stated that the plaintiff sued him in 1991 in **Kitale Civil Suit No. 221 of 1991**. He averred that by way of purchase he acquired plot no 441 from **Joseph Kibor**, the plaintiff's brother who was also a respondent in the dispute before the tribunal; he produced the title he obtained upon purchase and stated that he also owns plot No. 667, a subdivision of plot number 410, having purchased it from one **Miriam Wanjiku Shabaan** who had also been named as a respondent in the tribunal dispute; that he has never trespassed on plots Nos. 77 and 87 and that his land was never excised from plot No. 77.

17. **DW2, Nelson Otieno Odhiambo** gave sworn evidence for the defence. The witness testified that according the area list (marked "**2DExh 1**") a total of 420 land parcels were carved out of the Kesogon Farm; that plot No. 77 comprising of 6.6 Ha belongs to *Flora Cherono Jonathan*; that plot No. 87 is in the names of *Flora Cherono and 6 other persons*; that plots Nos. 410 and 411 are in the names of Miriam Wanjiku Shabaan and Hamisi Sumba respectively; that there in the records of a letter from the Director of Surveys indicating that plots Nos. 77 and 87 had been affected by a subdivision so that the new sizes of plot 77 and 87 became 1.336 Ha and 6.273 Ha respectively. The other plots that resulted from the subdivision were plots numbers 410 - 420 (inclusive). According to DW2 the titles issued to the plaintiff were issued in error and instead of the acreages currently reflected on title, the titles for plot numbers 77 and 87 should reflect 1.336 and 6.273 Ha respectively which error should, in his opinion, be rectified. Upon cross-examination he admitted having issued the plaintiff with the titles she produced in court and having assigned them their respective acreages; that the area list bears 6.6 Ha and 16.5 Ha for plots Nos. 77 and 87 respectively; that titles are issued on the basis of area lists, but in the current dispute he relied on the letter from the Director of Surveys which indicated that the RIM had been amended.

18. **DW3 Violet Wasike** a Surveyor working with the County Survey Office Trans Nzoia gave evidence on oath on **27/3/2019**. She produced a report complete with a sketch map on the suit land made pursuant to a court order issued in these proceedings. The report indicates that she visited the suit land and conducted the relevant survey exercise and came up with results. Her findings were that parcels Nos. 410 and 411 were not part and parcel of plot No 77 and 87.

19. I have considered the sketch which shows that the plot No. 77 and 87 are located a distance away from each other, but that plots Nos. 411 and 667 and 668 (the latter two which resulted from a subdivision of plot number 410) lie contiguously to plot No. 77.

## **Determination**

### **Issues for Determination**

*(a) Whether the suit against the 3<sup>rd</sup> defendant is res judicata;*

*(b) Who is the owner of plots Nos. 77 and 87?*

*(c) Whether the defendants have trespassed on plots Nos. 77 and 87 belonging to the plaintiff.*

*(d) What orders should issue?*

### **(a) Whether the suit against the 3<sup>rd</sup> Defendant is Res Judicata**

20. There is ample evidence that a Land Disputes Tribunal heard and determined a dispute relating to the suit land following reference of the dispute to it by the Senior Resident Magistrate's court in **Kitale SRMCC Land Case No. 227 of 1991** which had been filed before it by the current plaintiff against other persons who included the plaintiff's brother in **1991**.

21. **DExh 1**, a letter from the District Officer's Office, Cherangany, shows that the award was transmitted to the court for adoption.

22. **DExh 2** shows that the respondents in the tribunal proceedings included the 3<sup>rd</sup> defendant herein. In those proceedings the plaintiff herein claimed the entire of plots Nos. 77 and 87. That was before they were subsequently subdivided to give birth to the new plots now claimed by the defendants.

23. The current plaintiff's case before the tribunal then was that her brother came to the suit land in **1989** and took one (1) acre out of plot No. 77 near the shopping centre and subdivided it into 9 plots which he illegally sold. Her brother came again in **1989** and illegally sold 3.3 acres of the land from plot No. 87.

