



Keino v Maina & another (Sued as Personal Representatives of the Estate of Tapnyobii C. Maina - Deceased) & 2 others (Environment & Land Case 50 of 2019) [2024] KEELC 197 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 50 OF 2019
MC OUNDO, J
JANUARY 25, 2024**

BETWEEN

PAUL KIPKETER KEINO PLAINTIFF

AND

KIPKOECH ARAP MAINA AND AUGUSTINE KIMUTAI KOECH (SUED AS PERSONAL REPRESENTATIVES OF THE ESTATE OF TAPNYOBII C. MAINA - DECEASED) 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. Vide a Complaint dated 1st October 2019 and amended on 23rd May 2022, the Plaintiff herein sought for the following orders;
 - i. A declaration that the registration of the 1st Defendant as the sole proprietor of all that property known as LR. No. Kericho/Emkwen (Kapkures)/290 was illegal, null and void for having been procured through fraudulent, irregular and/or illegal means and for an order that its register be restored in the manner it was before the purported rectification.
 - ii. An order that the District Land Registrar in custody of the subject registers do rectify the register by cancelling the registration of the 1st Defendant as a sole proprietor of LR. No. Kericho/Emkwen (Kapkures)/290 in order to restore the register to the position it was before the purported rectification.



- iii. An order for partition of the property known as LR. No. Kericho/Emkwen (Kapkures)/290 into 7.05 hectares being the Plaintiff's entitlement thereof and 6 hectares being the 1st Defendant's share.
 - iv. An order directing the 1st Defendant to execute the necessary forms so as to effect a valid transfer of the 7.05 hectares comprised in LR. No. Kericho/Emkwen (Kapkures)/290 to the Plaintiff and in default, the Deputy Registrar of this Honourable court do execute the said forms on his behalf.
 - v. An order of permanent injunction restraining the Defendants, their servants, agents, assignees and/or any other person acting on their behalf and/or authority from interfering with the Plaintiff's quiet possession and use of 7.05 hectares comprised in that land parcel known by reference as LR. No. Kericho/Emkwen (Kapkures)/290.
 - vi. Cost of this suit and interest at court rates.
 - vii. Such further relief as this Honourable Court may deemed it or just (sic) to grant.
2. Pursuant to the service of the pleadings upon the Defendants herein, the 1st Defendants vide their Statement of Defence dated 11th November, 2019 and amended on 26th August, 2022 denied the allegations contained in the Plaintiff's Plaint putting the Plaintiff to strict proof thereto. It had been averred that the 1st Defendant had solely acquired the suit property through her own efforts wherein she had paid the consideration without the Plaintiff's help. That at no point had there been a decision to sub-divide the suit property between the 1st Defendant and the Plaintiff or otherwise since the Plaintiff was never a member of Kapkures Co-operative Society.
 3. The 2nd and the 3rd Defendants on the other hand in their Statement of Defence dated 14th July, 2020 denied the allegations contained in the Plaintiff's Plaint putting the Plaintiff to strict proof thereto.
 4. The suit herein abated upon the death of the 1st Defendant on the 30th August, 2021, however, upon a successful application that it be revived, the 1st Defendant was substituted by her legal representative.
 5. Parties having complied with the provisions of Order 11 of the Civil Procedure Rules, the matter proceeded for hearing on 17th November, 2022 where the Plaintiff herein, Paul Kipketer Keino testified as PW1 to the effect that he lived at Kiptulwo within Bomet County and was a farmer. That he had instituted the suit against Tapnyobii Maina who was now deceased but her son Augustine Koech had taken out letters of Administration which had been issued on 10th November, 2020 by the Kericho High Court in Ad Litem Cause No. E20 of 2020. He produced a copy of the said Grant Ad Litem as Pf. Exh.1.
 6. He proceeded to testify that he had also sued the Registrar of Bomet and the Attorney General upon giving them a notice of 30 days dated 19th August, 2019 herein produced as Pf. Exh.2, wherein the 3rd Defendant had responded to the said Notice by their letter dated 24th September 2019, a copy which he produced as Pf. Exh.3.
 7. That his claim against the Defendants arose after a misunderstanding over the suit property No. Kericho/Emkwen/ (Kapkures)/290 which was currently registered in the name of the late Tapnyobii Maina and himself. He produced the certified copy of the register as Pf. Exh.4 and proceeded to testify that there had been some changes to the said register where his name had been deleted. That his name was lastly noted on the Register on 24th November, 1993 but had subsequently been deleted on the 23rd October 2006.



8. That initially, Tapnyobii Maina, Joseph Kipkemoi Korir and Paul Kipterer Keino (the Plaintiff herein) had been registered proprietors of land parcel No. Kericho/Emkwen/ (Kapkures) 110 as evidenced in the copy of Register to parcel No. Kericho/Emkwen/ (Kapkures)/110 herein produced as Pf. Exh.5. That the said parcel of land had subsequently been sub-divided. That Joseph Kipkorir bought a small portion of land from parcel Kericho/Emkwen/ (Kapkures) 110 and was given the title number Kericho/Emkwen/ (Kapkures)/291. He produced a certified copy of the register to land parcel number Kericho/Emkwen/ (Kapkures)/291 as Pf. Exh.6. That he however did not get his own title, as the title which bore two names had been held by the Late Tapnyobii Maina. He produced a copy of title to Kericho/Emkwen/ (Kapkures)/290 as Pf. Exh.7.
9. His further evidence was that in the year 1971, Tabnyobii Maina and her husband Kipkoech Maina and one Taparumei had gone to his plot in the scheme, which was bordering the suit land, seeking for help as they had stayed on the land from the year 1968 to the year 1972 without making payment to the Kapkures Co-operative Society (Co-operative) wherein the said Co-operative had given them notice to leave the farm. That they had asked him to help them pay the Co-operative in exchange for the share of the farm.
10. He clarified that one share which consisted of 37.2 acres, was equivalent to Kshs. 5,020/=. That he had paid up a total of Kshs. 4,320/= by instalment through Barclays Bank from the year 1975 to the year 1977 when he completed paying up for the share.
11. That although he used to take the payment slip to the Co-operative Society offices, it had been the 1st Defendant who was the member of the said Co-operative Society whereas he had just been a shadow member because they did not want to disclose two entities. That after their agreement with the 1st Defendant in the year 1972 they had gone to Kapkures Co-operative Society offices and met the Chair, Secretary and Treasurer and other members who had agreed to their arrangement and registered the same in their book. That his witnesses had been the Chairman Mr. Joseph Tuwei and Joseph Langat, a youth leader in the Co-operative.
12. It was his testimony that they had agreed with the 1st Defendant that the farm be divided into equal shares which agreement had been recorded by the committee. That he had then developed the land by building water dams and houses for workers who grazed the animals there. That he built the houses in the year 1972 and although he was living on a bigger portion of suit property, because of their good relationship, they had been grazing together. That later in the year 1991 he had fenced off 9.3 Acres of the suit property because of the misunderstanding among the children of Mr. & Mrs. Maina who had prohibited him from fencing 18.6 Acres.
13. Following this misunderstanding he had called a baraza of the Committee and Assistant Chief whereby he had been requested to take 9.3 Acres of the suit property and leave the rest to the Mainas for reasons that he was a headmaster and had other properties. That had been how he had ended up fencing 9.3 Acres. That the said meeting was held on 5th September, 1991 and minutes taken at the deliberations. That they also attended another meeting on 2nd April, 1992 which had been presided over by the District Officer one Mr. Chege Mwangi. He produced copies of minutes of the meeting dated 5th September, 1991 and 2nd April, 1992 as Pf. Exh.8 (a) and (b) respectively.
14. He confirmed that he was still in occupation of 9.3 Acres as deliberated in the minutes of the meetings although between the years 2016 and 2017, the 1st Defendant and her children had tried to remove him from the farm. That he was currently not farming the suit property because of interference from the (deceased) 1st Defendant's children who had chased away his workers from the suit property. That since the said children were his neighbours and relatives, he did not want to be harsh on them. Further,



