

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT ELDORET**  
**ELC LAND APPEAL NO. E005 OF 2024**

**FLORENCE      CHERONO      CHERUIYOT      .....**  
**APPELLANT**

***-VERSUS-***

**HILLARY      KIMUTAI      .....      **1<sup>ST</sup>****  
**RESPONDENT**

**SYPRIAN      JEPTANUI      KIPKOSGEI      .....      **2<sup>ND</sup>****  
**RESPONDENT**

**J U D G E M E N T**

1. The Appellant herein did file a Memorandum of Appeal dated 29.01.2024 (hereinafter referred to as **“the present Appeal”**) against the Judgement and Decree pronounced on the 04.01.2024 (hereinafter referred to as **“the Trial Court Judgement”**) issued in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein seeking for the following Orders; -
  - a) **The Judgment delivered on 4<sup>th</sup> January, 2024 be set aside.**
  - b) **The Appellant’s claim in ELDORET CMCC ELC NO. 125 OF 2018 be allowed with costs.**
  - c) **Costs of this Appeal.**
2. The grounds in support of the prayers sought in the present Appeal are as follows; -
  - i. The Honourable Trial Magistrate erred in law and in fact in dismissing the Plaintiff’s case without giving sufficient reasons.

- ii. The Honourable Trial Magistrate erred in law and in fact in issuing orders for cancellation of registration of Title Deed for the suit land when such order was not prayed for by parties.
3. The Appellant herein did prepare, file and serve the Record of Appeal dated 01.04.2025 on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein.
4. On 10.06.2025, the Record of Appeal dated 01.04.2025 was duly admitted for hearing.
5. The Court did direct that the present Appeal would be heard by way of written submissions.
6. The Appellant did file his submissions dated 23.07.2025 while the Respondents did file their submissions dated 06.08.2025.
7. The duty and jurisdiction of a first appellate court was also outlined in the case of **SELLE & ANOTHER-VERSUS-ASSOCIATED MOTOR BOAT CO. LIMITED & OTHERS (1968) EA 123** where the Court stated as follows; -

***“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”***

8. Based on the holding in the above authority, this Court is mandated to relook at the pleadings that were before the Trial Court, the evidence adduced thereof and make its own independent conclusions on the issues raised before the Trial Court.

9. Thereafter, the Court is to review the Judgement of the Trial Court and make its determination as to whether the correct and relevant facts as well as the correct and relevant laws were applied by the Trial Court in arriving at its decision to be able to make a finding as to whether the appeal before it is merited and/or not.
10. It is on these principles that this Court will now proceed to relook and re-evaluate the Trial Court proceedings and make its own conclusion on the issues raised therein based on the facts and the law applied to arrive at the Judgement in the present Appeal.

### **APPELLANT'S PLEADINGS BEFORE THE TRIAL COURT**

11. The Appellant (who was the Plaintiff before the Trial Court) did file a Plaint dated 13.03.2018 in the proceedings known as ELDORET CHIEF MAGISTRATES COURT ELC CASE NO. 55 OF 2018 (hereinafter referred to as **"the Trial Court proceedings"**) seeking for the following Orders against the Respondents herein (who were the Defendants before the Trial Court); -
  - a) **An Order holding that the Plaintiff is the legal owner of Land Parcel KARUNA/KARUNA BLOCK 1 (TILATIL)/75.**
  - b) **An Order do issue compelling the Defendants and their agents to vacate Land Parcel KARUNA/KARUNA BLOCK 1 (TILATIL)/75.**
  - c) **In default of Order (b) above, an Eviction Order do issue.**
  - d) **An Order of Permanent Injunction restraining the Defendants and their agents from encroaching or in any other way interfere with the Plaintiff's right to Land Parcel KARUNA/KARUNA BLOCK 1(TILATIL)/75.**

### **e) Costs.**

12. The facts in support of the prayers sought above can be summarised as follows; -
- i) The Appellant herein is the lawful registered owner of Parcel Number KARUNA/KARUNA BLOCK 1 (TILATIL)/75 (hereinafter referred as **“the suit property”**).
  - ii) On or about the year 2017, the Respondents herein did encroach the suit property by constructing a structure on the suit property without the consent and/or authority of the Appellant herein.
  - iii) Thereafter, in the year 2018, the Respondents did further plant and/or plough a portion of 2 acres within the suit property without the consent and/or authority of the Appellant herein.
  - iv) The Appellant therefore did plead that the actions by the Respondents herein were in contravention of her ownership rights and therefore illegal.
  - v) The Appellant did seek for an Order of Eviction to be issued against the Respondents herein forthwith.
  - vi) Similarly, the Appellant did seek for an Order of a Permanent Injunction to be issued against the Respondents prohibiting any further interference and/or use of the suit property thereof.
13. The Complaint dated 13.03.2018 filed by the Appellant was duly served on the Respondents who did oppose the same by filing a Statement of Defence and Counter-Claim dated 16.09.2020.
14. In the Statement of Defence dated 16.09.2020, the Respondents did oppose the Complaint dated 13.03.2018 filed by the Appellants on the following grounds; -

- i) To begin with, the Respondents did plead that the suit property was the property of a deceased person.
  - ii) The Respondents herein were part of the beneficiaries of the estate of the deceased person who was the registered owner of the suit property.
  - iii) The Deceased person had granted the Respondents permission and/or authority to plough and/or use the portion which they have been cultivating since the year 2010.
  - iv) The Appellant without the knowledge and/or authority of the other beneficiaries to the suit property did fraudulently transfer the entire asset of the deceased person to her own name.
  - v) Upon the fraudulent and/or unlawful registration of the suit property in the name of the Appellant, she had been disposing it off in small portions.
  - vi) The Respondents did plead that currently, the Appellant was in the process of also disposing off the portion which they have been in occupation and use without their knowledge and/or consent.
  - vii) In conclusion, the Respondents sought the Trial Court to dismiss the Appellant's Complaint dated 13.03.2026 with costs.
15. In addition to the Statement of Defence dated 16.09.2020, the Respondents also did file a Counter-Claim dated 16.09.2020 against the Appellant seeking the following Orders; -
- a) A declaration that the 2<sup>nd</sup> Defendant is the beneficial owner and thus entitled to approximately two and half acres of Land Parcel**

**KARUNA/KARUNA BLOCK 1 (TILATIL)/75 and the Plaintiff and her agents be restrained from encroaching or in any other way interfering with the 2<sup>nd</sup> Defendants right and use of approximately two and a half acres of the subject land.**

