

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ELC CASE NO. 82 OF 2017**

**EVERLYNE CHEPKEMBOI KITUR ..... 1<sup>ST</sup>**  
**PLAINTIFF**

**AMOS TIROP MATUI**  
(Suing as the Legal Administrator of the Estate of the  
Late **KITUR ARAP KIBIEGO .....2<sup>ND</sup>**  
**PLAINTIFF**

**-VERSUS-**

**PETER KIRWA ARAP BOIT ..... 1<sup>ST</sup>**  
**DEFENDANT**  
**NATIONAL BANK OF KENYA LTD ..... 2<sup>ND</sup>**  
**DEFENDANT**

**-AND-**

**PATRICK OKANGI MAHANI ..... 1<sup>ST</sup> INTERESTED**  
**PARTY**  
**ESTHER MYAKOMBO MAJUMA ..... 2<sup>ND</sup> INTERESTED**  
**PARTY**  
**LAURENCE MUKENYA WEKESA ..... 3<sup>RD</sup> INTERESTED**  
**PARTY**

**JUDGMENT:**

1. The Plaintiffs instituted the instant suit vide a Plaint dated 21.02.2017 and amended on 6<sup>th</sup> October, 2021, against the Defendants, seeking the following orders:-
  - i. A Declaration that plaintiffs are the lawful owners of all that parcel of land known as ELD /MUN /BLOCK 23 (KING'ONG'O)/8,9,10,11,12,13,14,15 and 16 and all the

- documents held by the 1<sup>st</sup> defendant are null and void ab initio.
- ii. A permanent injunction restraining the defendants, their agents and/or servants from transferring, offering for sale through private treaty or public auction, encumbering, trespassing onto and/or otherwise interfering with the plaintiff's quiet possession of all that parcel of land known as ELD /MUN /BLOCK 23 (KING'ONG'O)/8,10,11,12,13,14,15 and 16.
  - iii. Costs of this suit.
  - iv. Any such other relief this honourable court may deem fit and just to do so.

**Plaintiffs' Case;**

2. It is the plaintiffs' claim that at all material times, KITUR ARAP BIEGO was the registered owner of all that parcel of land known as ELDORET MUNICIPALITY/BLOCK 23 (KING'ONG'O)/8 - 16 measuring approx. 36 Acres (hereinafter referred to as the 'suit land').
3. It is their contention that sometimes around 15.03.1989, the 1<sup>st</sup> defendant's late father, PAUL KIPLIMO BOIT, entered into a sale agreement with the 1<sup>st</sup> plaintiff's deceased husband.
4. That in the said sale agreement, the 1<sup>st</sup> defendant's late father exchanged 10 Acres of land in Kamagut Area with 2 ¼ Acres of land curved out from the suit land measuring approx. 36 Acres and registered in the name of the late Kitur Arap Biego.

5. The plaintiffs further claim that the said agreement never materialized. That the 1<sup>st</sup> plaintiff's father died and they have never taken possession of the 10 acres of the parcel of land at Kamagut.
6. They did aver that despite not taking possession of the said parcel of land in Kamagut Area as provided in the sale agreement, the 1<sup>st</sup> defendant fraudulently obtained title in respect to the 2 ¼ Acre portion to be carved out from the suit land.
7. The 1<sup>st</sup> defendant thereafter proceeded to secure a loan at the 2<sup>nd</sup> defendant's bank, Eldoret Branch and used the title deed thereto as security for the loan. They outlined the particulars of fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
8. They maintained that the documents held by the 1<sup>st</sup> defendant in support of his ownership claims are false documents which do not belong to him. That the same were issued without any legal or lawful justification.
9. Consequently, they urged the court to allow their claim and to grant the orders as sought in the Amended plaint.
10. The plaintiffs' case was opposed. The defendants filed their respective statements of defence in response to the allegations raised against them in the plaint.