- that although the fence and everything that he had put on the land was still intact, he had not utilized the suit property since then.
15. He proceeded to testify that after the said children had chased away his workers, he had called the same committee who said that they could not do anything. He together with Mr. Tuwei the Chairman of the Committee, Joseph Langat and Mr. Kiptanui Maina then went to see the Chief at Kamureito Location and after making out their case, the said Chief had written a letter to the Registrar which letter he had to the Bomet Land Registrar's Office. That in the said letter dated 6th September, 2018, the Chief had requested for clarification and directive to repossess the land because he was desirous of being reinstated on the land together with his workers. He produced a copy of the said letter as Pf. Exh.9.
 16. That after the people on the suit property had become so rude, he had suspected that something was amiss, only to discover from the Chief Land Registrar in Bomet that his name had been deleted from the register in the year, 2006. He now understood that one should check on the registers every year as people could steal and cause havoc on somebody's land.
 17. He testified that he who had not been given any notice prior to his name being deleted from the register in the year 2006. That the same had been done secretly as there was no Court Order to that effect. Further, that no reasons had been supplied for the removal of his name hence the same was done unlawfully, and in a mischievous way.
 18. He sought that the court orders reinstatement of his name and sub-division of the suit property so that he could get his title deed and live happily as other members. He also sought for costs of the suit. He clarified that he was asking for 18.6 Acres portion of the suit property since the elders at the farm had forced him to take 9.3. Acres despite the fact that he paid Kshs.4,320/= out of Kshs.5,020/= while the 1st Defendant had only paid Kshs. 700/=. Further that the said 1st Defendant would have not gotten the suit property were it not for his help.
 19. He acknowledged that the member of the Kapkures Co-operative Society was Tapnyobii C. Maina but clarified that according to the Co-operative, even if there were 3 persons paying, only one person was registered and in the instant case, Tapnyobii was the registered members.
 20. Upon being cross-examined, he confirmed that they had acquired land parcel No. Kericho/Emkwen/(Kapkures) 110 between the years 1975 and 1977. That they are relatives as his father and Mr. Maina were brothers and that it is his father who told him to help the 1st Defendant. He reiterated that he contributed Kshs. 4,320/= for the purchase of the suit property while the 1st Defendant contributed only Kshs. 700/=. That he paid the money to Kericho Barclays Bank after which he took the receipt to the Co-operative Society Offices for recording and issuance of the receipt but he was not given the receipt as the Co-operative gave the said receipts to the 1st Defendant.
 21. That in the year 1972, they agreed to equally share the suit property that was about 13 hectares after which the Co-operative wrote down the agreement and kept it in their records but when the said Co-operative was dissolved, the records got lost. He reiterated that he was a shadow member who assisted the 1st Defendant who could not have obtained the suit property without his help.
 22. He further confirmed that in the year 1972, the 1st Defendant and her husband told him that they were to be evicted from the land because they had defaulted in the payments. That before the farm was divided in 1984, it had been a vast parcel of land and when Kapkures Co-operative Society was dissolved, they got into the 37 Acres (the suit property) with the 1st Defendant.
 23. On re-examination, he confirmed that they had a written agreement which had been locked in the cupboard by the officials of the Kapkures Co-operative Society who had drafted it. That in the year



1972 when they met at his house with the 1st Defendant, they did not write anything because there was no official present so they went to the Co-operative's Society's offices for the officials to record the agreement and let them live on the farm.

24. Joseph Arap Tuwei testified as PW2 to the effect that he lived at Kapkures Ranch within Bomet County and was a farmer. That he knew PW1 and the 1st Defendant as both of them were his neighbors. That whereas he did not know the parcel number of the suit property nor the reason for their dispute, physically, he knew the land on the ground because they were his neighbours. That the Plaintiff and the 1st Defendant jointly bought the suit property from Kapkures Co-operative Society
25. That he was the Chairman of the Kapkures Co-operative Society for around (one) 1 year although he could not remember the year of his chairmanship. He explained that there were 68 members in the Society and whereas the 1st Defendant was a member; the Plaintiff was not a member. That the 1st Defendant did not have money to pay for a share in the Co-operative Society so she had negotiated with the Plaintiff to jointly purchase a share in the land in which the Plaintiff accepted. That the Plaintiff paid by instalment and took the receipt to the Co-operative Society offices until the amount of Kshs.5,020/= was fully paid. That as a Co-operative, their function was only to receive the receipt and acknowledgment of payment.
26. His evidence was that the Plaintiff and the 1st Defendant went to their offices after a committee meeting though he could not remember the year. That the Plaintiff had a worker on the farm who had a separate piece of land but who took care of the cattle. That the Plaintiff had taken 9 Acres of the suit property since the 1st Defendant talked to the members asking them to ask the Plaintiff to take less land because he was a wealthy man and also because the said 1st Defendant had several children. That notwithstanding the fact that the Plaintiff had agreed to the said proposal, he had now been chased away from the suit property.
27. On cross-examination, he confirmed that he had been the Chairman of Kapkures Co-operative Society between the years 1968 to the year 1985. That the Plaintiff, the 1st Defendant and her husband had gone to their offices whereby they had agreed that whenever payment was made, the 1st Defendant would take the receipt to the said office.
28. That the Plaintiff was a shadow member because the 1st Defendant had no money. That they did not make any agreement but it had been noted that they had agreed. That they had issued each member a receipt, up to the time of the Survey.
On examination by the court he confirmed that he was 92 years old.
29. PW3 one Joseph Kipkoech testified that he lived in Kapkures Sub-Location within Bomet County and was a farmer. That he knew both the Plaintiff and the 1st Defendant as they were his neighbors. He confirmed that land parcel Kericho/Emkwen/ (Kapkures)/110 measuring 37.2 acres had been jointly bought from the Kapkures Co-operative Society by the Plaintiff and the 1st Defendant. That although the said parcel of land was initially jointly occupied by 3 people, one Joseph Korir, took his share but the Plaintiff and the 1st Defendant still remained as registered proprietors of the suit property.
30. That the Plaintiff took possession of a portion of the suit property in the early 1990's wherein he had been given around 9.3 Acres by the Dispute Committee around the year 1993 but he had been utilizing 6 Acres. That even though the Plaintiff was not utilizing his land, the boundary was still clear.
31. He explained that the Plaintiff stopped using that portion of the suit property when his worker's house caught fire prompting the said worker to return the cows to the Plaintiff's home. That it was true that the 1st Defendant's children sought to evict the Plaintiff from the suit property. That he did not know