**b) Costs of this suit.**

16. The facts in support of the prayers above can be summarised as follows; -
- i) The suit property was registered in the name of the late MIRIAM MELENIA and the Appellant herein.
  - ii) The 2<sup>nd</sup> Respondent is a beneficiary of the late MIRIAM MELENIA who did give her the consent and authority to use a portion of two and half acres within the suit property since the year 2010.
  - iii) Upon the demise of MIRIAM MELENIA, the Appellant herein did fraudulently remove her name from the suit property without following the law.
  - iv) Thereafter, the Appellant has been disposing off portions of the suit property without the consent of the Estate of MIRIAM MELENIA including the portion occupied by the 2<sup>nd</sup> Respondent herein.
  - v) The Respondents therefore sought the Trial Court to grant the Orders sought in the Court therein.
17. Both the Statement of Defence and Counter-Claim dated 16.09.2020 by the Respondents were served on the Appellant who did file a Reply to Defence and Defence to the Counter-Claim dated 25.09.2020.
18. In the Reply to Defence dated 25.09.2020, the Appellant did respond to the Statement of Defence dated 16.09.2020 through the following facts; -

- i) The Appellant did reiterate that she was the lawful registered owner of the suit property herein.
  - ii) The Appellant did dispute the allegation that the 2<sup>nd</sup> Respondent herein had been in occupation and use of two and a half acres of the suit property since the year 2010.
  - iii) The Appellant further did deny the allegations that the transfer of the suit property into her name had been done fraudulently.
  - iv) The Appellant further did deny that the suit property was registered in her name in trust for the Estate of one MIRIAM MELENIA as alleged by the Respondents.
  - v) In essence, the Appellant did deny any intentions to dispose off any portion of the suit property as alleged by the Respondents.
19. In addition to the Reply to Defence dated 25.09.2020, the Appellant did file a Defence to the Counter-Claim dated 25.09.2020.
20. In the Defence to the Counter-Claim dated 25.09.2020, the Appellant did oppose the Counter-Claim dated 16.09.2020 on the following facts; -
- i) The Appellant did deny the allegation that the Respondents had been given consent and/or authority to use a portion of two and a half acres on the suit property by their grandparents as alleged in the Counter-claim.
  - ii) The Appellant did further deny the allegations that the suit property was the asset of the late MIRIAM MELENIA and/or had been registered in the joint names of the late MIRIAM MELENIA and the Appellant herein.
  - iii) The Appellant did deny the allegation that she had sold a portion of the suit property measuring 4.3 Acres.

- iv) The Appellant did plead that the Respondents herein were not entitled to any portion of two acres within the suit property as alleged in their Counter-Claim.
21. Upon service of the Reply to Defence and Defence to the Counter- Claim dated 25.09.2020 on the Respondents, the pleadings did close and the matter was set-down for hearing.

**THE APPELLANT'S TESTIMONIES AND DOCUMENTARY EVIDENCE BEFORE THE TRIAL COURT.**

22. The Appellant herein was the first witness before the Trial Court and was marked as PW 1.
23. The Appellant did introduce herself as a retired nurse currently residing in Baringo County.
24. The Appellant did confirm to the Court that she had written a witness statement dated 13.03.2018 of which she did adopt as her evidence in chief.
25. The Appellant did further produce the Title Deed of the suit property dated 13.02.2012 as PLAINTIFF EXHIBIT 1.
26. According to the Appellant, the suit property measured approximately 2.6 Hectares.
27. The Appellant did also produce a Copy of the Register and/or Green Card of the suit property issued on the 30.06.2021 which was marked as PLAINTIFF EXHIBIT 2.
28. Based on the Register and/or Green Card of the suit property, there was a caution recorded on the 21.02.2018 by one SYPRIAN JEPTANUI.

29. Based on the Caution recorded on the 21.02.2018, the Appellant did write and serve two Demand Letters to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein dated 23.02.2018.
30. The two Demand Letters dated 23.02.2018 to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were produced as PLAINTIFF EXHIBIT 3 & 4.
31. The Appellant therefore sought the Trial Court to declare her the lawful owner of the suit property and issue eviction orders against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
32. According to the Appellant, the Respondents herein did enter into the suit property in the year 2017.
33. The Appellant did inform the Trial Court that being the lawful registered owner of the suit property, she had all the rights and powers to dispose of the same without consultations with the Respondents.
34. The Appellant did point out that she was the first registered owner of the suit property.
35. The Appellant nevertheless did state that the suit property had initially been allocated to her mother.
36. The Appellant did state that when her father KIBIRIR TUMO passed on in the year 1986, he had two properties in Keiyo measuring 8.4 Acres and 1.2 Acres and 6.5 Acres in Uasin Gishu.
37. Later on, the Appellant's father KIBIRIR TUMO did purchase another property in TILATIL measuring between 13 to 15 Acres.

38. Upon acquisition of the property in TILATIL, the Appellant's father KIBIRIR TUMO did allocate 6.5 Acres to her late Sister MIRIAM MELENIA and the rest was given to her mother.
39. The portion allocated to the Appellant's late sister MIRIAM MELENIA measuring 6.5 Acres was registered in the name of the 1<sup>st</sup> Respondent.
40. The remaining portion which was for the Appellant's mother was not issued with a Title Deed.
41. It is this portion belonging to the Appellant's mother that was registered in the name of the Appellant.
42. The Appellant did further aver that before her registration as the lawful owner of the portion belonging to her mother, her late brother PIUS KIBIRI KIPTOO TUMO was the one leasing it out to third parties for farming.
43. The Appellant did testify that upon the demise of her brother, she took the responsibility of taking care of the mother and in a gesture of appreciation, the Appellant's deceased mother allocated the Appellant the remaining portion of the property in TILATIL.
44. In the year 2011, the Appellant's mother did go to the offices of the Land Registrar and did transfer the suit property to the Appellant herein.
45. The Appellant's mother who is known as MORRET TERIKI KIBIRIR did pass away on the 16.09.2013 which was after the suit property had been transferred to the name of the Appellant on the 13.02.2012.

46. At the demise of the Appellant's mother, she was survived by Nine Children of whom Four have since also passed on.
47. The Appellant therefore did deny the allegation that her registration as the owner of the suit property was in trust for the beneficiaries of the late MORRET KERIKI KIBIRIR.
48. The Appellant did insist that the 2<sup>nd</sup> Defendant had not been in the suit property since the year 2010 because she was the one that had been cultivating the suit property since the year 2005.
49. On being referred to the Defendant's List of Documents and in particular Item No. 1 therein, the Appellant could not recognise the document before the Trial Court.
50. The Appellant did acknowledge that her name was on the document but did deny ever being in attendance of the said meeting and/or appending her signature thereon.
51. On being referred to the Defendant's List of Documents and in particular Item No. 3, the Appellant did confirm that she was aware of the said document.
52. The Appellant did state that in the said document, she had agreed to refund MP Chepkok a sum of KShs.40,700/- which he was claiming to have paid for tilling of five acres since she was the only one who was in gainful employment.
53. The Appellant did further state that the late mother had instructed all the siblings to refund her Kshs.8,115/- before she could distribute the land to them.
54. The Appellant did confirm that her siblings did refund the sum of KShs.8.115/- in the year 2015 after the mother had died.