**1<sup>st</sup> Defendant's Case;**

11. The Defendant filed a Statement of Defence dated 28.01.2018, wherein he denied each and every allegation of fact raised in the plaint and in particular, paragraphs 5,6,7

- and 8 of the plaint and put the plaintiffs to strict proof thereof.
12. He dismissed the plaintiff's claim as having no legal basis, discloses no reasonable cause of action against him and thus amounts to an abuse of the court process.
  13. He denied being the legal administrator of the estate of the late Paul Kiplimo Boit or the issues of land exchange agreement dated 15.03.1989. He further denied the particulars of fraud outlined or that he obtained any loan with the suit parcels as security.
  14. He made no comment on the ownership claims made by the plaintiff with regards to the suit land but invited the plaintiff to strict proof thereof.
  15. On the contrary however, it was his claim that he was lawfully registered as a member of the King'ong'o Farm in his personal capacity and subsequently acquired the suit land and the title thereto.
  16. He thereafter subdivided the title to the original parcel of land and which gave rise to the suit parcels of land known as ELDORET MUNICIPALITY /BLOCK 23 (KING'ONG'O)/8 -16.
  17. He maintained that the same was done in his personal capacity and not as the representative or heir of his late fathers' estate. The plaintiffs were invited to strict proof of the contrary.
  18. It was further his claim that the plaintiffs owned an adjacent parcel of land but have since trespassed into his portion of land without any color of right.

19. In conclusion, he urged the court to dismiss the plaintiffs' claim against him with costs.

**2<sup>nd</sup> Defendant's Case;**

20. The 2<sup>nd</sup> defendant filed a Statement of Defence dated 30.03.2017 in response to the plaint.

21. The 2<sup>nd</sup> defendant denied having knowledge of the ownership claims contained in paragraph 4 of the plaint or that the 1<sup>st</sup> defendant was the legal administrator of the estate of Paul Kiplimo.

22. It was averred that the 2<sup>nd</sup> defendant was not privy to the particulars of the alleged sale agreement between the 1<sup>st</sup> defendant's late father and the plaintiffs' deceased husband. They averred that the same was immaterial to its dealings with the 1<sup>st</sup> defendant in granting the loan facility.

23. It was the 2<sup>nd</sup> defendant's contention that there was no fraud with respect to the security offered that was known to them. That it carried out its due diligence and to ensure that the title to the suit land offered as security was clean and free of any fraud. The plaintiffs were invited to strict proof thereof.

24. With regard to the prayer sought of restraining it from offering the suit land for sale either through a private treaty or public auction, it was its claim that it is entitled as of right to exercise its statutory power of sale in the event of default of repayment of the loan facility advanced.

25. Consequently, if the said order sought is granted, the same would frustrate the bank's recovery process and expose it to further risks.

26. In conclusion, it was the 2<sup>nd</sup> defendant's claim that the plaintiffs' suit against it be dismissed with costs.
27. The said statements of defence were served upon the plaintiffs on diverse dates and they filed their responses thereto.

**Plaintiffs' Reply to Statement of Defence;**

28. The plaintiffs filed their various responses to the Statements of Defence filed by the defendants respectively.
29. In response to the 1<sup>st</sup> defendant's statement of defence, the plaintiffs filed a Reply to Defence dated 16.02.2018, where they denied each and every allegation of fact raised by the 1<sup>st</sup> defendant and reiterated the contents of their plaint.
30. They maintained that there was a land exchange agreement which was reduced into writing vide the agreement dated 15.03.1989.
31. At the end, they urged the court to strike out the 1<sup>st</sup> defendant's defence as the same was vague and consisted of mere denials and does not raise any triable issue.
32. In response to the 2<sup>nd</sup> defendant's statement of defence, the plaintiffs filed a Reply to Defence dated 05.05.2017, wherein they denied all the allegations raised therein and reiterated the contents of the plaint in response thereto.
33. In further response to the allegations of fraud raised and denied, it was their claim that the title documents in relation to the suit parcels, originally King'ong'o Farm L.R. No. 10492 measuring 36 Acres, held by the 1<sup>st</sup> defendant having been

fraudulently and unlawfully obtained, the 1<sup>st</sup> defendant neither had the capacity to use the suit parcels as collateral nor did the 2<sup>nd</sup> defendant acquire any rights in respect to the suit parcels.