- if the said 1st Defendant's children were in occupation of the suit property although they had been using it since the year 2016.
32. When he was examined by the Court, he testified that he had known the parties since the year 1984, that the Plaintiff was a teacher at (Kapkures)s Primary School while the 1st Defendant was a small-scale farmer on the suit property.
 33. On being cross-examined, he testified that he was born in 1959 hence he was 18 years old in the year 1977 and that he was not present when the parties went to the Co-operative Society. That the only time he encountered the Plaintiff and the 1st Defendant was in a dispute tribunal where the 1st Defendant confirmed that they had bought the suit property jointly.
 34. He confirmed that the dispute was between the years 1991 and 1993 and that he was present at the three sittings whereby the Committee allowed the Plaintiff to stay on the suit property. That the 1st Defendant requested the said Committee to ask the Plaintiff to allow her take a bigger portion but that he was not aware of the payment made by the Plaintiff.
 35. On re-examination, he confirmed that indeed the 1st Defendant had been favored by the Committee because the Plaintiff had been asked to take a lesser portion. That the said 1st Defendant had stated that the Plaintiff was well off as he had two schemes but the 1st Defendant on the other hand only had the suit property.
 36. Kennedy Edward Bosire testified as PW4 to the effect that he lived in Bomet and was a civil servant working as the County Land Registrar Bomet. That he was posted to Bomet in July 2021 as the Land Registrar but he had worked as such for the last 24 years.
 37. That his main duties as the Land Registrar involved issuance of title deeds, presiding over boundary dispute determination, advising members of public over technical matters, attending court to answer summons among other duties. That they deal with records that originate from their offices as they were the custodian of all land records.
 38. That the registration section was for Kericho/Emkwen/ (Kapkures)/ 290 and 291 which were resultant number after the partition of parcel No. Kericho/Emkwen/ (Kapkures) 110. That Summons issued to him was for purposes of producing records in reference to parcel No Kericho/Emkwen/ (Kapkures)/290 and that he had certified copies of the land Registers or green cards.
 39. He testified that the Land Register issued on 4th September, 2018 in respect to Kericho/Emkwen/ (Kapkures)/290 corresponded with their records. That the register had 4 entries, the acreage was 13 hectares wherein entry No. 2 was entered after partition was done on 24th November 1993 and pursuant to the said entry, the proprietors were Tapnyobii C. Maina and Paul Kipterer Keino. That entry number 3 was done on 23rd October, 2006 in which the suit land was transferred to Tanpyobii C. Maina alone without the other proprietor consent and a title deed issued on the same day.
 40. He explained that given that the initial registration was a registration in common, to be able to transfer one's share, there was a requirement that transfers or divided share forms be used. That the said transfer was not supported by the said forms as he did not find any forms to that effect. He further explained that in case the registration was joint, it could automatically go to the other person and added that joint registrations were normally done between spouses.
 41. That rectification of a register under Section 79 of *Land Registration Act* clearly confirmed what could or could not be rectified and that in the instant case, rectification of the register was required but the same could only be done through transfer of individual shares not rectification. Further that



rectification could be done when there was wrong registration but in the instant matter there was no such wrong registration.

42. He clarified that were entry 3 and 4 to be found to have been un-procedurally registered, then rectification could be done, but not entry 1 unless there were supportive documents to prove that the said entries were not legally entered. He produced the copy of the Register as P. Exh 10.
43. On being cross-examined by the Counsel for the 1st Defendant, he confirmed that he was the County Land Registrar Bomet and was in charge of land parcel No Kericho/Emkwen/ (Kapkures)/290 and 291. That he had submitted a copy of the green card in regard to parcel No. Kericho/Emkwen/ (Kapkures)/290 which was as a result of partition over parcel No. Kericho/Emkwen/ (Kapkures)/110. That the said parcel number Kericho/Emkwen/ (Kapkures)/110 on entry No.2, had 3 people registered in common proprietorship which people included Tapnyobii Chepkemioi Maina, Joseph Kipkemioi Korir and Paul Kipketer Keino.
44. That the basis of registration of the 3 people was in common and since the shares were not indicated, it would be assumed that they had commons shares. That he did not have the supporting documents of the 3 people made on 7th August 1991 and that what could have been done was to provide the beneficiaries by the co-operative society but he did not find any such documentation.
45. On cross-examination by the State Counsel for the 2nd and 3rd Defendants, he was referred to entries made on 12th April 1991 where he explained that it was in the place of the Adjudication office to make the 1st entries and that it was not in his place to know the shares by Adjudication officer. That he could not make any adjustments made by the Adjudication officer.
46. He confirmed that there were no supporting documents to entries made on 23rd October, 2006. That the specific documents which would have been presented before him would have included an executed transfer form of undivided shares of the property signed by the proprietor and the one taking the shares, an Application of an approved consent from the Land Control Board, a Letter of consent signed by the chair of the Land Control Board prepared by the land administration officer of the area who is the secretary of the Land Control Board. That the presentation of documents could have been done either by oneself or through an Advocate hence Tapnyobii C. Maina should have known who presented the documents. That she should also have copies of all the 3 documents after registration which documents she did not produce in court.
47. He reiterated that under Section 79 (2) of *Land Registration Act*, he could rectify a wrong entry and the instant case was a candidate for such rectification since no documents in support had been presented by Tanyobii C. Maina. That the said rectification could apply even without involving the court as long as the parties were notified.

The Plaintiff thus closed his case.