24. However evidence was adduced before the panel that Joseph Kibor (who is the plaintiff's brother) and his mother had made contributions to the purchase of plot No. 87 while Joseph's mother alone had aided the plaintiff herein in the purchase of plot No. 77.

25. The panel observed that Joseph Kibor had inherited a half of each the plots claimed by the plaintiff herein respectively and that the plaintiff should not interfere with the defendants' plots.

26. The tribunal decision was made in **1992**. The plaintiff herein applied to set aside the award by way of an application to the Senior Resident Magistrate's Court but that application was declined in a ruling dated **17/3/93** by the **Hon. Kanyangi, SRM**.

27. In my view one of the courses of action open to the plaintiff, which she never took, was to lodge competent proceedings before the High Court to quash the decision of the tribunal. This court has not been expressly asked by the plaintiff to make any adverse orders against those proceedings and award, but she has replied to the allegation of *res judicata* in the defence and this is a suit regarding ownership of the suit lands.

28. The reply of the plaintiff to the claim of *res judicata* raised by the 3<sup>rd</sup> defendant is that the judgment in **Kitale SRMCC Land Case No. 227 of 1991** has been extinguished by the **Limitation of Actions Act Cap 22** and acquisition of title to parcel No. 411 on the basis of the said judgment is illegal.

29. This court must first delve into the issue of whether there was a competent decision on the part of the Tribunal in the first place.

30. The tribunal decision issued on **27/4/1992** ordered that the subdivision of the suit lands equally between the plaintiff and the defendant was properly done and further that the defendant was the rightful owner of the two portions which he got. In effect, the tribunal made certain declaration as to ownership of land.

31. The **Land Disputes Tribunals Act** came into commencement on 1/7/1993. **Section 3 (1)** thereof, under which The Land Disputes Tribunal obtained its jurisdiction does not grant it power to determine ownership of land. The Land Disputes Tribunal therefore overshot its jurisdiction, or acted *ultra vires* when it ordered that the portions of land taken by Joseph Kibor were rightfully his.

32. In the case of **M'Marete -vs- Republic & 3 Others, [2004] eKLR (Nyeri Civil Appeal No. 259 of 2000)**, the Court of Appeal stated as follows:

**“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of Section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”**

33. The decision of the tribunal is therefore null and void. That being the case the issue of *Res Judicata* does not therefore arise at all in this case. This court is therefore properly seized of this matter to right any wrong that may have been committed by any of the parties.

34. In the light of the above finding of this court on the issue of jurisdiction of the tribunal, this court does not need delve into whether any decree arising from the judgment in **Kitale SRMCC Land Case No. 227 of 1991** was executed within the appropriate statutory period or not.

**(b) Who is the Owner of Plots Nos. 77 and 87?**

35. The plaintiff demonstrated that she bought shares in Kesogon Farm and subsequently was allocated land by virtue of the shares. She produced **PEXh 2**, an original share certificate in respect of **20** shares in Kesogon Farm which she stated entitled her to plot No. 87, and **PEXh 4**, an original share certificate issued on **2/11/1976** which she stated entitled her to plot number 77.

36. Titles to plots Nos. 77 and 87 are in the name of the plaintiff. The plaintiff has established without doubt that she is the owner of plots Nos. 77 and 87. These titles were issued under the **Registered Land Act** (now repealed). **Section 27** of the repealed Act is similar to Section of the current **Land Registration Act**.

37. **Section 27** of the repealed Act provided as follows:

**Subject to this Act -**

**(a) 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;**

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

**Section 28** of the repealed Act provided as follows:

**“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or 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 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:**

**Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”**

38. It is therefore the case that having been issued with title to the land she owns the land and her rights to the suit land were protected by the provisions of the Act and are now protected by the provisions of **Section 25** of the **Land Registration Act**.

***(c) Whether the Defendants have trespassed on Plots Nos. 77 and 87 belonging to the Plaintiff***

39. It is incumbent upon any claimant to demonstrate how they obtained their title when the validity thereof is in issue. In my view the proceedings and decision of the tribunal having been found to be null and void the defendants required to establish the validity of their titles in the course of these proceedings.

40. No share was demonstrated to have been issued by Kesogon Farm in the name of Joseph Kibor which could have entitled him to the suit land.