55. The Appellant did testify that on 27.04.2015, she did sell a portion of the suit property to DAVID KIYENG.
56. Thereafter, her sister did offer to sell her portion of the suit property to the same DAVID KIYENG and the purchase price was given to her son.
57. In conclusion of her evidence in chief, the Appellant did insist that the 2<sup>nd</sup> Respondent had her own portion of land and had no ownership rights on the suit property herein.
58. On cross-examination, the Appellant did admit that the suit property is within a Settlement Scheme.
59. The Appellant did further confirm that the suit property was allocated to the late father KIBIRIR TUMO.
60. The Appellant did state that she was not aware of the late MIRIAM MELENIA was a co-owner of the suit property with the late father KIBIRIR TUMO.
61. According to the Appellant, the portion that was due to the late MIRIAM MELENIA was registered in the name of the 1<sup>st</sup> Respondent.
62. The remaining portion of land within the suit property was allocated to the Appellant's mother MORRET KIBIRIR.
63. The Appellant did disclose that the portion given to her late mother MORRET KIBIRIR was to be allocated to the late brother PIUS KIBIRIR KIPTOO TUMO who had passed on.

64. However, upon the demise of PIUS KIBIRIR KIPTOO TUMO, the Appellant began taking care of the deceased mother on the suit property and was then allocated the same.
65. The Appellant did testify that an Agreement between the Appellant's deceased mother and the Appellant was prepared by the Area Chief known as JOHN KIPTAGAT.
66. The Appellant did aver that in all the meetings before the Area Chief JOHN KIPLAGAT, all the siblings were present and minutes were prepared.
67. The Appellant did further admit that she had given the 2<sup>nd</sup> Respondent a share of the suit property herein.
68. According to the Appellant, their first born known as MARIA KIPCHOGE is still alive and resides in Keiyo.
69. Two other siblings known as RITA and ELIZABETH were also given land in Keiyo.
70. On the other hand, the late MIRIAM MELENIA got land in Uasin Gishu which is different from the suit property.
71. The Appellant did reiterate that the 2<sup>nd</sup> Respondent was not in occupation of the suit property when the meetings before the Area Chief were happening.
72. The Appellant did inform the Court that the first-born sister though alive was too old and not of good memory.
73. The Appellant did state that she had not built any developments on the suit property.

74. Further to that, the Appellant had not visited the suit property since the year 2018 due to fear of being attacked.
75. The Appellant did inform the Trial Court that she was not aware who had built a temporary structure of the suit property.
76. On re-examination, the Appellant did state that the portion of land which the Respondents occupy belongs to their deceased mother.
77. The Appellant could not tell if the Respondent's mother had purchased the same or not.
78. The Appellant did testify that the Respondents mother had passed away in the year 1976.
79. As such, the Appellant's father KIBIRIR TUMO did register the Respondents mother's portion in the name of the 1<sup>st</sup> Respondent.
80. The Appellant was of the view that none of the beneficiaries of the Late KIBIRIR TUMO was left without a portion of land.
81. The Appellant did insist that during the meetings at the Chief's office, there was no dispute on how the suit property should be divided but only the business of transferring it to the Appellant.
82. The Appellant states that in the year 2015, there was a memorial of the late mother but she could not attend due to hostility from the community.

83. The Appellant did reiterate that she had not signed the minutes before the Area Chief identified as Item 1 on the Defendant's Lists of documents.
84. At the end of this re-examination, the Appellant was duly discharged from the witness box.
85. The second Appellant's witness was BENJAMIN KIMELI who was marked as PW 2.
86. PW 2 did introduce himself as the Area Chief of Moiben Location within Uasin Gishu County.
87. PW 2 did confirm to the Trial Court that he was in charge of two settlement schemes known as KARUNA/KARUNA BLOCK 1 which were within his jurisdiction.
88. PW 2 did further confirm to the Trial Court that he was familiar with all the parties in the Trial Court proceedings.
89. According to PW 2, the Late MORRET TERIKI TUMO was the mother to the Appellant.
90. On the other hand, the Respondents are the grandchildren to the late MORRET TERIKI TUMO.
91. PW 2 did inform the Trial Court that he had known the family of KIBIRIR TUMO for the last twenty years.
92. PW 2 did state that the suit property measuring about 15 acres did belong to the late KIBIRIR TUMO and his wife the late MORRET TERIKI TUMO.

93. Prior to the demise of KIBIRIR TUMO, the property measuring 15 acres was divided into two portions which were allocated to the late MELENIA and PIUS TUMO.
94. The portion allocated to MELENIA was registered in the name of the 1<sup>st</sup> Respondent and is known as PLOT.NO.77.
95. The other portion allocated to PIUS TUMO was not yet registered in his name at the time of his demise.
96. After the demise of PIUS TUMO, the Appellant's mother MORRET TERIKI TUMO decided that the remaining portion be allocated to the Appellant herein.
97. As such, by the time the Appellant's mother MORRET TERIKI TUMO was passing away, the suit property had been transferred to the Appellant herein.
98. PW 2 did testify that he had met the late MORRET TERIKI TUMO who explained to him that the Appellant had taken care of her and therefore as a sign of good gesture, she had allocated the suit property to her.
99. During the process of transferring the suit property to the Appellant, PW 2 was called to the Land Department and in his presence, the late MORRET TERIKI TUMO did transfer the same to the Appellant.
100. In essence, PW 2 did state that the Respondents herein did have their own portion of land which even the 2<sup>nd</sup> Respondent had sold off a portion of it.
101. PW 2 did confirm to the Court that the other siblings of the Appellant did have their own portions of land and there had

been no complaint over the estate of the late KIBIRIR TUMO and MORRET TERIKI TUMO.

102. In conclusion thereof, PW 2 did confirm to the Trial Court that the suit property belongs to the Appellant herein.
103. On cross-examination by the Respondents, PW 2 did inform the Trial Court that he became involved with the suit property when there was a dispute with one Member of Parliament known as PAUL CHEPKOK.
104. PW 2 did state that prior to this dispute, he had not had any meeting with the estate of the late KIBIRIR TUMO and/or MORRET TERIKI TUMO.
105. PW 2 did confirm that the dispute involving the Member of Parliament known as PAUL CHEPKOK was resolved after the Appellant refunded the sum of KShs.40,000/- on behalf of the late PIUS TUMO.
106. PW 2 did could not tell whether the amount of KShs.40,000/- paid by the Appellant was reimbursed to her by the family members including the Respondents herein.
107. PW 2 did inform the Trial Court that meetings of the said meeting were prepared.
108. PW 2 did testify that during the said meeting, the estate of KIBIRIR TUMO did not inform him that another Chief known as JOHN KIPLAGAT had been involved in the same dispute and was not present in the said meeting.
109. PW 2 did reiterate that he was one of the persons that was present when the suit property was transferred to the Appellant by the late MORRET TERIKI TUMO at the Land Department.

