



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. E014 OF 2024**

**WILSON KOROS KIYENG ..... APPELLANT**

**= VERSUS =**

**JAMES KONGA ..... 1<sup>ST</sup> RESPONDENT**

**TARGOK CHEPCHIENG ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

***(Being an Appeal from the Judgement of Hon Purity Kosgei  
SPM delivered on 19<sup>th</sup> September 2024 in Kabarnet ELC  
case No.15 of 2020)***

1. By a plaint dated 28<sup>th</sup> April 2020, the appellant instituted a suit in the lower court *to wit* Kabarnet PMC ELC Case No.15 of 2020 seeking judgment against the defendants, now respondents, for:

- i) A declaration that the parcel of land known as Pokor/Keben/Tenges/276 measuring 5.4 ha or thereabout belongs to him;
- ii) A permanent injunction restraining the defendants by themselves, their agents/servants

and/or employees from entering, developing, remaining, trespassing and/or threatening his quiet enjoyment and possession of the suit property;

- iii) An order of eviction of the defendants by themselves, their agents, servants and/or employees from the suit property;
- iv) Costs of the suit
- v) Any other relief the Honourable Court may deem fit to grant.

2. As can be discerned from the averments/contentions in the plaint, the appellant's suit was premised on the grounds that he (the appellant) is the registered proprietor of the parcel of land known as Pokor/Keben/Tenges/276 (hereinafter referred to as the suit property); that he had been enjoying quiet possession of the suit property until sometime in 2012 when the 1<sup>st</sup> respondent made an attempt to enter the suit property but he repulsed him; that sometime in April 2020, the 1<sup>st</sup> respondent trespassed into the suit property and evicted him

therefrom thereby diminishing and extinguishing his chances of enjoying the suit property.

3. Terming the actions of the respondents complained of illegal, the appellant instituted the suit hereto seeking the reliefs listed hereinabove.
4. The respondents filed a statement of defence and counterclaim, dated 10<sup>th</sup> August, 2022 and later amended culminating in the further amended statement of defence and counterclaim dated 23<sup>rd</sup> January, 2023.
5. In their further amended statement of defence and counterclaim, the respondents contended that they are the beneficial owners of the suit property; that the suit property was gifted to the 1<sup>st</sup> respondent by his father, Chepkiyeng Tuitoek (deceased) in 1985 and that the 1<sup>st</sup> respondent had been in use and occupation of the suit property for a long period of time pursuant to the said beneficial interest.

6. The respondents further contended that the appellant fraudulently obtained the title to the suit property by: -
- a) fraudulently forging his father's signature in the transfer forms;
  - b) fraudulently causing himself to be registered as the proprietor of the suit property without the consent of the registered proprietor, Chepkiyeng Tuitoek;
  - c) fraudulently obtaining the title to the suit property through illegal, unprocedural and corrupt scheme;
  - d) fraudulently attempting to evict the defendant and his family from the suit property.
7. In alternative to the pleaded fraud in acquisition of the title to the suit property by the appellant, the respondents pleaded/contended that registration of the appellant as the proprietor of the suit property is subject to a trust in their favour.
8. By way of the counterclaim, the respondents sought judgment against the appellant for: -

- a) A declaration that the appellant fraudulently procured the suit property through illegal, unprocedural and corrupt scheme and/or in the alternative, a declaration that the appellant is holding the suit property in trust for him;
  - b) An order cancelling the registration of the appellant as the proprietor of the suit property and transfer to the defendant;
  - c) Any other order the court may deem fit to grant in the interest of justice.
9. It is noteworthy that in their pleadings, both the appellant and the respondents, admitted and/or acknowledged that the suit property belonged to their father, Chepkiyeng Tuitoek, before it was registered in the name of the appellant. In that regard, the appellant and the respondents respectively pleaded as follows:

**“The plaintiff shall aver that he was given the suit property sometimes in the year 1991 by his father...(Paragraph 4 of the plaint);**

**The defendant avers that he is the beneficial owner of the suit property having been bequeathed by his father Chepkiyeng Tuitoek in 1985... (Paragraph 5 of the further amended defence)."**

10. When the suit came up for hearing, it emerged that Chepkiyeng Tuitoek (father to the appellant and the 1<sup>st</sup> respondent) had three families; that the appellant belongs to the 2<sup>nd</sup> family while the respondents belonged to the 1<sup>st</sup> family. It further emerged that both the appellant and the respondents had been claiming interest in the suit property for a long period of time and that the claim to the suit property by the appellant and the respondents had been subject of a dispute before the local administration (area chief). The dispute was however, not resolved by the local administration.
  