48. Augustine Kimutai Koech testified as DW 1 to the effect that he was the son of the late Mr. and Mrs. Tapnyobii Chepkemioi Maina. That he lived in Kapkures sub-location Kiptulwa location Sotik division in Bomet County and worked with James Finlay Tea Company as a Leaf Count Clerk. He adopted his Witness Statement dated 26th August, 2022 as his evidence in chief before proceeding to testify that he had an interest in the suit property since the deceased 1st Defendant herein was his mother on whose behalf he had been admitted as a Legal Representative as per Df Exhibit 1.
49. That his mother was the original shareholder of Kapkures Co-operative Society in the year 1975. That she was a small-scale farmer and reared cattle for milk production whereby she sold milk in installments from the year 1975 to the year 1984 when she completed the payment of the required fee of Kshs.5020/



= for her share of 37 acres, an equivalent of 15 hectares. That the payments were evidenced by the receipt dated 20th May, 1975 for Kshs. 900/=, receipt is dated 17th September 1975 for Kshs. 700/=, receipt dated 15th October, 1984 for Kshs. 80/=, receipt dated 3rd November, 1983 for Kshs. 470/=, receipt dated 1st February, 1984 for Kshs. 100/=, receipt dated 3rd August, 1982 for Kshs. 400/=, receipt dated 18th June, 1976 for 500/=, receipt dated 19th January, 1977 for Kshs. 1500/=, receipt dated 7th June, 1997 for Kshs. 1400/= and receipt dated 19th August, 1981 for Kshs. 20/=.

50. That after she had finished paying the said money, she had been placed as No.109 in the list of members with 15 hectares undivided. He maintained that the said payments were received from Tapnyobii Maina and that block No.109 became block number 110 upon sub-division of the land. He referred to a list of members of Kapkures Co-operative society and confirmed that his late mother's name was indicated as No.109 and that those who were sharing the said land were clearly marked. He produced the said List as Df Exhibit 2 (a-f) and proceeded to testify that the list had indicated the acreage of each member, and where there had been a tenancy in common, the list had also indicated the same.
51. His further evidence was that after the payment, the land was adjudicated wherein the committee had distributed it to its members between the years 1984 and 1985 and the deceased 1st Defendant, was given 37 acres after which she fenced the land with barbed wire. That during the adjudication, Paul Keino the Plaintiff herein was nowhere to be seen. Further that after the said sub-division, between the years 1986 and 1987, his mother had sold 2 acres of the suit property to Joseph Korir in order to educate her children.
52. That they had developed the suit property from the year 1986 to the year 1991 when the committee decided to finalize the transition of co-operative society to individual ownership. That all members had been asked to pay Kshs. 270/= for the transfer of title deeds to individual owners where his late mother had paid the said Kshs. 270/= via receipt No.C100392 dated 6th August, 1991 which indicated that the money had been received from Tapnyobii. He produced the said Receipt as Df Exhibit 3.
53. That immediately after the transfer to individual ownership, Paul Keino, the Plaintiff herein who was his teacher, emerged claiming a share of the suit property. That the said Paul went to the District Officer's office at Chepalungu division and summoned his mother to appear before a panel of elders in which the case was heard under chairman Mr. Ochode the then sitting District Officer. That there was a division in the award in that, while some elders awarded Paul 6 acres others awarded him 9 acres on humanitarian grounds and the said award was taken to court for adoption as Case No.44 of 1991.
54. That his mother having been dissatisfied with the decision of the elders, proceeded to the Ministry of Lands to confirm the status of her title deed and she was shocked to learn that on 7th August, 1991 the two names had been inserted into the title deed being Paul Keino and Joseph Korir as in the Pf Exhibit 4. That his mother went to the District Officer's office Ndanai division where she met Mr. Chege who was the incumbent District Officer at the time where her case was heard and each party was asked to produce documents relating to the land purchase. That whereas his mother had produced receipts, (herein produced as evidence) Paul Keino had failed to produce anything.
55. That there had been a ruling that the whole land belonged to his mother after which the matter was taken to court. He produced the minutes of the panel of elders dated 21st March, 1993 as Df Exhibit 4 and proceeded to testify that the matter was referred to court and heard several times whereby the ruling of the panel of elders was adopted by the Magistrate's court and parties were given 30 days to file their objection. That at the lapse of the 30 days period, they had gone back to court where they had found that the court file had mysteriously gone missing. That they tried tracing it in vain. Eventually the Principle Magistrate had ordered for a skeleton file to be opened after which 60 days had been issued to file an objection.



56. That at the lapse of the 60 days, when they went back to court, they found that the skeleton file had also gone missing and their effort to trace the same bore no fruit hence they went back home and stayed for a longtime but kept on checking with the court to see whether the file had been traced. That eventually, the file having not been traced, their case had been struck out on 17th August, 2006. He marked the proceedings at PM's Court Kericho Miscellaneous Application No. 144/91 as MFID5.
57. His evidence was that from the year 2006 to the year 2019 Paul Keino, the Plaintiff herein, emerged claiming that he had a share on the suit property and afterwards, the said Paul filed the instant suit whereby he sued DW1's mother, the Land Registrar and the Attorney General. Further that the said Paul knew very well that Kericho Miscellaneous Application No. 144/91 was not in court hence he took advantage of the situation to file the instant suit.
58. His further evidence was that the Plaintiff also went to Bomet police station and accused his (DW1's) mother of engaging in corruption to delete his name from the title deed. That his then ailing mother was intimidated, harassed and forced to accept that she was the one who had deleted the Plaintiff's name from the title deed otherwise she would be jailed. Despite the intimidation and threats, she refused to accept the said allegations. That his mother later succumbed to her sickness in the year 2020.
59. He maintained that his mother had acquired the title to the suit property. He referred to Pf Exhibit 7 and Pf Exhibit 4 to testify that since the title bore 3 names and there was a case in court, his mother went with Joseph Korir to Ndanai Land Board whereby the said Joseph was given this title deed.
60. That the remaining title bore 2 names, that is the Plaintiff and the 1st Defendants name but the Registrar knowing that the matter was pending in court, had deleted the Plaintiff's name hence the said title remained in his mother's name. He relied on Df exh 4 to testify that presently, the title was in the name of his mother who was in possession of the suit property. That the Plaintiff lived far away from them and was not in occupation of any part of the suit property.
61. On being cross examined by the Plaintiff's Advocate, the 1st Defendant he confirmed that the suit property formerly parcel No. Kericho/Emkwen/ (Kapkures) 110 was initially registered in the name of Tapnyobii Maina. That the transfer form No.C100393 also showed that the land had wholly been transferred to the said Tapnyobii.
62. That on 7th August, 1991, the Plaintiff and one Joseph Kipkemoi Korir had secretly gone and had their names inserted in Tapnyobii's title deed. He reiterated that the receipt bore the name of Tapnyobii. However, on being prompted further, he admitted that between the year 1986 and 1987 his mother had sold 2 areas to Joseph Kipkemoi Korir and that he had the receipt to the transfer forms.
63. He denied the existence of any arrangement between the Plaintiff and his mother and maintained that his mother paid the entire amount as per the receipts produced in court that is, Kshs. 5020/= for the shares and Kshs. 270 for the title deed. That he did not know where the excess amount had come from since he knew that the total amount was Kshs. 5020/=
64. When he was referred to Pf Exhibit 8(a) the minutes of the elders dated 5th September, 1991, he testified that the same was to the effect that his mother purchased the suit property on her own and that he was not aware that his mother purchased the land with others. On further interrogation, he testified that he was not aware of the said minutes and maintained that the Plaintiff emerged from nowhere.
65. His further testimony was that he was not aware that the Plaintiff's name was in the register and maintained that whereas his mother was a member of Kapkures Co-Operative Society as per the list of members, the Plaintiff was not a member of the said Society hence he had no interest in the suit property.