110. PW 2 did confirm that the Appellant's siblings were present although he could not remember all of them by name.
111. PW 2 did nevertheless insist that the late MORET TERIKI TUMO was the one that made the request for registration of the suit property to the Appellant herein.
112. PW 2 did state that the Appellants surviving sisters reside in Keiyo where they had been allocated land by the late KIBIRIR TUMO.
113. In conclusion thereof, PW 2 did deny knowledge that the suit property had been divided into three portions and not two portions.
114. On re-examination, PW 2 did inform the Court that he was not the secretary of the meeting and had not been given the minutes of the meeting.
115. PW 2 did inform the Trial Court that his testimony was in so far as he was aware of the facts of the matter before it.
116. At the end of this re-examination, PW 2 was discharged from the witness box.
117. The Appellant's third witness was ERNEST KIMUTAI CHESEREM who was marked as PW 3.
118. PW 3 did introduce himself as a resident of Kapkoi within Elgeyo Marakwet County.
119. PW 3 did confirm to the Court that he was familiar with all the parties in the proceedings before the Trial Court.

120. PW 3 did state that the late MORRET TERIKI TUMO was an aunty as the late KIBIRIR TUMO was his father's brother.
121. PW 3 did inform the Court that most of time when schools were closed, he would visit the late MORRET TERIKI TUMO and spend time with her.
122. During this period, the late MORRET TERIKI TUMO did inform PW 3 that the suit property had been given to the Appellant herein.
123. Similarly, the late MORRET TERIKI TUMO did ensure that the suit property was registered in the name of the Appellant.
124. PW 3 did further seek to rely on the witness statement dated 18.04.2018 of which he did adopt as his evidence in chief.
125. On cross-examination, PW 3 did state that his first name was WILLIAM before he was baptised and took the name ERNEST.
126. PW 3 did inform the Court that the Appellant had five sisters although some of them had since passed away.
127. PW 3 did testify that the late MORRET TERIKI TUMO did pass away in the year 2015.
128. PW 3 did aver that during one of the visits to the late MORRET TERIKI TUMO, the Appellant did inform him that the suit property had been divided into three portions.
129. Currently, the portion that the Respondents are seeking to occupy is within the suit property owned by the Appellant.

130. PW 3 did reiterate that the late MORRET TERIKI TUMO is the one that had gone to the Land Department to ensure the suit property is registered in the name of the Appellant in the presence of the Area Chief who was marked as PW 2.
131. During the visit to the Land Department, some of the siblings of the Appellant were also present.
132. PW 3 however could not tell in whose name the suit property was at the time it was transferred to the Appellant by the late MORRET TERIKI TUMO.
133. PW 3 did insist that all the surviving children had been given land by both the late KIBIRIR TUMO and the late MORRET TERIKI TUMO.
134. On re-examination, PW 3 did confirm that the late KIBIRIR TUMO had a number of properties which he did allocate to his children.
135. PW 3 however did reiterate that the suit property was allocated and registered in the name of the Appellant in the year 2011.
136. At the end of this re-examination, PW 3 was discharged from the witness box and the Appellant did close her case before the Trial Court.

## **RESPONDENTS' TESTIMONIES AND DOCUMENTARY EVIDENCE BEFORE THE TRIAL COURT**

137. The 1<sup>st</sup> Respondent's witness to be called was JOHN KIPLAGAT who was marked as DW 1.

138. DW 1 did introduce himself as the Area Chief of Kapkonga Location in Elgeyo Marakwet County.
139. DW 1 did confirm that he was familiar with the parties therein.
140. DW 1 did state that the Appellant was an Aunty to the Respondents therein.
141. DW 1 did aver that he was familiar with the suit property in issue.
142. DW 1 did testify that on the 11.09.2010, there was a meeting held by the family of the late KIBIRIR TUMO in his office.
143. In the same meeting, one of the agendas were the properties in Kapkonga and Tilatil.
144. According to DW 1, upon deliberations, it was resolved that the property in Kapkonga would be shared between four siblings namely Tapsimei Jepngetich, Rita Jelanga, Elizabeth Kiprir and Anna Singoe.
145. The other property located in Tilatil would be shared between three siblings namely Melenia Kiprir (Deceased), Florence Cheruiyot and Miriam Lemuge.
146. DW 1 did inform the Court that at the time of the meeting, the suit property had been registered in the names of the late PIUS KIPRIR and PAUL CHEKOK.
147. It was further resolved that a sum of KShs.40,700/- would be refunded to PAUL CHEPKOK so that he would no longer have an interest in the suit property.

148. Initially, the amount of KShs.40,700/- was refunded in full by the Appellant and thereafter the siblings did contribute KShs.5,815/-, which was a refund to the Appellant herein.
149. DW 1 did reiterate that based on the Resolutions of the said meeting, each of the three siblings was to get about two and a half acres within the suit property.
150. DW 1 did produce the Minutes of the Meeting held on 11.09.2010 as DEFENCE EXHIBIT 1.
151. DW 1 did also produce the Debt Collection Receipt dated 16.01.2015 as DEFENCE EXHIBIT 2.
152. DW 1 did acknowledge that currently, the suit property was to registered to the Appellant, although it ought to have been in the three siblings namely MELENIA KIPRIR (DECEASED), the Appellant and MIRIAM LEMUGE.
153. In essence, DW 1 was of the considered view that the Respondents are entitled to their mothers share on the suit property.
154. On cross-examination, DW 1 did state that he was the Chief of KAMOI Location within Elgeyo Marakwet.
155. DW 1 did admit that the suit property was not within his jurisdiction.
156. DW 1 did inform the Court that he was not aware of the fact that the Area Chief of where the suit property was located had testified in the matter.

157. DW 1 however did insist that the family of the late KIBIRIR TUMO had visited his office and held a meeting.
158. During the meeting, DW 1 was the Chairman and the Secretary was William.
159. DW 1 did inform the Court that the Minutes were not on the office letterhead and did not bear his official stamp.
160. DW 1 did admit that the Minutes were not signed by all the persons that were in attendance.
161. In the Minutes of the meeting, the parcel numbers of the properties under discussion were not indicated therein.
162. DW 1 however did reiterate that at the time of the meeting, the suit property was in the name of the late PIUS KIPRIR.
163. In the meeting, the late MORRET TERIKI TUMO was complaining about the activities of Chepkok on the suit property yet according to her, he had not bought the suit property.
164. Consequently, the amount of KShs.40,700/- which had been paid by CHEPKOK to PIUS KIPRIR in relation to the suit property was refunded by all family members as at that time PIUS KIPRIR had already passed on.
165. DW 1 did confirm that the late MELENIA also had a share on the land that was registered in the name of PIUS KIPRIR in addition to her own portion of land which was recorded in the name of the 1<sup>st</sup> Respondent.
166. DW 1 could not tell when the Appellant did procure her registration but even if she did, it was to be from PIUS KIPRIR and not the late MORRET TERIKI TUMO.

167. On re-examination, DW 1 did insist that all the family members of the late KIBIRIR TUMO were present in the meeting held on 16.01.2015.
168. At the end of the Meeting on the 16.01.2015, each family member was given a copy of the Minutes.
169. DW 1 did further testify that the portion which the 1<sup>st</sup> Respondent was registered as the owner was for the share of his mother.
170. In conclusion, DW 1 did state that the late MORRET TERIKI TUMO had insisted that all his daughters should get their father's assets.
171. At the end of this re-examination, DW 1 was discharged from the witness box.
172. The Respondents second witness was the 1<sup>st</sup> Respondent who was marked as DW 2.
173. The 1<sup>st</sup> Respondent did introduce himself as a resident of Tilatil within Karuna Location.
174. The 1<sup>st</sup> Respondent did recognise the Appellant as his aunty while the 2<sup>nd</sup> Respondent was his cousin.
175. The 1<sup>st</sup> Respondent did also confirm that he was familiar with the suit property.
176. According to DW 2, the suit property was the asset of the late PIUS KIPRIR who was the uncle.