11. Whilst the appellant in his plaint claimed and/or pleaded that he had been enjoying quiet/peaceful use and possession of

the suit property since 1991 or thereabout and that the respondents interfered with his quiet possession in 2012 and 2020 respectively, the evidence adduced before the lower court shows that the respondents had been in use and occupation of the suit property before the time the appellant claims they illegally trespassed into the suit property. That fact is borne out in the appellant's own evidence in cross examination which, at the relevant part, is as follows: -

**“...“Tarkok lives on the suit property in Tulwomoi ...my sister from the 1<sup>st</sup> house lived near the suit plot, ploughed the land. My father let her... Chepchieng Tuitoek subdivided that land, he was the 1<sup>st</sup> owner. I am the 2<sup>nd</sup> owner...” (page 256 and 257 of the Record of Appeal).**

12. The appellant's wife, PW2, acknowledged that the 2<sup>nd</sup> respondent was living in the suit property. In that regard, see her testimony in cross examination, found at page 260 of the record of appeal, which at the relevant part is as follows: -

**“...the 1<sup>st</sup> wife moved to parcel 276...”.**

13. According to the testimony of Henry K. Kidogo Ng'otie, former chief for the area where the suit property is situated, who testified as DW2, the dispute between the appellant and the respondents was brought to his office for arbitration way before the time pleaded by the appellant as the time when the dispute concerning entitlement to the suit property arose. According to DW2, the dispute was brought to his office in 2009 a fact confirmed by the appellants in their testimonies before court. Concerning the dispute brought to his office for arbitration/resolution, DW2 stated that the appellant wanted the respondents to vacate the suit property.
  
14. DW3 Silita Malakwen, an assistant chief and later chief for the area where the suit property is situated, told the court that the suit property belongs to the 2<sup>nd</sup> respondent and that the 2<sup>nd</sup> respondent and her deceased husband lived in the suit property.

15. According to John Tuigong Koros (DW4) the 2<sup>nd</sup> respondent had been living in the suit property since 1962.
16. The 1<sup>st</sup> respondent, who testified as DW5, led evidence to the effect that he had lived in the suit property together with his family, his mother, the 2<sup>nd</sup> respondent included, since 1985 when he was gifted the suit property by his father.
17. According to the DW5, he is the one who allowed the appellant to occupy a portion of the suit property sometime in 2006.
18. It is noteworthy, that the respondents attempted to depart from their pleaded case by claiming that the suit property was acquired by the 2<sup>nd</sup> respondent or the 2<sup>nd</sup> respondent contributed to its acquisition, yet their pleaded case was that the suit property was given to them by its owner, Chepkiyeng Tuitoek.

19. It is on the basis of the foregoing pleading, evidence and the submissions by the parties that the learned trial magistrate determined that the appellant had failed to prove his pleaded case on a balance of probabilities and dismissed it.
20. Concerning the respondents' case, the learned trial magistrate determined that the respondents had proven their case on a balance of probabilities and entered judgment in their favour in the following terms: -
- a) A declaration that the plaintiff held the suit land in trust for himself and others, including the defendants;
  - b) A declaration that registration of the title of the suit property to the plaintiff was null and void;
  - c) The Land Registrar, Baringo County, is hereby ordered to cancel the title of the suit land issued to the plaintiff and have the suit land revert to the name of their deceased father, Chepkiyeng Tuitoek, awaiting succession of his estate and/or inclusion in the succession proceedings of his Estate;

- d) An order of injunction is hereby issued to the plaintiff, his agents, servants, restraining him from interfering with the defendants' possession, use and occupation of the suit land;
- e) The end result is that the plaintiff's suit is hereby dismissed;
- f) The counterclaim succeeds on prayers sought;
- g) Each party will bear their own costs.

21. Dissatisfied with the decision of the trial court, the plaintiff, now appellant, appealed to this court on the grounds that the learned trial magistrate erred in law and fact by: -

- i) Failing to take into consideration his pleadings, submissions and exhibits thereby arriving at a manifestly wrong conclusion;
- ii) Failing to apply judiciary and to adequately evaluate the evidence and exhibits tendered thereby arriving at a decision unsustainable in law;

- iii) Arriving at a decision which was not only manifestly unjust but also against the weight of the evidence on record;
- iv) Misapprehending the evidence on record to a material decree resulting in her arriving at a wrong conclusion;
- v) Not considering the evidence presented before her in totality and in particular the evidence presented by him;
- vi) Finding that the registration of the suit land in the name of the appellant was held in trust for himself and others including the respondents herein;
- vii) Shifting the burden of proof to the appellant herein by finding that it was imperative upon the appellant to go beyond the instrument of title deed and establish how he acquired the title deed and demonstrate that it was done legally and procedurally and was free from any

encumbrances to include interests of the respondents herein;