66. He reiterated that there was no arrangement between the Plaintiff and his mother and that the shadow members were shown on the list of members. He also maintained that his mother was the only person in occupation of the whole suit property and that the Plaintiff was not in occupation of any portion of the property neither did he see anybody grazing their cattle on the suit property.
67. Upon being cross-examined by the State Counsel, he confirmed that the Adjudication period was from the year 1984 to the year 1985 but which time the Plaintiff did not raise any complaint from the year 1984 to the year 1991 since he was nowhere to be seen.
68. When he was referred to Df Exhibit 3, he testified that his mother paid for the transfer of title to her name. However, upon the collapse of Kapkures Co-operative Society, it took time to get individual titles and that was when people took advantage to insert their names in the title deeds.
69. He was further referred to Pf Exhibit 4 (Entry No.3) wherein he confirmed that his mother was the sole registered owner of the suit property and that the Land Registrar was only concerned with inserting and deleting the names in the register.
70. On re-examination, he was referred to the list of shareholders where he confirmed that the same was dated 1996. That Kshs.270/= was to be paid for the transfer where his mother made the said payment on 6th August 1991 and a title deed bearing the 3 names was issued the following day. That the issues arose when the Plaintiff appeared claiming ownership of the land.
71. When he was further referred to Df Exhibit 4, he testified that in the year 2006, the Registrar had amended the register. That the same was based on the decision of the court in the court file that had gone missing.
72. DW2 one Stanley Arap Koske testified to the effect that he lived in Kapkures and was a farmer. He adopted his witness statement dated 26th August, 2022 as his evidence in chief and proceeded to testify that he knew the deceased Tapnyobii Maina as they were from the same village. That because they had big portions of land, they lived far apart. That his deceased father was a member of the co-operative society hence Tapnyobii Maina and him picked their respective title deeds on the same day.
73. That Parcel No. Kericho/Emkwen/ (Kapkures) 110 was Tapnyobii's land. That initially they were 128 members but later Tapnyobii went and requested to be a member whereby she was allowed to join and she started paying for the shares. That she had been in possession and occupation of the suit property to date.
74. On being examined by the court, he stated that the Plaintiff was a head teacher in a certain school. That he was in a different scheme elsewhere and was not part of the society. Further that land was not issued to none members who were singly registered per share.
75. On cross-examination by the Plaintiff's Counsel, DW2 confirmed that the Plaintiff was a head teacher but he did not know if they had any arrangement with the 1st Defendant.
76. He testified that the payment was done using calves and that he was not aware that the title was registered in the names of three people. That once he was given his title, he sold his portion of land and moved away at the time, which Tapnyobii had been the one living on the suit property. That upon his return recently, he had not visited the suit property.
77. Samwel Arap Langat alias Kipkosgei Langat testified as DW3 to the effect that he lived at Kapkures Ranch and was a farmer. He adopted his witness statement as his evidence in chief and proceeded to testify that he knew Tapnyobii Maina. That at the time people were being registered for land, she too had been registered. That he was a member of Kapkures Co-operative Society and so was Tapnyobii.



- That he had seen her being registered as the sole owner of the suit property and she had been the one who had paid for the share of the land upon being registered.
78. That he just heard of Paul Keino, the Plaintiff herein, who was not a member of the society. That initially there were 128 people registered then Kipnyobii and Arap Sang were registered thus increasing the membership to 131. That nobody who was not on the register was allocated land.
79. On being Cross-examined by the Plaintiff's Counsel, he admitted that he knew Paul Keino and that he had initially said that he was at the scheme. That he also knew Tapnyobii Maina but did not know whether there had been any arrangement between the two of them over the suit property. However, when the land was sub-divided, he had moved further away from them hence he could not tell who was in occupation of parcel No Kericho/Emkwen/ (Kapkures) 110.
80. The Defence closed their case and despite parties being directed to file written submissions, only the Plaintiff filled his submissions to which I shall herein summarize as follows;

Plaintiff's submissions.

81. The Plaintiff summed up the brief background and facts of the matter as well as the evidence adduced in court before framing his issues for determination as follows:
- i. Whether the registration of the Plaintiff as a common owner of that property known as LR. No. Kericho/Emkwen (Kapkures)/290 was a consequence of fraud, irregularity and/or illegality.
 - ii. Whether the rectification of the register in respect of the property known as LR. No. Kericho/Emkwen (Kapkures)/290 to reflect the name of Tapnyobii C. Maina as its sole proprietor, was un-procedural, irregular and/or unlawful.
 - iii. Whether there exists a common tenancy between Tapnyobii C. Maina and the Plaintiff over that parcel of land known as LR. No. Kericho/Emkwen (Kapkures)/290.
 - iv. If the answer to (iii) above is in the affirmative, whether the tenancy in common should be severed by the court.
82. On the first issue for determination, the Plaintiff while relying on the Provisions of Section 26(1) of the [Land Registration Act](#) as well as the decided cases of Lawrence Muriithi Mbabu vs. District Land Registrar, Nyeri & another; John Githui Kinyua (Interested Party) [2019] eKLR and Arthi Highway Developers Ltd vs. West End Butchery Ltd & Others C.A Civil Appeal No. 246 of 2013 [2015] eKLR submitted that in so far as the 1st Defendant's charges of fraud, irregularity and illegality were never specifically pleaded, particularized and evidence in support led, the same ought to be dismissed. Further that even in the unlikely event that the 1st Defendant had properly pleaded charges of fraud perpetrated by the Plaintiff, such a claim would still fail as the evidence submitted did not meet the threshold required to prove such.
83. That in as much as DW1 and his witnesses all asserted that the Plaintiff was not a member of Kapkures Co-operative Society in support of their assertion that he was not entitled to a registration as a common owner, it must be remembered that the Plaintiff himself conceded the said fact while asserting that all payments for the subject parcel were paid on the account of Tapnyobii C. Maina who was the substantive member of the said Co-operative Society. Moreover, that although the 1st Defendant claimed that his mother paid for the property on her own, he admitted during cross-examination that he did not know where the extra funds used to settle the purchase price of KShs. 5020/= came from.