41. Only the 3<sup>rd</sup> defendant and the 7<sup>th</sup> defendant filed their defence in this matter. Even then, those defendants dwelt on the issue of acquisition of the land from Joseph Kibor and they never established by way of evidence a proper root of title to the plots that were allegedly purchased from one Joseph Kibor.

42. In particular, the 3<sup>rd</sup> defendant's simple answer to the plaintiff's claim is that he bought plot 411 from Joseph Kibor the plaintiff's brother, that the area list bore his name and that he obtained title vide that area list. He also averred that he purchased plot number 667 from one Mariam Shaban. He never called the said Joseph Kibor or Mariam Shaban to testify and establish that they had the right to sell those respective portions to him.

43. In order to establish the appropriate size of the plaintiff's land for the purposes of determining if there was trespass as alleged, regard must be had to the record.

44. It must be recalled that going by the plaintiff's evidence before the purported excision of plots held by the defendants the two original land parcels comprised of **6.6 Ha** and **16.5 Ha** respectively.

45. The area list produced by the **DW1** as **DExh 5** reflected the plaintiff as owner of plot No. 77 whose measurements are given as "6.6", (without any indication as to whether the measurement is in hectares or acres). She is also reflected as owner of plot number 87 whose measurements are given simply as "16.5", also without indication as to whether that is in hectares or acres. Above her name in the same entry is the name "*Peter Wanyonyi Naburuk*". Below her name are the names "*William Kamau*" "*Erastus Ombwanga Mwanje*", "*Patrick Silali Wabwoba*", "*Peter Mbuthia*", "*David Mwangi Migwi*" and "*John Muchachi Muhoro*".

46. The measurements of the land are indicated only parallel to the plaintiff's name. **DExh 5** is an incomplete copy of an area list. Only four (**4**) out of a possible fourteen (**14**) pages of the area list are exhibited and no annotations are made to explain the entries regarding plots numbers 77 and 87 or any other plot.

47. It is noteworthy that all the registers for the plots mentioned in this suit were opened on the same day in the name of the Government of the Republic of Kenya. Thereafter, titles issued to the plaintiff and other parties. All the parcels were registered at the same time.

48. Evidence called by the defendants shows that the Director of Surveys, citing an unnamed High Court Case, effected a further subdivision of plots Nos. 77 and 87 and wrote to the District Land Registrar vide a letter dated **10/8/1992** (marked "**7DExh 4**") indicating that the said subdivision had taken place.

49. The Director of Surveys was not enjoined in this suit as a party. No evidence was called by the plaintiff to controvert the defence evidence that the subdivision of the plaintiff's parcels was effected by the Director of Surveys.

**50. "7DExh 4"** stated that consequent to the further subdivision plots Nos. 77 and 87 would measure 1.336 and 6.273 Ha respectively. Plots Nos. 410 - 420 (inclusive) are alleged to have emanated from this subdivision, yet Plots Nos. 77 and 78 retained their original numbers contrary to accepted practice on subdivision whereby new numbers are given to all parcels resulting from a subdivision.

**51. DW2, the Land Registrar** indicated that on **10/11/2005** he *erroneously* issued the title documents marked **PEXh 5** and **PEXh 6** to the plaintiff showing the acreages of plots 77 and 87 to be 6.6 Ha and 16.5 Ha respectively. However, consistency is lacking in his evidence in that despite his being aware of some instructions from the Director of Surveys on the new sizes of land, he issued the plaintiff with titles bearing the old measurements.

**52.** It is the submission of the plaintiff that the alleged subdivision of her two parcels was unprocedural because the registers of those parcels were not closed after the alleged subdivision as was the usual practice under **Section 25(2)** of the Registered Land Act (now repealed). She also lays great emphasis on the fact that the area list pursuant to which the titles to the suit lands were issued contained the original measurements.

**53.** In my view a reading of the letter dated **10/8/1992** informs me that the area of the suit lands had been reduced by way of a subdivision which spontaneously created plots numbers 410 - 420. The High Court case alleged to have delayed the subdivision is not identified in the said letter. If the area list which was produced by the defence and vide which the titles to the suit lands were issued was prepared in the year 1997 and the suit titles were issued later on in 2005, and the area list reflected their original sizes before the Director of Survey's action of subdivision, titles issued using that area list would in my view be proper titles reflecting the appropriate dimensions.