177. DW 2 did further testify that PIUS KIPRIR had been allocated the land by his grandfather KIBIRIR TUMO.
178. Upon the demise of PIUS KIPRIR, the suit property was registered in the name of the Appellant as an Administrator.
179. DW 2 did confirm that various family members did go to the Land Registrar Uasin Gishu for the same to be recorded.
180. However, later on, DW 2 was surprised to be sued by the Appellant on the ground that they were not supposed to be on the suit property.
181. DW 2 then did proceed to adopt his witness statement as his evidence in chief.
182. On cross-examination, DW 2 did reiterate that the suit property was the asset of his grandfather KIBIRIR TUMO.
183. In the year 1994, the property was sub-divided into two portions.
184. One portion was recorded in the name of the 1<sup>st</sup> Respondent on behalf of the deceased mother and the second portion was given to the late PIUS KIPRIR.
185. In the year 1994, the late PIUS KIPRIR did pass way without any direct beneficiaries.
186. DW 2 could not therefore explain how the Appellant had been able to procure the registration of the suit property in her name.
187. DW 2 did confirm that at the time the Appellant procured her registration, the grandmother MORRET TERIKI TUMO was still alive.

188. DW 2 did state that the suit property had been divided into three portions by the late grandmother MORRET TERIKI TUMO.
189. DW 2 did also deny being the person that had planted tomatoes of the Appellants portion of land.
190. DW 2 did also confirm that he resides on another parcel of land and not the suit property.
191. On re-examination, DW 2 state that upon discovering that the Appellant had obtained the registration of the suit property in her own capacity, they did register a caution on the same.
192. DW 2 did insist that the suit property should be sub-divided between three sisters.
193. At the end of this re-examination, DW 2 was discharged from the witness box.
194. The Respondents third witness was the 2<sup>nd</sup> Respondent who was marked as DW 3.
195. The 2<sup>nd</sup> Respondent did introduce herself as a Civil Servant and resident of Iten town within Elgeyo Marakwet.
196. The 2<sup>nd</sup> Respondent did confirm being familiar with the Appellant and the 1<sup>st</sup> Respondent.
197. The 2<sup>nd</sup> Respondent did adopt the witness statement she had prepared and filed as her evidence in chief.

198. The 2<sup>nd</sup> Respondent did produce a List of Members of Tilatil Farm as DEFENCE EXHIBIT 3.
199. The 2<sup>nd</sup> Respondent did inform the Court that she was one of the family members that had attended the meeting on 16.01.2015.
200. The 2<sup>nd</sup> Respondent did also confirm that the sum of KShs.40,700/- owed to CHEPKOK was refunded as shown in the Debt Collection Receipt produced as DEFENCE EXHIBIT 2.
201. The 2<sup>nd</sup> Respondent did inform the Trial Court that she was not aware of the Agreement for Sale dated 27.04.2015 or how the suit property should be shared.
202. The 2<sup>nd</sup> Respondent did testify that she was aware of the Agreement For Sale dated 17.06.2015 but was not a party to the same.
203. The 2<sup>nd</sup> Respondent in concluding her testimony in chief did confirm that the suit property was registered in the name of the Appellant herein.
204. On cross-examination, the 2<sup>nd</sup> Respondent did state that the suit property was 15 acres.
205. However, the 2<sup>nd</sup> Respondent could not tell the actual original number of the suit property.
206. According to the 2<sup>nd</sup> Respondent, the original property was purchased by her grandfather KIBIRIR TUMO and her deceased mother MELENIA KIPRIR although she did not have any share certificate to confirm the same.

207. The 2<sup>nd</sup> Respondent did clarify that the portion in dispute was that owned by the late PIUS KIPRIR which measures 6.5 Acres.
208. The 2<sup>nd</sup> Respondent did testify that there was no evidence that the Appellant was the administrator of the Estate of PIUS KIPRIR.
209. The 2<sup>nd</sup> Respondent was categorical that her occupation is on the portion that her mother was entitled to within the Estate of the late PIUS KIPRIR.
210. The 2<sup>nd</sup> Respondent did admit that the Register of the suit property was opened on the 24.12.1993 and the first registered owner was the Appellant herein.
211. The 2<sup>nd</sup> Respondent did further admit that the registration of the Appellant was absolute and not in trust of any other person.
212. It was based on the registration of the Appellant as the absolute owner of the suit property that a caution was registered on the 21.02.2018.
213. The 2<sup>nd</sup> Respondent did state that at the time the late MORRET TERIKI KIBIRIR was passing on, the suit property was already registered in the name of the Appellant.
214. The 2<sup>nd</sup> Respondent was of the view that the suit property was to be registered in the name of the late MORRET TERIKI KIBIRIR but due to her advanced age, it was registered in the name of the Appellant in trust.
215. The 2<sup>nd</sup> Respondent did inform the Court that no report had been made to the investigative arms of government to look into the issue of fraud perpetuated by the Appellant.

216. On re-examination, the 2<sup>nd</sup> Respondent did state that the Minutes of 16.01.2015 did not give the particulars of the properties under discussion.
217. The 2<sup>nd</sup> Respondent did further testify that the suit property should have been divided into three portions belonging to MELENIA, MIRIAM and LEMUGE.
218. The 2<sup>nd</sup> Respondent did reiterate that she had not made any report of fraud to the police.
219. At the end of this re-examination, DW 3 was discharged from the witness box.
220. The Respondents fourth witness was one JAMES KEMBOI LEMUNGE who was marked as DW 4.
221. DW 4 did introduce himself as a resident of Turbo.
222. DW 4 did also confirm to the Trial Court that he was familiar with the parties in the proceeding.
223. DW 4 did adopt the evidence of DW 1 in its totality.
224. DW 4 did confirm that the Appellant herein had sold off a portion of the suit property to one DAVID KIYENG which he was a witness.
225. DW 4 did testify that the portion which was being sold off is the one relating to MIRIAM KIGEN LUMUNGE.
226. However, the Appellant was the one who signed the Agreement because the suit property was in her name.

227. DW 4 did aver that he was aware the Appellant had sold another portion to the same DAVID KIYENG which was the portion she was entitled to within the suit property.
228. On cross-examination, DW 4 did inform the Court that he had never seen the Title to the suit property herein.
229. However, from the information and records regarding the suit property, it is registered in the name of the Appellant.
230. DW 4 did reiterate that the portion which was sold did belong to his deceased mother.
231. Consequently, DW 4 did aver that he had no claim on the suit property currently registered in the name of the Appellant.
232. On re-examination, DW 4 did inform the Court that he was the only beneficiary of the MIRIAM KIGEN LUMUNGE and had the authority to sale the portion which belonged to her.
233. At the end of this re-examination, DW 4 was discharged from the witness box.
234. The Respondents fifth witness was one MARY JEPTANUI SINGOE who was marked as DW 5.
235. DW 5 did introduce herself as a resident of Kipkaren within Uasin Gishu County.
236. DW 5 did state that she was familiar with the parties therein with the Appellant being her sister and the Respondents being her nephew and niece.