84. The Plaintiff further submitted that although the 1st Defendant claimed that he and one Joseph Korir had secretly entered their names in the suit property's register, he reprobated and acknowledged the interest of the said Joseph Korir while disowning the Plaintiff's interest without elaborating when they discovered his alleged fraud. Instead, the 1st Defendant chose to conveniently state that the Plaintiff, was only allocated the 9.3 acres on humanitarian grounds.
85. The Plaintiff contended that he was first registered as co-owner of the suit property way back on 24th November 1993 hence any claim challenging his registration ought to have been brought within 12 years thus the 1st Defendant's claim that the Plaintiff fraudulently inserted his name in the register was time-barred. Further that the 1st Defendant's argument that since the Plaintiff was not a member of Kapkures Cooperative Society, he could not have been duly registered as one of the proprietors of the suit land, failed since the first three owners of the property known as L. R. No. Kericho/Emkwen/(Kapkures)/110 was one Joseph Korir who was equally not a member of the said Cooperative Society and whose name was included in the membership list submitted by the 1st Defendant.
86. It was The Plaintiff's submissions that the minutes he had produced as Pf exh 8(a) and 8(b) had indicated that the 1st Defendant had initially acknowledged his contribution towards acquisition of the suit land however, the said 1st Defendant's narrative changed as evident in the minutes dated 21st March, 1993 produced as Df exhibit 4 although it was still acknowledged that the Plaintiff had given money to the 1st Defendant and/or her husband.
87. That subsequently the Plaintiff and PW2 (the former chair of Kapkures Cooperative Society both gave consistent and compelling evidence on the circumstances upon which the Plaintiff came to acquire a stake on the suit land. That the Plaintiff clearly indicated that he had been approached to pay off part of the purchase price for the acquisition of one share comprising 37.2 acres for a consideration of Kshs. 5020/= out of which he duly paid Kshs. 4320, on the 1st Defendant's account and that the said evidence was supported by PW2 and PW3.
88. His further submission was that the witnesses called by the Defendants did not support the 1st Defendant's account as they all claimed that they could neither tell whether the 1st Defendant's mother had entered into any arrangement with the Plaintiff over the suit land or specifically attest whether or not the Plaintiff was in occupation of any part of the suit land. The Plaintiff thus submitted that his registration as common owner of the suit property was lawful and urged the court to find and hold as such.
89. On the second issue for determination as to whether the rectification of the register in respect of the property known as L. R. No. Kericho/Emkwen (Kapkures)/290 to reflect the name of Tapnyobii C. Maina as its sole proprietor, was un-procedural, irregular and/or unlawful, the Plaintiff's submission was that it had been evident from the outset, that he was one of the proprietors of the property known as LR. No. Kericho/Emkwen (Kapkures)/110 as confirmed by PW4, the Land Registrar, Bomet. That PW4 had produced copies of the register in respect of LR. No. Kericho/Emkwen (Kapkures)/290 as Pf exhibit 4 wherein he had testified that an entry made on 24th November, 1993 showed that the proprietors to the said property were Paul Kipketer Keino, the Plaintiff and Tapnyobii C. Maina, who were tenants in common.
90. That on 23rd October 2016, the suit land was transferred to Tapnybii C. Maina without the other proprietor's consent, wherein Tapnybii C. Maina had been issued with a title deed. That given that the nature of registration was that of tenancy in common, for the transfer to be affected, there ought to have been transfer of dividend share forms but the transfer herein was not supported by the said forms. That the said witness also testified that in the circumstances of the instant case and under Section 79



of the [Land Registration Act](#), rectification of the register was required but the same could only be done through transfer of individual shares and not rectification of the register.

91. Further, that the registration made in the register in favour of Tapnybii C. Maina could only have been effected if there was wrong registration. No such reason had however been noted in the register to warrant such a conclusion. That unless there were documents to support entries numbers 3 and 4, they could not be said to have been legally entered. PW4 had further clarified that the entries made on 12th April 1991, on first registration of the suit property were subject to the records held by the Adjudication Officers and that his office could not make any adjustments to entries or records entered by the Adjudication Officers.
92. That with regards to the entries made on 23rd October 2006, which in effect delisted the Plaintiff as a co-owner of the suit land, he conceded that the entry was not supported by any documents such as a properly executed transfer form for undivided shares, application of approved consent from Land Control Board and Letter of Consent signed by the chair of the Land Control Board. That from the foregoing, it could be said that the deletion of the Plaintiff's name from the suit property's register and subsequent issuance of a title deed in the sole name of Tapnybii C. Maina (deceased) was not only irregular and un-procedural but also out rightly illegal as the Plaintiff neither executed any transfer of undivided share as required by law in her favour nor were the impugned entries supported by any lawful instruments.
93. It was the Plaintiff's further submissions that in so far as his interest in the suit property was alienated without notice to him and without any reason having been noted, the impugned entry no's 3 and 4 under the suit property's register had also been entered un-procedurally and irregularly. Consequently, the Plaintiff urged the court to invoke the court's powers under Section 26 of the [Land Registration Act](#) and accordingly order cancellation of the said entry numbers 3 and 4 and direct the reinstatement of the Plaintiff as a co-owner of the suit property as was earlier espoused under entry 1 of the said property's register.
94. The Plaintiff placed reliance in the decided case of Zacharia Wambugu Gathimu & another vs. John Ndungu Maina [2019] eKLR where the court had inter-alia ordered cancellation of an illegally procured title and ordered reversion of the register back to the state it was before the transfer was effected and Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR where the court ordered cancellation of the title and charge subsequently registered and directed that the register be duly rectified for lack of any proper documents.
95. On the third issue for determination as to whether there existed a common tenancy between Tapnybii C. Maina and the Plaintiff over that parcel of land known as L. R. No. Kericho/Emkwen (Kapkures)/290, the Plaintiff submitted that having established that entry numbers 3 and 4 in the register of the suit property were entered illegally, it was only fair and just that the said offending entries be cancelled and an order do issue reinstating entry number 1. That as confirmed by PW4 entry number 1 in the register in respect of LR. No. Kericho/Emkwen (Kapkures)/290 showed that an entry made on 24th November, 1993 showed that the proprietors to the said property were Paul Kipterer Keino, the Plaintiff and Tapnybii C. Maina, who were tenants in common.
96. On the fourth issue for determination as to whether the tenancy in common should be severed by the court, the Plaintiff submitted that although the provisions of Section 94 of the [Land Registration Act](#) No. 3 of 2012 vests jurisdiction to order partition on the Land Register, in the first instance, the court was duly clothed with original and appellate jurisdiction to hear and determine all land disputes relating to the use, occupation and title to land pursuant to the provisions of Section 13 of the [Environment and Land Court Act](#) as read with Article 162 (2) (b) of [the Constitution](#).