34. Consequently, that the 2<sup>nd</sup> defendant's purported statutory power of sale is illegal, irregular, inequitable and greatly prejudicial to the plaintiffs' rights as the lawful and/or bonafide owners.
35. In addition, the plaintiffs did aver that they have an overriding interest over the suit parcels and any transaction between the 1<sup>st</sup> and 2<sup>nd</sup> defendants with regard to the security of the loan advanced is fraudulent, illegal and without the consent of the original owner or his assignees.
36. It was further their contention, that despite the plaintiffs unregistered interests on the suit land, the suit land was encumbered and thus the 2<sup>nd</sup> defendant acquired no rights over the suit parcels or affect the plaintiffs' rights as the beneficial owners of the suit parcel.
37. In conclusion, the plaintiffs urged the court to dismiss the 2<sup>nd</sup> defendant's statement of defence and enter judgment against the 2<sup>nd</sup> defendant.

**Interested Parties Case;**

38. Vide a ruling issued on 09.06.2020 by Hon. Lady Justice M. A. Odeny allowing the application for joinder, the interested parties herein were enjoined into the suit.

39. From a perusal of the court record, I have only seen a list of witnesses and the subsequent witness statements dated 15.02.2022 as well as the list of documents and the accompanying documents filed in support of their claim also dated 15.02.2022.

**Trial:**

40. The plaintiffs' case proceeded for hearing on 30.04.2024. The 1<sup>st</sup> plaintiff testified as PW1. She adopted her witness statement dated 23.7.2018 as part of my evidence in chief.
41. She also produced the following documents as part of her exhibits in support of their claim as follows: -
- Pexh.1 - copy of limited grant of letters of administration issued on 24.10.2016
  - Pexh. 2 - copy of the sale agreement dated 15.03.1989
  - Pexh. 3 - copy of the title deed in respect to the suit property in the name of the 1st defendant.
  - Pexh. 4 - copy of letter dated 20.09.2016.
  - Pexh. 5 (a) and (b) - copies of chief's letters dated 24.07.2018 and 10.10.2016 respectively.
  - Pexh. 6 - copy of the demand letter dated 04.10.2014
42. In addition, it was her testimony that the late Kitur Arap Kibiego was her husband. It was her claim that her husband had one acre of land whereas the 1<sup>st</sup> defendant had 5 acres. That they therefore agreed to exchange the one-acre parcel

of land belonging to her late husband with the five acres belonging to the 1<sup>st</sup> defendant.

43. That pursuant to the said exchange agreement, she tried to take possession of the 5 acres but she was chased away by the 1<sup>st</sup> defendant. Consequently, she remained in occupation of their one-acre parcel of land whereas the 1<sup>st</sup> defendant also remained in occupation of his five acres.
44. In conclusion, she urged the court to allow her claim as sought and order that the title reverts to her name.
45. On cross examination by counsel for the 2<sup>nd</sup> defendant, it was her testimony that her husband was the registered owner of the suit land Eldoret Municipality/Block 023 (King'ong'o) 8-16 and she was not aware how the 1<sup>st</sup> defendant became the registered owner thereof. She denied the claims that her husband's parcel was changed with a different number.
46. She conceded that the 1<sup>st</sup> defendant was issued with the title to the suit land in 1994.
47. When referred to the Exchange Agreement dated 15.03.1989, she stated that the same was in respect to a portion measuring 2 ¼ acres belonging to her late husband with Paul Kiplimo Boit. She confirmed that she was not a witness to the said agreement but one Benard Lagat was the witness thereto.
48. She admitted that from her witness statement, she stated that her husband was exchanging one acre in return for 10 acres.

49. When referred to the letter on her further list of documents, she stated that she is the one who went for the letter from the chief of Kibulgeny location. She maintained that there was fraud on the part of the defendants in charging her property. That the said allegations of fraud were reported to the chief and not to the Police.
50. It was her contention that the 1<sup>st</sup> defendant obtained title to the suit land fraudulently and that the chief's letter is proof that she reported the fraud.
51. On cross examination by counsel for the Interested Parties, it was her testimony that she lived on the suit property alongside the three interested parties herein.
52. She confirmed to have sold a portion of the suit land to Patrick Onkangi Machini on 24.1.2000, another portion to Esther Nyakambi Majuma on 28.9.2000 and another portion to Mildred Nasambu on 28.7.2014. It was her testimony that she was aware that Mildred Nasambu sold her land to Lawrence Mukaya Wekesa, the 3<sup>rd</sup> Interested Party herein.
53. She stated that she only came to know that the 2<sup>nd</sup> defendant intended to auction the suit land in 2019 despite the Interested parties' occupation of the suit land.
54. On re-examination, she clarified that the exchange was for one acre against 5 acres. However, the exchange did not materialize.
55. It was her testimony that she was not aware that the suit property was transferred to the 1<sup>st</sup> defendant in 1994. She