- viii) Making a declaration that the suit land is part of the Estate of the deceased, Chepkiyeng Tuitoek, and ought to be distributed under his Estate to his beneficiaries without any evidence to prove the same;
- ix) Finding that the requirement that a gift *inter vivos* has to be perfected and/or completed by a registered transfer was not met despite the fact that the suit land passed to the appellant during the lifetime of the deceased, Chepchieng Tuitoek;
- x) Making a finding that there was fraud in the process of registration of the suit land in the name of the appellant without any evidence on record;
- xi) Finding that there was fraud and relying on the absence of the name of the deceased in the green card and that the green card does not show that the suit land was transferred to the

appellant by his late father, Chepchieng Tuitoek, when the said green card was not produced as an exhibit in the case.

xii) By delivering judgment in favour of the respondents.

22. Lamenting that the judgment of the learned trial magistrate has occasioned grave injustice to him, the appellant urges this court to allow his appeal with costs, set aside the judgment of the trial court and dismiss the respondents' counterclaim.

23. Pursuant to directions given that the appeal would be disposed of by way of written submissions, the respondent filed submissions which I have read and considered. At the time of writing this judgement, the appellant had not filed submissions.

24. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I

have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see **Selle & Another vs. Associated Motor Boat Co. Ltd (1968) E.A 123** and **Mwanasokoni vs. Kenya Bus Service Ltd (1982-88)1 KAR** and **Kiruga vs. Kiruga & Another (1988)KLR 348**.

25. Upon re-evaluation of the cases urged before the lower court, the evidence, the submissions by the parties in the lower court, the judgment of the lower court, the grounds of appeal advanced in respect of the appeal and the submissions of the respondents, I have identified the following as the issues for the court's determination;
- i) Whether the learned trial magistrate erred by determining that the appellant fraudulently and/or illegally obtained title to the suit property;

- ii) Whether the learned trial magistrate erred by determining that registration of the suit property is subject of a trust in favour of the respondents and the appellant;
- iii) Whether the learned trial magistrate erred by determining that the suit property belongs to the Estate of the deceased;
- iv) Whether the learned trial magistrate erred by ordering the cancellation of the appellant's title to the suit property?
- v) What orders should the court make?

26. Because the issues are intertwined, I will consider and determine them together and/or without regard to how they are listed.

27. On whether the learned trial magistrate erred by determining that the appellant fraudulently and/or illegally obtained title to the suit property, it is noteworthy that such a determination was as a result of the defendant's pleaded claim that the

appellant had fraudulently caused himself to be registered as the proprietor of the suit property. In line with the obligation imposed on them by law, in particular, **Order 2 Rule 4** of the Civil Procedure Rules and settled legal principles regarding pleading a case of fraud, the respondents had given particulars of the fraud and/or illegality urged against the appellant in obtaining title to the suit property in the manner listed in paragraph 6 herein above.

28. Being the ones who desired judgment on the basis of the pleaded fraud, irregularity and/or illegality, the burden was on the respondents not only to prove the pleaded fraud, irregularity and/illegality but also to prove it to the required standard of proof, which is higher than on a balance of probabilities but lower than prove beyond reasonable doubt. In that regard, see the provisions of **Section 107** of the Evidence Act, Cap 80 Laws of Kenya which places the burden of proof on whoever desires any court to give judgment as to any legal right or liability on the existence of facts which he

asserts to prove existence of those facts. Also see **Gladys Wanjiru Ngacha vs Theresa Chepsaat & 4 others (2013) e KLR** where the Court of Appeal held that allegations of fraud must be strictly be proved, requiring something more than a mere balance of probabilities as established in **R.G Patel vs. Lalji Makani (1957) E.A 314** and **Mutsonga vs. Nyati (1984) KLR 425**.

29. I have read and considered the pleaded particulars of fraud, illegality and/or irregularity in the registration of the appellant as the owner of the suit property and I am unable to find anything that could form the basis of the trial court's determination that the respondents had proved the pleaded fraud against the appellant. Whilst both the appellant and the respondents through their pleadings and oral testimonies led evidence showing that the suit property belonged to the parties' father/husband, before it was registered in the name of the appellant, no evidence whatsoever was adduced by either of the parties showing that the parties' father/husband, Chepkiyeng Tuitoek, was ever registered as the proprietor of

the suit property. The claim by the respondents and their witnesses that Chepkiyeng Tuitoek, was very bitter when he got to know that the appellant had title to the suit property cannot be verified or even believed considering the explanation offered by the chief that the owner agreed to be taken for lunch by the appellant and did not return for the meeting that had been called to resolve the dispute between the parties concerning their claim to entitlement to the suit property.