97. That in the circumstances, although Section 94 of the *Land Registration Act* vests such power in the land registrar to determine application for partition, in the first instance, that did not oust the jurisdiction of the court to conclusively determine the rights of parties including issuing an order for partition of the suit land.
98. He urged the court to take cognizance of the fact that the 1st Defendant was now deceased and although she was represented by her legal representative herein, who held Limited Grant for purposes of defending the instant suit, no one was holding a substantive grant in respect to her estate. That subsequently, if the matter of partition was referred to the Land Registrar, the parties would be left in a state of limbo as the estate of the 1st Defendant would in effect lack a competent legal representative and the dispute over the suit land would be unnecessarily prolonged.
99. That deferring the matter of partition to the Land Registrar would be inconsistent with the spirit of the provisions of Sections 1A and 1B of the *Civil Procedure Act*. The Plaintiff thus prayed that the court orders severance of the common tenancy over the property known as L. R. No. Kericho/Emkwen (Kapkures)/290 as proposed vide his Amended Plaint dated 23rd May, 2022 so that the dispute herein could be conclusively determined.

Determination.

100. At this juncture it is worthwhile to note that although the 2nd and 3rd Defendants participated in the trial, they did not file any pleadings to the suit in defence.
101. I have however considered the matter before me, the evidence as well as the submission by the Parties, the authorities and the applicable law. From the summation of the matter in question, the Plaintiff's case is based on oral and documentary evidence that that in the year 1971, the 1st Deceased Defendant Tabnyobii Maina and her husband Kipkoech Maina and one Taparumei had gone to him on his plot in the scheme, which bordered the suit land, seeking for help because they had stayed on the land from the year 1968 to the year 1972 without making payment to the Kapkures Co-operative Society (Co-operative) who had subsequently given them notice to leave the farm.
102. That they had asked him to help them pay the Co-operative in exchange for a share of the farm which share consisted of 37.2 acres and was equivalent to Kshs. 5,020/=. That since Mr. Maina was a brother to his father, his father had implored upon him to help the 1st Defendant. That subsequently he had contributed Kshs. 4,320/= for the purchase of the suit property while the 1st Defendant had only contributed Kshs. 700/=. That he had paid by instalment through Barclays Bank from the year 1975 to the year 1977. That the payment slip had been given to the Co-operative Society Offices for recording and issuance of the receipt in the name of Tabnyobii Maina because she was a member of the society while he was just a shadow member because they did not want to disclose two entities.
103. The agreement with the deceased 1st Defendant in the year 1972 that the farm be divided into equal shares was witnessed by officials of Kapkures Co-operative Society being the Chair, Secretary and Treasurer and other members who had agreed to their arrangement. The Plaintiff had proceeded to develop the land by building water dams and houses for workers who grazed the animals there.
104. That later in the year 1991 there arose a misunderstanding among the children of Mr. & Mrs. Maina who prohibited him from fencing 18.6 Acres wherein a baraza of the Committee and Assistant Chief had been called on 5th September 1991. In the said meeting, he had been requested to take 9.3 Acres of the suit property and leave the rest to the "Mainas" for reasons that he was a headmaster and had other properties. On 2nd April, 1992 another meeting was again convened and presided over by the District



- Officer one Mr. Chege Mwangi wherein the deceased 1st Defendant had been asked to surrender the 9.3 acres to the Plaintiff.
105. That what followed was that in 1993, the land was registered as No. Kericho/Emkwen/ (Kapkures)/110 to three people; Tapnyobii Maina (the original 1st Defendant now deceased), Joseph Kipkemoi Korir and Paul Kipterer Keino (the Plaintiff). Subsequently, this land was subdivided after Joseph Kipkorir bought a small portion from the deceased 1st Defendant wherein he had been issued with a title to parcel No. Kericho/Emkwen/ (Kapkures)/291 and deceased 1st Defendant Tapnyobii Maina remained registered in common with the Plaintiff to Kericho/Emkwen/ (Kapkures)/290.
 106. The Plaintiff then remained in occupation of 9.3 acres as deliberated in the minutes of the meetings but in the years of 2016 and 2017, the 1st Defendant and her children tried again to evict him from the land wherein he had sought help from the Chief of Kamureito Location who wrote a letter dated 6th September, 2018 to the Registrar which letter he had taken to the Bomet Land Registrar's Office seeking clarification and directive to repossess the land. That it had only been after the people on the suit property had become so rude, the he had suspected that something was amiss, only to discover that his name had been deleted from the register and instead the land had now been registered solely in the name of the deceased 1st Defendant Tapnyobii Maina in the year, 2006 without notice.
 107. The Plaintiff's case therefore was that the registration of the deceased 1st Defendant Tapnyobii Maina as the sole proprietor to LR. No. Kericho/Emkwen (Kapkures)/290 without the backing of any documentary evidence was a consequence of fraud, irregularity and/or illegality.
 108. The 1st Defendant's defence on the other hand was that his mother Tapnyobii Maina who was a shareholder and member No. 109 in Kapkures Co-operative Society. That she had thus bought the suit land for Kshs.5020/= through installments, from her share of the society through the sale of milk from the year 1975 to the year 1984. That each share was for of 37 acres, an equivalent of 15 hectares. That block No.109 therefore became block number 110 upon sub-division of the land.
 109. That after adjudication of the land, the committee had distributed it to its members between the years 1984 and 1985 and the deceased 1st Defendant, had been given 37 acres after which she had fenced with barbed wire and developed it from the year 1986 to the year 1991. That between the years 1986 and 1987, his mother had sold 2 acres of the suit property to Joseph Korir in order to educate her children. That his mother had also paid the required Kshs. 270/= via receipt No.C100392 dated 6th August, 1991 for the title deed wherein immediately after the transfer to individual ownership, Paul Keino, the Plaintiff herein had emerged claiming a share of the suit property.
 110. That the Plaintiff had then filed a dispute to the District Officer's office at Chepalungu division wherein there had been a division in the award in that, while some elders awarded him 6 acres others awarded him 9 acres on humanitarian grounds. That the award had been taken to court for adoption via Case No.44 of 1991.
 111. Later the 1st Deceased Defendant was shocked to learn that on 7th August, 1991 two names had been inserted into the title deed being Paul Keino and Joseph Korir. She went to the District Officer's office Ndanai division where her case was heard where the Plaintiff failed to produce anything in evidence. An award by the panel of elders dated 21st March, 1993 had been rendered that the whole land belonged to his mother. This award was adopted by the Magistrate's Court wherein the court file and subsequently the skeleton file mysteriously went missing. Eventually, their case had been struck out on 17th August, 2006.