237. DW 5 then did proceed to adopt her witness statement as her evidence in chief.
238. On cross-examination, DW 5 did state that the suit property belonged to the late PIUS KIPTOO KIBIRIR.
239. However, at the time of his demise, the same had not been registered in his name.
240. According to DW 5, in the year 2010, there was a family meeting where it was resolved that the suit property would be registered in the name of the Appellant due to the advanced age of the late MORRET TERIKI TUMO.
241. DW 5 was therefore surprised that the Appellant had registered the suit property in her own name to the exclusion of the other family members.
242. There was no re-examination on DW5 and she was thereafter discharged from the witness box.
243. The Respondents then did proceed to close their case.
244. The parties herein did proceed to file their final submissions with the Appellant filing her submissions on 30.10.2021 while the Respondents did file their submissions dated 30.10.2023.
245. The Court has carefully gone through the pleadings before the Trial Court, the testimonies of the witnesses therein, the documentary evidence adduced and the submissions filed and identifies the following issues for determination; -

**ISSUE NO.1- WHO WAS THE RIGHTFUL BENEFICIAL OWNER OF THE SUIT PROPERTY HEREIN?**

**ISSUE NO.2- WAS THE APPELLANT'S REGISTRATION AS THE LAWFUL OWNER OF THE SUIT PROPERTY FRAUDULENT IN ANYWAY?**

**ISSUE NO.3- DO THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS HEREIN HAVE ANY BENEFICIAL INTEREST ON THE SUIT PROPERTY HEREIN?**

**ISSUE NO.4.- IS THE APPELLANT ENTITLED TO THE PRAYERS SOUGHT IN THE PLAINT DATED 13.03.2018?**

**ISSUE NO.5- ARE THE RESPONDENTS ENTITLED TO THE PRAYERS SOUGHT IN THE COUNTER-CLAIM DATED 16.09.2020?**

**ISSUE NO.6- IS THE PRESENT APPEAL MERITED OR NOT?**

**ISSUE NO.7- WHO BEARS THE COST OF THE PRESENT APPEAL?**

246. The Court having identified the issues for determination as hereinabove provided, the same will now be discussed below.

**ISSUE NO.1- WHO WAS THE RIGHTFUL BENEFICIAL  
OWNER OF THE SUIT PROPERTY HEREIN?**

247. The first issue for determination is who was the rightful beneficial owner of the suit property herein.
248. To begin with, the Appellant herein during her cross-examination did testify that the original allottee of the suit property was the deceased father known as KIBIRIR TUMO.
249. The testimony of PW 2 also did identify the late KIBIRIR TUMO as the original allottee of the suit property herein.
250. DW5 further did corroborate this testimony that the original allottee of the suit property was the late KIBIRIR TUMO.
251. The only witness that did depart from this position was the 2<sup>nd</sup> Respondent who did testify that the suit property was originally allotted to the late KIBIRIR TUMO and her deceased mother MELENIA who was a daughter of the late KIBIRIR TUMO.
252. In support of this testimony, the 2<sup>nd</sup> Respondent sought to rely on the List of Members of TILALIT FARM which had the name of the late MELENIA as a member of the said farm.
253. Nevertheless, in her cross-examination, the 2<sup>nd</sup> Respondent did admit that her uncle PIUS KIPTOO KIBIRIR was the one entitled to 6.5 Acres which had been identified as PLOT NO.44.
254. From a perusal of the evidence adduced by the witnesses herein, it is clear that the original allottee of the 15 acres within TILALIT FARM was the late KIBIRIR TUMO.

255. While the 2<sup>nd</sup> Respondent did claim that the original portion of 15 acres had been acquired by both the late KIBIRIR TUMO and her deceased mother MELENIA, this Court did not find any evidence to that effect.
256. The fact that the 2<sup>nd</sup> Respondent was a member of TILALIT FARM as contained in the List of Members of TILALIT FARM does not mean that she had an automatic ownership right over the original portion of 15 acres allocated to the late KIBIRIR TUMO.
257. This Court therefore makes a finding that the original 15 acres within TILALIT FARM was the asset of the late KIBIRIR TUMO who was the father to the Appellant and the grandfather to the Respondents herein.
258. Upon acquisition of the original 15 acres within TILALIT FARM, how did the late KIBIRIR TUMO deal with the same?
259. According to the testimony of the Appellant, the late KIBIRIR TUMO did sub-divide the 15 acres into two portions.
260. The first portion of 6.5 Acres was allocated to the late MELENIA KIBIRIR and this portion was duly registered in the name of the 1<sup>st</sup> Respondent herein who was her only child.
261. The other portion of 6.5 Acres was left to the wife of KIBIRIR TUMO who was MORRET TERIKI TUMO.
262. The Appellant did further testify in her examination in chief that her late mother MORRET TERIKI TUMO did then allocate this portion to the late PIUS KIPTOO KIBIRIR who was the surviving son at the time.

263. The Appellant's further testimony in chief was that the late PIUS KIPTOO KIBIRIR did take possession of the portion measuring 6.5 acres and did lease the same to one member of parliament known as CHEPKOK.
264. However, in the year 2010, the Appellant's brother PIUS KIPTOO KIBIRIR did pass away without any beneficiaries to his estate.
265. After the demise of PIUS KIPTOO KIBIRIR, the Appellant herein did take the responsibility of caring for the mother MORRET TERIKI TUMO who was of advanced age.
266. It was during this period that the Appellant was taking care of the late MORRET TERIKI TUMO that she did transfer the portion of 6.5 Acres which is the suit property herein in her name.
267. The Respondents on the other hand admit that indeed the original property measuring 15 acres was sub-divided into two portions measuring 6.5 acres each.
268. The Respondents further admit that one of the portions measuring 6.5 acres from the original 15 acres was registered in the name of the 1<sup>st</sup> Respondent on behalf of the deceased mother MELENIA KIBIRIR.
269. However, the other portion of 6.5 acres was allocated to the late PIUS KIPTOO KIBIRIR and not the late MORRET TERIKI TUMO.
270. According to the testimony of DW 1, the second portion measuring 6.5 acres was the asset of the late PIUS KIPTOO KIBIRIR who had taken possession and leased the same to the member of parliament known as CHEPKOK.