30. I note that the learned trial magistrate determined the dispute concerning the alleged fraudulent acquisition of title held by the appellant based on the principle espoused in **Munyu Maina v Hiram Gathiha Maina (Civil Appeal No. 239 of 2009) (2013) eKLR** that when a title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. I find reliance on that case, in the circumstances of this case where the respondents did not prove the pleaded fraud, illegality and/or irregularity in registration of the title to the suit property in the name of the appellant, to be a

misdirection in law as it amounted to shifting the burden of the pleaded fraud/illegality from the respondents to the appellant contrary to the applicable law and legal principles. The respondent bore the duty of proving the pleaded fraud in the action of the title before the appellant could be called upon to demonstrate that he acquired title in the suit property in circumstances other than those alleged by his accusers. To require a registered proprietor to prove that he acquired the title procedurally and/or lawfully, even where no scintilla of evidence of fraud or irregularity has been tendered, would beat the logic of requiring allegations of fraud to be strictly pleaded and proved to a standard higher than on a balance of probability. It is the considered view of this court that the duty of a holder of title to prove that he acquired his title procedurally, legally and/or lawfully only attaches after the person alleging irregularity, fraud and/or illegality in acquisition of the title has discharged the burden imposed on him or her by law, not otherwise.

31. As to whether the learned trial magistrate erred by determining that registration of the suit property is subject of a trust in favour of the respondents, I note that the issue of registration having being subject of an overriding interest in the form of customary trust was impleaded in the respondent's pleadings and taken up by both parties as one of the issues the court was called upon by the parties to make a determination on.

32. Upon consideration of the totality of the evidence adduced in this case, comprised in the admitted/acknowledged fact by both parties that the suit property belonged to the parties' father/husband, the conduct of the parties comprised in long use and occupation of the suit property by the respondents as persons entitled to it by virtue of being members of the family of Chepkiyeng Tuitoek, I find and hold that the learned trial magistrate's determination that the registration of the suit property to the appellant is subject of a trust in favour of the respondents and himself to be incapable of being reasonably faulted in the circumstances of this case.

33. As to whether the learned trial magistrate erred by holding that the suit property belongs to the Estate of Chepkiyeng Tuitoek, having determined that no evidence was led capable of proving to the required standard the pleaded fraud, illegality and irregularity in registration of the suit property in the name of the appellant, I find no basis for the determination that the suit property belongs to the Estate of Chepkiyeng Tuitoek and for reverting it to the Estate for distribution among his heirs/beneficiaries. The parties having failed to prove their extent of entitlement to the suit property to enable the court order termination of the trust and the appropriate consequential orders, the trial court should have left it at that.

34. On whether the learned trial magistrate erred by ordering the cancellation of the appellant's title to the suit property, it is noteworthy that the title held by the appellant enjoys legal protection and can only be cancelled if the circumstances

contemplated in **Section 26** as read with **Section 80** of the Land Registration Act, 2012 are proved to exist.

35. Having already determined that the respondents did not prove the alleged fraud, illegality or irregularity in registration of the appellant as the proprietor of the suit property and there being no case of mistake in registration of the suit property urged and proven, I find and hold that the learned trial magistrate erred in ordering the cancellation of the title held by the appellant.
36. The upshot of the foregoing is that the appellant's appeal partially succeeds in that: -
- i) I set aside the decision of learned trial magistrate declaring that the appellant fraudulently procured the suit property, title number Pokor/Keben/Tenges/276 through illegal, unprocedural and corrupt scheme, and substitute it with an order declaring that the defendants/respondents did not prove the pleaded fraud

in the registration of the title held by the plaintiff/appellant;

- ii) I set aside the decision of learned trial magistrate declaring that the suit property belongs to the Estate of Chepkiyeng Tuitoek and ought to be reverted to his Estate and registered in the name of the Estate of Chepkiyeng Tuitoek awaiting the administration of the Estate;
- iii) I also set aside the order of the learned trial magistrate directing the cancellation of the appellant's title.

37. I uphold the trial court's judgment/decision to the extent that it determined that the plaintiff/appellant did not make a case for being granted the reliefs sought against the defendants/respondents.

38. On costs, the dispute being between family members, I order that parties bear their own costs of the suit at the lower court and the appeal.

39. Orders accordingly.

**Judgement dated, signed and delivered virtually at Busia  
this 22<sup>nd</sup> day of April, 2026**

**L. N. WAITHAKA**

**JUDGE**

**In the presence of;**

N/A for the Appellant

Mr Chebii for the respondents

Court Assistant; Tracy