- however maintained that her husband did not transfer the suit land to the 1<sup>st</sup> defendant.
56. At the end of the re-examination, the plaintiffs closed their case.
  57. Peter Chelanga testified as DW1 on behalf of the 2<sup>nd</sup> defendant. He stated that he works with the 2<sup>nd</sup> Defendant as a credit clerk at Eldoret Branch. He adopted his witness statement dated 10.7.2023 as his evidence-in-chief.
  58. In addition, the 2<sup>nd</sup> defendant filed documents dated 20.7.2018 which he produced as Dexh 1 -6 respectively.
  59. It was also his testimony that the 1<sup>st</sup> defendant applied for a loan facility of Kshs. 640,000/- through a company known as StyraX Ware Plastic Industry Limited. That as security for the loan, 1<sup>st</sup> defendant provided a title for the suit land herein parcel No. Eldoret Municipality Block 23 (King'ong'o)/8-12.
  60. That upon receiving the said application, the bank conducted a search at the Land registry on all the 4 parcels and confirmed that they were all registered in the name of the 1<sup>st</sup> defendant. Consequently, the bank did proceed to register a charge against the security provided, in full compliance with the statutory procedures on obtaining the various consents from the Land Control Board.
  61. It was his testimony that the 1<sup>st</sup> defendant defaulted in paying the loan, leaving an outstanding amount of Kshs. 5,918,643/15 as at 10<sup>th</sup> July, 2007 as contained in the statement. Before recovering the said amounts, the instant case was filed.

62. In conclusion, he urged the court to dismiss the plaintiffs' claim against the 2<sup>nd</sup> Defendant with costs.
63. On cross - examination by counsel for the plaintiffs, he admitted that in the letter of offer dated 28.8.1996, the applicant of the loan was Styrex Ware Plastics Ltd, whereas the security is registered in the name of 1<sup>st</sup> defendant. He confirmed that the 2 entities are different.
64. It was however his contention that the beneficiary of the said credit facility was 1<sup>st</sup> defendant who was trading as Styrex Ware Plastics Industries Ltd. He conceded that no document had been adduced in support of the said claims.
65. On whether they conducted due diligence, it was his claim that they only conducted a search but did not carry any due diligence on the ground to find out and confirm who was in occupation.
66. The letter of consent granted was from the 1<sup>st</sup> defendant. He stated that they pursued Styrex Ware Plastics Industries Ltd to recover the loan through 1<sup>st</sup> defendant. He stated that he did not know the plaintiffs in the case.
67. On cross- examination by counsel for the interested parties, he stated that he has worked in the bank sector since 2010, which is 14 years. He explained that it is part of the procedure that a bank visits the ground of the land and further that the searches, pre-search and consent give them authority.
68. He denied the claims of negligence on their part for failing to visit the ground but acknowledged that the legal documents

given to them did not show that different people were in occupation of the suit land. He reiterated that the loan was based on the legal documents presented.

69. He however confirmed that the suit parcels were occupied but maintained that the 1<sup>st</sup> defendant was the one in occupation thereof. It was his testimony that the 1<sup>st</sup> defendant was the rightful owner of the suit land and not the interested parties.
70. On re-examination, he stated that the letter of offer is in the name of Styrex Ware while the title is in the name of 1<sup>st</sup> defendant and that the same is normal.
71. It was his contention that it is not a procedure in law that the bank must physically visit the property before registering the charge, but admitted that the same is good practice. Thus, he stated that it was not negligence on the part of the 2<sup>nd</sup> defendant not to visit the ground since the same was not a legal requirement.
72. It was his testimony that the Interested parties have not produced any evidence to show that they are in occupation of the property.
73. He further stated that no dispute had been raised over the charge documents herein and therefore the charge that was registered by the bank was and remains valid because there was pre-registration search, consent and post-registration search.