271. Upon the demise of PIUS KIPTOO KIBIRIR, the family of the late KIBIRIR TUMO did object to the use of this portion measuring 6.5 acres by the member of parliament known as CHEPKOK.
272. Consequently, a meeting was convened on the 16.01.2010 when it was resolved that the sum of KShs.40,700/- which had been paid by the member of parliament known as CHEPKOK to the late PIUS KIPTOO KIBIRIR for the use of the said portion measuring 6.5 acres would be refunded.
273. DW 1 did confirm that indeed the sum of KShs.40,700/- paid by the member of parliament known as CHEPKOK was refunded by the Appellant in toto and then the siblings thereof did refund her the same through payments of KShs.5, 817/- each.
274. Based on the above testimonies, the issue for determination is who was the rightful beneficial owner of the 6.5 acres between the late PIUS KIPTOO KIBIRIR and the late MORRET TERIKI TUMO.
275. The Court herein earlier did make a finding that the original portion of 15 acres within TILALIT FARM was the asset of the late KIBIRIR TUMO.
276. It was also the Court's finding that the late KIBIRIR TUMO had divided the original portion of 15 acres into two portions measuring 6.5 Acres each.
277. The first portion of 6.5 Acres was allocated and registered in the name of the 1<sup>st</sup> Respondent on behalf of the deceased mother MELENIA KIBIRIR.

278. The second portion was allocated to the late PIUS KIPTOO KIBIRIR who took possession of the same and even leased it to the member of parliament known as CHEPKOK.
279. The Appellant on the other hand took a different route on the allocation of the remaining 6.5 acres.
280. The Appellant's testimony was that this second portion of 6.5 Acres was allocated to the mother MORRET TERIKI TUMO by the late KIBIRIR TUMO who in turn allocated it to the late PIUS KIPTOO KIBIRIR.
281. Either way, this Court is of the considered and finding that the portion of 6.5 acres remaining from the original portion of 15 acres owned by the late KIBIRIR TUMO was for the benefit and use of the late PIUS KIPTOO KIBIRIR.
282. The only unfortunate part was that the late PIUS KIPTOO KIBIRIR did not have the same registered in his name as the 1<sup>st</sup> Respondent had done with the 6.5 acres allocated to his mother MELENIA KIBIRIR.

**ISSUE NO.2- WAS THE APPELLANT'S REGISTRATION AS  
THE LAWFUL OWNER OF THE SUIT PROPERTY  
FRAUDULENT IN ANYWAY?**

283. The second issue for determination is whether the Appellant's registration of the suit property was fraudulent or not.
284. The issue about the fraud of the Appellant's registration has been raised by the Respondents herein.

285. According to the testimony of the Respondents and their witnesses, the suit property registered in the name of the Appellant is the second portion measuring 6.5 acres which was the asset of the late PIUS KIPTOO KIBIRIR.
286. The Respondents and the witnesses thereof did testify that based on the Meeting of 16.01.2010, there was a resolution that the portion of 6.5 Acres which was the asset of the late PIUS KIPTOO KIBIRIR was to be registered in the name of the mother MORRET TERIKI KIBIRIR now deceased.
287. However, due to the advanced age of the late MORRET TERIKI KIBIRIR, the family did agree that the portion of 6.5 acres belonging to the estate of PIUS KIPTOO KIBIRIR would be registered in the name of the Appellant herein in trust for the sisters namely MELENIA KIBIRIR, MIRIAM KIBIRIR and the Appellant.
288. The exercise of registering the 6.5 acres in the name of the Appellant on behalf her own behalf and that of the siblings known as MELENIA KIBIRIR and MIRIAM KIBIRIR was undertaken hence the Title issued on 13.02.2012.
289. Unfortunately, the registration of the Appellant did not recognise and/or take note of the rights of MIRIAM KIBIRIR and MELENIA KIBIRIR.
290. Consequently, the Respondents were of the view that the Appellants registration as the owner of the suit property was unlawful and fraudulent and therefore should be rectified to acknowledge the beneficial ownership of both MELENIA KIBIRIR and MIRIAM KIBIRIR.
291. The Appellant on the other hand did testify that the portion of 6.5 acres which belonged to the late PIUS KIPTOO KIBIRIR was the asset of the late MORRET TERIKI TUMO.

292. Consequently, upon the demise of PIUS KIPTOO KIBIRIR, the late MORRET TERIKI TUMO had the capacity and authority to register the same to the Appellant herein.
293. The Appellant did further testify and submit that the late MORRET TERIKI TUMO on her own volition did attend the Land Department offices and register the suit property in her name in the presence of her siblings therein.
294. As such, the Appellant was of the view that she was the lawful registered owner of the suit property and that no fraud had been perpetuated by her during the registration of her name.
295. In an effort to resolve this issue, it is not in dispute that the suit property herein is the same portion of 6.5 acres that was the asset of the late PIUS KIPTOO KIBIRIR.
296. It is also not in dispute that the Appellant herein is the registered owner of the suit property pursuant to the Title Deed issued on the 13.02.2012.
297. The Appellant did testify that the suit property was transferred to her name by the late MORRET TERIKI TUMO who was her mother in appreciation of the care she had given her in her lifetime.
298. The Appellant did plead, testify and submit that she was the first registered owner of the suit property after the Government of Kenya and her ownership thereof was therefore protected under Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012.

299. However, Section 26 (1) of the Land Registration Act, No. 3 of 2012 allows the challenging of a first registration on the following limited grounds; -

- 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.”***

300. The Court of Appeal in the case of **MUNYU MAINA-VERSUS- HIRAM GATHIHA MAINA (2013)** eKLR did make the following finding; -

***“we have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership.***

***It is that instrument of title that is challenged and the registered owner must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free of any encumbrances including any interest which would not be noted in the register.”***

301. Based on the above provision of the law and the authority cited hereinabove, the Court is required even in a first registration to check how the registration was acquired and

if the same was devoid of the grounds outlined in Section 26(1) (a) and (b) of the Land Registration Act, No. 3 of 2012.

302. In addition to the above, the registered owner is also required to go beyond the instrument of registration and show that the acquisition was legal, formal and free of any encumbrances including any interest which would not be noted in the register.

303. Having established the above parameters, the question that needs to be answered is whether the Appellants registration of the suit property was lawfully done to the exclusion of the grounds provided under Section 26 (1) (a) and (b).

304. To answer this issue, it is not lost to this Court that in its earlier finding, the second portion measuring 6.5 acres from the original portion of land measuring 15 acres allocated to the late KIBIRIR TUMO was the asset of the late PIUS KIPTOO KIBIRIR.

305. If this was the case, upon the demise of the late PIUS KIPTOO KIBIRIR, the portion of 6.5 Acres currently registered as the suit property in the name of the Appellant should have been administered through the Law of Succession Act, Cap 160.

306. The expectation of the Court was that the late MORRET TERIKI TUMO would have filed for Letters of Administration Inter-state and thereafter vested the said portion of 6.5 Acres in her own name before transferring the same to the Appellant herein.

307. In the alternative, if the late MORRET TERIKI TUMO was of the view that she was the legitimate owner of the 6.5 acres previously occupied and used by the late PIUS KIPTOO KIBIRIR, then the correct procedure was for her to procure

the registration in her own name and thereafter transfer the same to the Appellant herein procedurally.