54. Notably, since the year **2005** when the said titles were issued, the Land Registrar has never found it fit to recall the same and rectify the register. For 8 years up to 2013 when this suit was filed the contents of register remained the same. It would not then be correct for the Land Registrar to state as he did in his evidence that he erroneously assigned those titles an incorrect acreage since he relied on the proper document to obtain the relevant data on acreage. To hold otherwise would be to encourage disorganization in government offices relating to land whereby all kinds of wrongdoing may be considered normal. That kind of holding may also not inspire public trust in the documents issuing therefrom, and may also encourage negligence on the part of public officers in future dealings regarding land.

55. I have earlier on described how shallow and devoid of evidence of due diligence the defendant's defence is. It is clear that much as one of the defendants' potential remedies may have included a claim against Joseph Kibor, the defendants, apparently convinced he had capacity to sell the land, never raised a finger against him.

56. In **Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others**[2016] eKLR, the court stated as follows:

**“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”**

57. The plaintiff meticulously set out her evidence and demonstrated how she obtained the suit land by virtue of her shareholding in Kesogon Farm Ltd. The production of the area list DExh.5 never aided the defendants defence because, first, the plaintiff's land as described therein is of the original acreage of 6.6 and 16.5. There is no indication in DExh.5 that the defendants were entitled to any land from the acreage assigned to the plaintiff.

58. In this case the court is dissatisfied with the defendants who merely waved their titles in its face and pleaded sanctity thereof without more. No court order was produced in this court to support the Director of Survey's subdivision of the suit land and neither was the process provided for under **Section 25(2)** of the Registered Land Act demonstrated to have been followed. I do not think the Director of Surveys had power to arbitrarily subdivide the plaintiff's land without the authority of the proprietor thereof, or a properly obtained court order.

59. In the case of **James Joram Nyaga & Another -vs- A.G. & Another** [2019] eKLR, the court observed as follows:

**“It follows that the onus was on the appellants to satisfy court that the Commissioner of Lands had requisite powers to grant the suit property to them. The appellants were indeed required to do more in proving that the legal and right procedure was followed in alienating the suit property to them. Bare denials of fraud on their part in acquiring the suit property or assertions that they acquired the suit property legally above board would not suffice. In Munyu Maina -vs- Hiram Gathiha Maina, Civil Appeal No. 239 of 2009, this Court 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 would not be noted in the register.”** (Emphasis added)

**As it is, other than the certificate of title and the letter of allotment, the appellants did not produce any other evidence to show that the procedure required for alienation of the suit property was followed. There was no evidence tendered of documents from the Department of Survey to show planning or surveying before a land reference number was issued in respect of the suit property. Other than the certificate of title and the allotment letter, the appellants failed to produce any other document in support of their case. It is our view that they failed to prove they were legally entitled to the suit property especially in the face of counter allegations that the suit property had never been de-gazetted as public land, was not available for alienation by the Commissioner of Lands and the respondents' insistence that the appellants acquired the suit property illegally thus necessitating their eviction.”**

60. In the case of **Elizabeth Wambui Githinji & Others -vs- The Hon. Attorney General & Others** C.A. No. 156 of 2013 as consolidated with C.A. No. 160 of 2013 Ouko J.A., analysed the circumstances in which the Director of Surveys had failed to ensure the carrying out of a final survey and the filing of the final survey plan with his office with the result that the appellants relied on the existing records in purchasing the suit properties. It was his position that the land registration process in Kenya being a product of the Torrens System, the title of the bona fide purchase for value cannot be impeached and that the land register must mirror all currently registrable interests that affect a particular parcel of land.

61. In the **Elizabeth Wambui Githinji** case the appellants had purchased land from persons who did not have proper title for the reason that the land sold to the appellants had already been acquired by the government for a public purpose. The plaintiff in the current case is not a purchaser in their position but the original owner of the land by virtue of shareholding in a company which shareholding entitled her to the land and who by an opaque process has been deprived of her ownership. By the time the defendants in the present suit purported to purchase the plaintiff's land from a third party it was not yet registered in her name and by the time the Registrar issued title to her he relied on

documents which had not been affected by any amendment to reflect change in size of the plaintiff's parcels. This cannot be brushed away as a mere mistake.