74. At the end of the re-examination, the 2<sup>nd</sup> defendant closed its case.
75. In the absence of the 1<sup>st</sup> Defendant and his advocate without reasonable and justifiable explanation, his case was also closed.
76. The Interested Parties case proceeded for hearing on 17.12.2025. The 1<sup>st</sup> Interested Party testified and was marked as IP1. He adopted his witness statement dated 15.02.2022 as his evidence in chief.
77. He also produced the following document in his list of documents dated 15.02.2022, that is the agreement dated 24.01.2000 as IP 1 Exhibit 1.
78. It was also his testimony that he purchased a portion of the suit land measuring 0.052Ha in the year 2000 and entered into the same in 2001 and has remained in occupation to date.
79. That upon the said purchase, he was waiting for the vendors of the said parcel to process the title in his favor. He thus urged the court to protect his interests thereto and to direct that he be issued with a title deed.
80. On cross-examination by counsel for the plaintiffs, it was his testimony that he bought the said portion of land from the 1<sup>st</sup> plaintiff.
81. It was his claim that pursuant to the sale and taking possession thereafter, nobody has ever made claims to the said portion. It was also his testimony that he has never seen

- any person by the name Peter Kirwa Arap Boit, the 1<sup>st</sup> defendant herein, on the said portion of land.
82. On cross-examination by counsel for the 2<sup>nd</sup> defendant, he reiterated that he bought the land from the 1<sup>st</sup> plaintiff. He admitted that at the time of sale, he was not shown a copy of the title by the 1<sup>st</sup> plaintiff but she told him that the land was registered in her husband's name.
  83. He conceded that he did not go to the Land's Office to confirm the said averments or the title of the suit land. He confirmed that he has never seen any title thereto.
  84. He however admitted that he is aware that the title of the suit land is in the name of the 1<sup>st</sup> defendant. He reiterated that he bought the land on 24.01.2000 and at the time of the said sale, the 1<sup>st</sup> plaintiff only showed him her husband's death certificate. No succession proceedings documents were however shown to him.
  85. On re-examination, he confirmed that he was not shown the original title of the land until persons from the bank visited the land and showed him a copy of the title, which was in the name of the 1<sup>st</sup> defendant.
  86. The 2<sup>nd</sup> Interested Party testified and was marked as IP2. She adopted her witness statement dated 15.02.2022 as her evidence in chief. She also produced a copy of the sale agreement dated 26.09.2000 in support of her purchase claims as 2<sup>nd</sup> IP Exhibit 1.
  87. It was her testimony that the said sale agreement shows that she purchased a portion of the suit land from the 1<sup>st</sup> plaintiff.

That at the time of the said purchase, the seller (1<sup>st</sup> plaintiff) was staying on the suit land. That pursuant to the said sale, she entered the suit land on 26.09.2000 and have remained thereon to date.

88. She further testified that she does not know the 1<sup>st</sup> defendant, and has never seen him nor has he ever been to the suit land. In conclusion, she asked the court to order that she be issued with a title deed and for her interest over the purchased portion to be protected.
89. On cross-examination by counsel for the plaintiffs, it was her testimony that she purchased the suit land from the 1<sup>st</sup> plaintiff. At the time of the said purchase, the 1<sup>st</sup> defendant was not on the suit land but the same was occupied by the 1<sup>st</sup> plaintiff/seller.
90. That she first heard of the 1<sup>st</sup> defendant in the year 2019. She maintained that the suit land was lawfully sold to her and that she has been in occupation for a period of over 25 years.
91. She further admitted that she was not aware how the 1<sup>st</sup> defendant acquired the title over the suit land.
92. On cross-examination by counsel for the 2<sup>nd</sup> defendant, she stated that she purchased plot No. 15 King'ong'o Farm Block No. 23. She however admitted that she had never seen the title of the suit land but only saw it when people from the 2<sup>nd</sup> defendant visited the suit land and showed her a copy.
93. She confirmed that the title of the suit land is in the name of the 1<sup>st</sup> defendant. She admitted that she was only shown a

map of the suit land but that she did not conduct a search at the lands office.