112. Having laid down the background of the matter in question and having considered the evidence adduced in the matter, the issues that come out clearly for determination are as follows.
- i. Whether there exists a common tenancy between Tapnyobii C. Maina and the Plaintiff over that parcel of land known as L.R. No. Kericho/Emkwen (Kapkures)/290.
 - ii. Whether the rectification of the register in respect of the property known as L.R. No. Kericho/Emkwen (Kapkures)/290 to reflect the name of Tapnyobii C. Maina as its sole proprietor, was un-procedural, irregular and/or unlawful.
 - iii. Who should pay the cost of the suit?
113. On the first issue for determination, having pleaded fraud and illegality on the part of the deceased 1st Defendant in the manner in which she had been registered as a sole proprietor to L.R. No. Kericho/Emkwen (Kapkures)/290, land in which they had held in common, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In *R.G Patel vs Lalji Makanji* 1957 E.A 314, the Court of Appeal stated as follows:
- “Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.
114. I have no doubt in my mind that the Plaintiff herein distinctly pleaded the facts on which fraud is alleged against the deceased 1st Defendant. The next step however was for him to prove those allegations to the required standard. I will therefore interrogate this allegation of fraud as submitted by the Plaintiff. The Plaintiff's case was that after the deceased 1st Defendant and her husband had asked him to help them offset the debt owed to the Kapkures Co-operative society on a promise that they would share equally the resultant parcel of land from the purchase, he had complied and even paid more than the deceased 1st Defendant, only to discover later that his name had been deleted from the register in the year, 2006 without Notice.
115. It is also on record through the oral evidence and documentary evidence being the minutes herein produced as evidence that there had been sittings by panels of elders wherein it had been acknowledged that indeed the Plaintiff and the deceased 1st Defendant had bought the suit land together wherein they had agreed to divide it amongst themselves. It also evident that the Plaintiff had paid a larger part of the purchase money to the society wherein the deceased 1st Defendant was a member. The panel of elders who had no jurisdiction over issues pertaining ownership of land had then decided, in their own wisdom, to award the Plaintiff 9.3 acres out of a total of 37.2 acres.
116. It is thus not in dispute that initially the suit land Kericho/Emkwen/ (Kapkures)/block 1(Kapkures) had then been registered in 1991 as No. Kericho/Emkwen/ (Kapkures)/110 to both the Plaintiff, the Deceased 1st Defendant and one Joseph Kipkemoi Korir. Subsequently after Joseph Kipkemoi bought a piece from the deceased 1st Defendant, No. Kericho/Emkwen/ (Kapkures)/110 had been subdivided into two resulting into No. Kericho/Emkwen/ (Kapkures)/290 and 291 and whereas No. Kericho/Emkwen/ (Kapkures)/291 was registered to Joseph Kipkemoi Korir on 24th November 1993 and a title issued. A title to parcel No. Kericho/Emkwen/ (Kapkures)/290 measuring 13 hectares was then issued in 1993 in the names of the both Plaintiff and the deceased 1st Defendant.
117. Section 91 of the *Land Registration Act* gives a meaning and incidents of co-tenancies in land



118. Section 91(1) is clear to the effect that;

In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.

119. Subsection 2 goes on to stipulate that;

Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.

120. In the present case, it is clear that the title deed issued in 1993 in the names of the both Plaintiff and the deceased 1st Defendant did not specify the nature of their rights and therefore by virtue of the provisions of Section 91(2) of the [Land Registration Act](#) it shall be presumed that they held the interest on the land as tenants in common in equal shares.

121. The same law under Section 91(5) is then clear that where the land, is owned in common, each person shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate and no tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.(Section 91(6) of the Act).

122. Indeed the evidence of the Land Registrar Bomet who testified as PW 4 was to the effect that Kericho/Emkwen/ (Kapkures)/290 had been registered after partition was done on 24th November 1993 to Tapnyobii C. Maina and Paul Kipterer Keino in common. That entry number 3 which had been done on 23rd October, 2006 where the suit land had been transferred to Tanpyobii C. Maina alone had been without any supporting documents like an executed transfer form of undivided shares of the property signed by the proprietor and the one taking the shares, an Application of an approved consent from the Land Control Board, a Letter of consent signed by the chair of the Land Control Board prepared by the land administration officer of the area who is the secretary of the Land Control Board. That rectification of the register under the provisions of Section 79 of [Land Registration Act](#) could only be done when there was wrong registration but in the instant matter there was no such wrong registration. That entry 3 and 4 were done without the other proprietor's consent where a title deed had been issued on the same day.

123. I thus find that indeed whereas there had been a common tenancy between the deceased 1st Defendant, Tapnyobii C. Maina and the Plaintiff over that parcel of land known as LR. No. Kericho/Emkwen (Kapkures)/290, the rectification of the register to reflect the name of Tapnyobii C. Maina as its sole proprietor, was un-procedural, irregular and/or unlawful and therefore the said Register is herein ordered as cancelled.

124. Having said that, the Plaintiff has sought for an order to partition of the property known as LR. No. Kericho/Emkwen (Kapkures)/290 into 7.05 hectares being the Plaintiff's entitlement thereof and 6 hectares being the 1st Defendant's share. This prayer is not however within the jurisdiction of the court.

125. Section 61 of the [Land Registration Act](#) provides for the procedure for dealing with a tenancy in common where one proprietor has died. It provides that the personal representative is entitled to be registered by transmission as proprietor in the place of the deceased, and further, that such registration relates back to and takes effect from the date of the death of the proprietor.

126. Sections 94 of the [Land Registration Act](#) provides for a severance of a common tenancy by way of partition as follows:



- (1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of a land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.
- (2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by—
 - (a) any one or more of the tenants in common without the consent of all the tenants in common; or
 - (b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.

127. It can therefore be seen that under the Section 94 of the *Land Registration Act*, the power to partition land held under common tenancy is given to the Registrars appointed under Section 12 and 13 of the *Land Registration Act*. The procedure having been set down, it had been held in the Case of Paul Muraya Kaguri vs Simon Mbaria Muchunu [2015] eKLR as follows;

“It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say her rights were denied.”

128. In the end, having carefully considered the available evidence and the available provisions of law, the Court finds and holds that the Plaintiff his partly established his case and hereby direct as follows;
- i. A declaration is herein issued that that the registration of the deceased 1st Defendant as the sole proprietor of all that property known as L.R. No. Kericho/Emkwen (Kapkures)/290 on 23rd October 2006 was illegal, null and void.
 - ii. There be within 30 days, the cancellation of the registration of the deceased 1st Defendant as a sole proprietor of L. R. No. Kericho/Emkwen (Kapkures)/290 and the Register be restored to the position it was before the purported rectification.
 - iii. The Plaintiff shall have cost of this suit with interest at court rates.

It is so ordered

DATED AND DELIVERED AT KERICHO VIA MICROSOFT TEAMS THIS 25TH DAY OF JANUARY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