308. The procedural way of the late MORRET TERIKI TUMO to transfer the portion of 6.5 acres to the Appellant was to obtain a valid Consent to Transfer from the Local Land Control Board, prepare and execute the relevant Transfer Form from herself to the Appellant, lodge both the Consent to Transfer and the Transfer Form for registration and pay the requisite Stamp Duty and Registration fees.
309. Unfortunately, none of the procedures outlined in the two scenarios outlined hereinabove were even followed by the late MORRET TERIKI TUMO in the transfer and registration of the Appellant herein as the owner of the suit property.
310. The testimonies of both the Appellant and her witnesses and some of the Respondent's witnesses is that a visit at the Land Department was made and thereafter the Title Deed was issued in the name of the Appellant.
311. The truth of the matter is that land cannot be transferred by verbal instructions to either a Land Registrar or any other public servant vested with the authority to transfer or issue registration documents.
312. The wishes and/or resolution of the family of the late MORRET TERIKI TUMO were bound by the provisions of the Land Registration Act, No. 3 of 2012 and there is no other way other than to comply with the said law.
313. Neither the Appellant and/or her witnesses did provide the documents that were used for the registration of the suit property in her name.

314. In the absence of these registration documents used by the Appellant to record her name as the legitimate owner of the suit property, then her registration can only be fraudulent and at the very least unprocedural and illegal.

**ISSUE NO.3- DO THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS HEREIN HAVE ANY BENEFICIAL INTEREST ON THE SUIT PROPERTY HEREIN?**

315. The third issue is whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein do have a beneficial interest over the suit property.

316. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the suit property herein was the asset of the late PIUS KIPTOO KIBIRIR.

317. Upon the demise of the late PIUS KIPTOO KIBIRIR, the late MORRET TERIKI TUMO who was the mother did sub-divide the same between three siblings namely MELENIA KIBIRIR, MIRIAM KIBIRIR and the Appellant equally.

318. Based on this sub-division, the Appellant herein did sale her portion of land to one DAVID KIPYENG.

319. Thereafter, DW4 did inform the Trial Court that a portion belonging to the late MIRIAM KIBIRIR was also sold to the same DAVID KIPYENG through the Appellant.

320. The Respondents herein therefore did plead that the suit property herein was ancestral land of which they had a beneficial interest by virtue of their mothers interests.

321. The Appellant on the other hand did oppose this allegation on the basis that she was the lawful registered owner of the suit

property to the exclusion of either the late MELENIA KIBIRIR and the late MIRIAM KIBIRIR.

322. The issue of whether there are any beneficial interests over the suit property can only be discussed if the Appellant's registration would have been found to be procedural and/or legal.

323. Unfortunately, this Court is of the view that the registration of the Appellant as the owner of the suit property was fraudulent, unprocedural and illegal from the very beginning.

324. In essence, the ownership rights acquired by the Appellant over the suit property to the exclusion of the late MALENIA KIBIRIR and the late MIRIAM KIBIRIR cannot stand in law.

325. In other words, this Court is of the considered view and finding that the beneficial rights and/or ownership rights of all the three sisters namely MELENIA KIBIRIR, MIRIAM KIBIRIR and the Appellant should be ascertained through the Law of Succession Act, Cap 160 as they touch on an asset of a deceased person who is the late PIUS KIPTOO KIBIRIR.

**ISSUE NO.4.- IS THE APPELLANT ENTITLED TO THE PRAYERS SOUGHT IN THE PLAINT DATED 13.03.2018?**

326. The fourth issue is whether or not the Appellant is entitled to prayers sought in the Complaint dated 13.03.2018.

327. Based on the determination in Issue No. 2 hereinabove, this Court is of the view that the Complaint dated 13.03.2018 is not merited and the prayers sought therein cannot be granted.

**ISSUE NO.5- ARE THE RESPONDENTS ENTITLED TO THE PRAYERS SOUGHT IN THE COUNTER-CLAIM DATED 16.09.2020?**

328. On the fifth issue as to whether the prayers sought in the Counter-Claim dated 16.09.2020 should be granted, the Court is of the view that the suit property herein is the asset of the late PIUS KIPTOO KIBIRIR and therefore the interests of the beneficiaries should be ascertained through the Law of Succession Act, Cap 160.

329. As such, the prayers in the Counter-Claim dated 16.09.2020 are also denied.

**ISSUE NO.6- IS THE PRESENT APPEAL MERITED OR NOT?**

330. The sixth issue is whether the present Appeal is merited or not.

331. The Court has indeed perused the Trial Court Judgement and is satisfied that it did appreciate the correct facts of the matter and applied the correct applicable law.

332. However, it was a finding of the Trial Court that the suit property is the estate of the late KIBIRIR TUMO and therefore the succession to be undertaken should be that of the estate of KIBIRIR TUMO.

333. Unfortunately, in Issue No. 1 hereinabove, this Court did make a finding that there was no dispute that the portion on 6.5 acres from the original 15 acres acquired by the late KIBIRIR TUMO was the asset of the late PIUS KIPTOO KIBIRIR.

334. The dispute before the Trial Court was the legality of the Appellant's registration and the manner in which the suit property should be distributed after the demise of the late PIUS KIPTOO KIBIRIR.

335. As such, this Court hereby sets-aside the Orders of the Trial Court that the suit property should be considered the asset of the late KIBIRIR TUMO and instead declares the said property to be the asset of the late PIUS KIPTOO KIBIRIR.

### **ISSUE NO.7- WHO BEARS THE COST OF THE PRESENT APPEAL?**

336. On costs, the same are usually awarded to the winning party.

337. However, in the present Appeal, none of the parties herein has been successful in prosecuting the Plaint and/or the Counter-Claim.

338. In conclusion thereof, the Court is of the view that each party should bear its own costs.

### **CONCLUSION**

339. In conclusion, the Court hereby makes the following Orders in determination of the present Appeal; -

### **A. MEMORANDUM OF APPEAL DATED 29.01.2024 IS NOT MERITED AND THEREFORE DISMISSED FORTHWITH.**

**B. THE ORDER DECLARING THE PROPERTY KNOWN AS KARUNA/KARUNA BLOCK 1 (TILATIL)/75 THE ASSET OF THE LATE KIBIRIR TUMO BE AND IS HEREBY SET-ASIDE.**

**C. AN ORDER BE AND IS HEREBY MADE THAT THE PROPERTY KNOWN AS KARUNA/KARUNA BLOCK 1 (TILATIL)/75 IS THE ASSET OF THE LATE PIUS KIPTOO KIBIRIR.**

**D. EACH PARTY WILL PAY ITS OWN COSTS AS RELATES TO THE PRESENT APPEAL.**

**DATED, SIGNED and DELIVERED in ELDORET this 29<sup>TH</sup> DAY OF APRIL, 2026.**

**EMMANUEL.M. WASHE  
JUDGE**

**IN THE PRESENCE OF:**

Court Assistant: Brian

Counsel for The Appellant: Mr. Kipnyekwei

Counsel for The 1<sup>st</sup> and 2<sup>nd</sup> Respondents: Mr. Isiji holding brief for Mrs. Khayo for the Respondent