94. On re-examination, it was her testimony that she did not go to the lands office because the seller was at the time living on the land and she informed them that the same was owned by her deceased husband and showed her the map. She maintained that the parcel of land she purchased was on the map.
95. The 3<sup>rd</sup> IP testified and was marked as IP3. He adopted his witness statement dated 15.02.2022 as his evidence in chief.
96. He also produced a copy of the sale agreement dated 28.07.2014 as 3<sup>rd</sup> IP Exhibit1. It was his testimony that from the said sale agreement, the seller was one Mildred Nasambu Shikuku and she was residing on the suit land at the time. That the said seller informed her that she had earlier purchased the said portion from the 1<sup>st</sup> plaintiff.
97. Pursuant to the said sale, he took immediate possession of the portion purchased in the year 2015 and has remained therein to date for a period of over 11 years and has even built his matrimonial home thereon.
98. It was his claim that he only learnt of the loan facility issued against the title of the suit land which they occupied in the year 2019 when people from the 2<sup>nd</sup> defendant visited the land.
99. He maintained that he has never seen or met the 1<sup>st</sup> defendant neither has the 1<sup>st</sup> defendant ever visited the suit land.

100. In conclusion, he urged the court to protect his interests over the suit land and to direct that he be issued with a title deed in respect to the purchased portion.
101. On cross-examination by counsel for the plaintiffs; he reiterated that he purchased the portion of the suit land in 2014. At the said time, one Mildred Nasambu was the one in possession of the said portion.
102. He maintained that the 1<sup>st</sup> defendant has never complained about his possession. He also added that the 1<sup>st</sup> plaintiff is still in occupation of a portion of the suit land.
103. On cross-examination by counsel for the 2<sup>nd</sup> defendant, he reiterated that he purchased a portion of the suit land on 28.07.2014 but admitted that he never conducted a search to confirm the ownership thereof.
104. It was his testimony that he found out that the registered owner of the suit land is the 1<sup>st</sup> defendant towards the end of the year 2019.
105. He reiterated that he purchased a portion of the suit land from one Mildred Shukuku, who informed him that she had earlier purchased the same portion from the 1<sup>st</sup> plaintiff.
106. He conceded that he had not produced the sale agreement between the said Mildred Shikuku and the 1<sup>st</sup> plaintiff. He also admitted that the acreage of the suit land is indicated in the sale agreement as 0.25 of an Acre whereas in his witness statement the same is indicated as 0.052Ha.
107. It was also his testimony that he has been in occupation of the suit land and even built a permanent structure thereon

but conceded that he had not produced any evidence of the said developments.

108. On re-examination, he confirmed that he had not produced a copy of the sale agreement between Mildred Shikuku and the 1<sup>st</sup> plaintiff. It was however his contention that the 1<sup>st</sup> plaintiff signed as a witness the sale agreement between the Mildred Shikuku and himself.
109. The interested parties thereafter closed their case.
110. Upon close of the Interested Parties case, directions were issued on the filing of the final submissions. The plaintiffs filed their submissions dated 12.2.2026 the 2<sup>nd</sup> defendant filed its submissions dated 10.4.2026 while the Interested Parties also filed their submissions dated 4.2.2026 together with authorities which I have read and duly considered.

**Analysis and Determination:**

111. Upon careful consideration of the facts as contained in the pleadings filed herein, the various testimonies and exhibits adduced in support of the rival claims as well as the parties' submissions filed herein and the authorities cited in totality, it is my considered opinion that the following issues arise for determination: -
  - a. *Whether the plaintiffs are the actual, lawful and/or legal owners of the parcel of land known as Eldoret Municipality/Block 23 (King'ong'o)/8 - 16*
  - b. *Whether the plaintiffs are entitled to the orders sought in the Amended Plaint against the defendants.*

*c. Who should bear the costs of the suit*

**Whether the plaintiffs are the actual, lawful and/or legal owners of the parcel of land known as Eldoret Municipality/Block 23 (King'ong'o)/8 - 16;**