62. Of great importance in the judgment in the **Elizabeth Wambui Githinji Case** is the emphasis on authentication of the survey plans. In this case had the survey plan and the area list been amended there is little likelihood that the Land Registrar may have issued titles reflecting the acreage that **P. Exhibit 5** and **P. Exhibit 6** did.

63. In the case of **West End Butchery Limited V Arthi Highway Developers Limited & 6 Others**[2012] eKLR the court observed as follows:

**“Likewise in the case of Iqbal Singh Rai vs Mark Lecchini and the Registrar of Titles, Civil Case No 1054 of 2001, this court (Hon. Justice Muchelule) held as follows:**

**“At the time when the 1st Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1st Defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”**

**It is thus my finding that similarly, in this case the 1st Defendant did not obtain a transfer from the registered proprietor, but from fraudulent persons namely the 2nd and 3rd Defendants who had no claim to the suit property. The 1st Defendant cannot therefore invoke indefeasibility of title and the transfer to him by the 2nd and 3rd Defendants was null and void.”**

64. In this case the defendants cannot be said to have purchased land from a person who had proper title to it.

65. This court has no alternative but to find that the purported subdivision of LR Numbers 77 and 87 by the Director of Surveys is therefore null and void and of no effect to reduce the area of the suit lands.

66. The consequence of that finding is that titles Nos. **Sinyerere /Kipsaina Block 2/410** and **411** were irregularly created within plots numbers **Sinyerere /Kipsaina Block 2/77** and **87**. The titles Nos. **Sinyerere /Kipsaina Block 2/410** and **411** and all their resultant subdivisions are consequently null and void and of no effect.

**(d) What Orders should issue**

67. The end result is that the defendants have not demonstrated that their claim to the land is based on properly rooted titles and their defence ought to be dismissed. The defendants' titles being null and void as declared above, then it follows that the defendants are in illegal occupation of the plaintiff's land.

68. In the circumstances set out above I find that the plaintiff has proved her claim on a balance of probabilities against the defendants and I enter judgment in her favour against the defendants jointly and severally and order as follows:

**(a) A declaration that the plaintiff is the proprietor of LR Numbers Sinyerere /Kipsaina Block 2/77 and Sinyerere/Kipsaina Block 2/87;**

**(b) A declaration that the titles Nos. Sinyerere /Kipsaina Block 2/410 and Sinyerere/Kipsaina Block 2/ 411 and all titles to their resultant subdivisions, having been irregularly created within land title numbers Sinyerere/Kipsaina Block 2/77 and Sinyerere/Kipsaina Block 2/87, are null and void and hence incapable of reducing the original size of the suit lands in any way;**

**(c) An order that Plot Nos. Sinyerere/Kipsaina Block 2/77 and Sinyerere/Kipsaina Block 2/87 shall retain their original acreages on the original Registry Index Map (RIM) obtaining before the purported amendment by the Director of Surveys, and as per the title documents and green cards issued by the Land Registrar;**

**(d) An order that the titles to Plots Nos. Sinyerere /Kipsaina Block 2/410 and Sinyerere/Kipsaina Block 2/411 and all their resultant subdivisions are hereby cancelled and the Land Register and Registry Index Map (R.I.M) shall be accordingly rectified by the Land Registrar and Director of Surveys respectively.**

**(e) An order that the defendants shall be evicted from the portions of land known as Sinyerere/Kipsaina Block 2/77 and Sinyerere/Kipsaina Block 2/87 belonging to the plaintiff;**

**(d) The defendants shall meet the costs of this litigation.**

It is so ordered.

Dated, signed and delivered at Kitale on this 31<sup>st</sup> day of July, 2019.

**MWANGI NJOROGE**

**JUDGE**

**31/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Bungei holding brief for Changorok for the respondent

Mr. Wanyama for applicant/plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**31/7/2019**