112. The plaintiffs have urged this court to make a declaration that they are the actual, lawful and/or legal owners of the land parcel known as Eldoret Municipality/ Block 23 (King'ong'o)/8 - 16 (hereinafter referred to as the '**suit properties**')
113. It is the 1<sup>st</sup> plaintiff's claim that her late husband, Kitur Arap Biego was the original registered owner of the suit land originally known as King'ong'o Farm L.R. No. 10492 measuring 36 Acres, which was subsequently subdivided to give rise to the suit properties herein.
114. It was their contention that vide a Sale Agreement dated 15.03.1989, between her late husband Kitur Arap Biego and one Paul Kiplimo Boit, the 1<sup>st</sup> defendant's late father, her late husband agreed to sell a portion of the original parcel of land measuring approx. 2  $\frac{1}{4}$  Acres at an agreed consideration price.
115. That as part of the payment of the consideration price, there was to be an exchange of land of the 10 acres from the 1<sup>st</sup> defendant's late father Paul Boit with the 2  $\frac{1}{4}$  Acres portion from the 1<sup>st</sup> plaintiff's late husband.

116. It is the plaintiffs' claim that the said agreement did not materialize. That her late husband died before the exchange of land could be implemented and consequently, each party remained on their respective portions of land.
117. Consequently, it is their claim that the 1<sup>st</sup> defendant fraudulently obtained the title in respect to the suit properties herein.
118. They maintained that as a result of the said fraudulent registration, the 1<sup>st</sup> defendant acquired no rights over the suit properties and subsequently had no capacity to use the same or offer the said title as collateral.
119. Consequently, the 2<sup>nd</sup> defendant acquired no rights in respect to the suit properties as a result of the charge registered and cannot therefore purport to exercise its statutory powers of sale as the same would be illegal and irregular.
120. To support their ownership claims, the plaintiffs produced copies of the sale agreement dated 15.03.1989 and title deed in respect to the parcel of land known as Eldoret Municipality/Block 23 (King'ong'o)/15 in the name of the 1<sup>st</sup> defendant as Pexhibits 2 and 3 respectively.
121. These ownership claims were strongly denied by the 1<sup>st</sup> defendant, who maintained that he is the lawful registered owner of the suit properties. It was his contention that he acquired the same by virtue of his membership to King'ong'o Farm and therefore acquired the same in his personal capacity.

122. That upon obtaining title to the original parcel, he subdivided the same to give rise to the suit properties.
123. However, despite dismissing the plaintiffs' ownership claims and maintaining that he is the actual, lawful and registered proprietor of the suit land, the 1<sup>st</sup> defendant did not attend court to prosecute his claim and produce evidence in support of his claims.
124. The Interested Parties on their part maintained that they are bonafide purchasers of portions of suit properties and are therefore entitled to be registered as the legal proprietors of the respective portions.
125. It is their claim that they purchased the portions of the suit properties from the 1<sup>st</sup> plaintiff, who they maintained was the actual and/or beneficial owner thereto by virtue of being in occupation at the time of the sale and the same belonging to her late husband.
126. To support their claims, the Interested Parties who testified as IP1, IP2 and IP3 respectively, each produced a copy of the sale agreement as IP1 Exhibit 1, IP2 Exhibit 1 and IP3 Exhibit 1 respectively as proof of the purchase claims.
127. The question that therefore follows is who is the actual, lawful and/or legal owner of the suit properties.
128. It is common ground that the 1<sup>st</sup> defendant is the registered proprietor of the original parcel of land No. 15, which was subdivided to give rise to the suit properties. This fact was confirmed by the testimonies of all the witnesses; PW1, DW1, IP 1, IP2 and IP3 and further buttressed by the copies

of title, certificate of official search, exhibits produced by the PW1 and DW1.

129. Section 26 of the Land Registration Act provides that a certificate of title shall be held as conclusive evidence of proprietorship. The section 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.***

130. The title held by the 1<sup>st</sup> defendant was challenged on the grounds of fraud as provided above. It is the plaintiffs claim that her late husband was the original registered owner of the suit land and the 1<sup>st</sup> defendant without any lawful right

and justification, did proceed to fraudulent transfer and register the same in his name.

131. In **Mutsonga V. Nyati [1984] K.L.R. 425** the Court stated thus:-

***“Allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities, and it is a question for the trial judge to answer.”***

132. PW1 produced copies of Chief’s letters dated 24.07.2018 and 10.10.2016 as proof that she reported the said fraudulent acts on the part of the 1<sup>st</sup> defendant.

133. It is settled law that fraudulent allegations must be distinctly and strictly proved. Save for the letters by the Chief produced as Pexhibit 5 (a) and (b), the plaintiffs did not provide any other proof to distinctly and strictly prove the said allegations of fraud against the 1<sup>st</sup> defendant.

134. Moreover, despite stating that her late husband Kitur Arap Biego was the registered owner of the original parcel known as King’ong’o Farm L.R. No. 10492 measuring 36 Acres, the plaintiffs did not provide any proof to support the said claims and the same remain unsubstantiated allegations with no probative value.

135. Further, this court has also noted the glaring contradictions from the facts pleaded in the amended plaint, the testimony of PW1 as well as the contents of the exhibits produced, particularly, Pexh. 2 which is a copy of the sale agreement dated 15.03.1989.
136. It is not clear whether the exchange of the land was in respect to 1 acre of land within the original suit land and 5 acres of land to be provided by the 1<sup>st</sup> defendant's late father as provided in Pexh. 2 or whether the exchange was in respect to 10 acres and the 2 ¼ Acre portion.
137. Further, it is also not clear whether the entire 36 Acres was fraudulently transferred and registered in the name of the 1<sup>st</sup> defendant as alleged or whether the same is limited to the acreage contained in Pexh. 3, which is a copy of the title deed.
138. Therefore, in view of the foregoing, it is the finding of this court that the plaintiffs have failed to sufficiently prove their claims of fraudulent acquisition against the 1<sup>st</sup> defendant.
139. Consequently, it is my finding that the 1<sup>st</sup> defendant is the actual, lawful and registered owner of the suit properties and the certificate of title held in his name is prima facie proof that he is the indefeasible owner thereof and is therefore entitled to all the rights and privileges appurtenant thereto.
140. With regard to the Interested Parties and their ownership claims, this court has taken into account their testimonies and the evidence adduced in court in support of their claims.

141. However, in view of the finding on ownership hereinabove, this court is unable to issue orders that they be issued with title deeds in their favor as sought. The latin maxim 'nemo dat quod non habet' is clear on this regard. One cannot pass that which he does not have. The 1<sup>st</sup> plaintiff could not pass a good title to the interested parties when in fact she had none.
142. To this end therefore, the Interested Parties are at liberty to pursue appropriate reliefs against the 1<sup>st</sup> plaintiff, who is the vendor including but not limited to getting an alternative parcel of land.

**Whether the plaintiffs are entitled to the orders sought in the Amended Plaint against the defendants;**

143. In addition to the declaratory orders sought by the plaintiffs, they also sought orders of permanent injunction against the defendants jointly and severally.
144. In view of the findings in issue (a) above, it is the finding of this court that the plaintiffs are not entitled to the orders sought in the amended plaint.

**Who should bear the costs of the suit;**

145. A successful party should ordinarily be awarded costs of the suit unless the court, for good reason, directs otherwise.

146. In this case, having held that the Plaintiffs have failed to satisfactorily prove their case against the Defendants to the required threshold, it is my finding that the defendants are entitled to the costs of defending the suit.

**CONCLUSION:**

147. The upshot of the foregoing is that the Plaintiffs have not proved their claim against the defendants. Consequently, this court finds that the Amended Plaint dated 6<sup>th</sup> October, 2021 is not merited and is hereby dismissed with costs to the defendants.

148. It is so ordered.

**DATED, SIGNED and DELIVERED** virtually at **ELDORET** this **23<sup>RD</sup> day of APRIL, 2026.**

**HON. C.K. YANO**

**JUDGE**

In the virtual presence of; -

Mr. Omboto for the Plaintiffs.

No appearance for the 1<sup>st</sup> Defendant.

Ms. Aduke holding brief for Mr. R. Mwangi for 2<sup>nd</sup> Defendant.

Mr. Okara for the Interested Parties

Court Assistant - Laban