



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO. 24 OF 2007

LUCIO MATINGWONY (Suing as the Administratrix of the estate of

KIMALEL MATINGWONY (DECEASED).....PLAINTIFF

VERSUS

KIPKEMOI ROP Alias SERONEY ROP.....DEFENDANT

JEREMIAH K. CHIRCHIR.....1ST DEFENDANT

RACHEL CHEROTICH ROP.....DEFENDANT

ERICK CHIRCHIR.....2ND DEFENDANT

GEOFFREY CHIRCHIR.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

THE HONORABLE ATTORNEY GENERAL.....5TH DEFENDANT

JUDGMENT

Introduction

1. This is an acrimonious case that has been in court for the past 11 years and caused great distress and anxiety among the parties. It has been handled by 7 judges, most of whom dealt with the various applications filed by the parties herein. The parties have had a total of 11 cases in different courts and other forums over the subject parcel of land. After numerous applications filed by both parties which considerably delayed the finalization of this case, the suit was finally fixed for hearing on 29th June 2016 and each of the parties testified and called their witnesses. The hearing commenced before my brother Justice Sila Munyao who took the evidence of the Plaintiff and her 3 witnesses as well as two Defence witnesses. I proceeded with the case from where he had left it and took the evidence of the remaining 6 Defence witnesses. The case was concluded on 5th April 2018 after which counsel for plaintiff and 1st defendant filed their written submissions on 2.7.2018 and 4.9.2018 respectively.

2. By a Plaint dated 8th March, 2007 the Plaintiff instituted a suit against the Defendant. The said Plaint was amended three times, the final amendment being on 17th June 2014. It is this Further, Further Amended Plaint that is the subject of this judgment. In the said Plaint, the plaintiff seeks the following reliefs against the defendants:

a. A declaration that 4.0 or 4.8 hectares of land comprised in L.R NO. KERICHO/KABIANGA/2406 or 2407 previously comprised in that property known as L.R NO. KERICHO/KABIANGA/1128 lawfully belongs to the Plaintiff in her capacity as the Administratrix of Kimalel Matingwony (Deceased).

b. An order that the respective registers of the suit properties hereto be rectified in order to reflect the true acreage of 6.8 hectares in L.R.NO. KERICHO/KABIANGA/1129.

c. A perpetual injunction do issue restraining the Defendants whether by themselves, their agents and/or servants from entering and/or remaining on the said land parcel L.R NO. KERICHO/KABIANGA/1129.

d. Costs of this suit.

e. Any other relief that this honourable court may deem fit and just to grant.

3. The 1st Defendant filed his Defence and Counterclaim dated 15th April 2015. In the said Defence he avers that the Plaintiff's husband namely, Kimalel Matingwony (Deceased), transferred a portion of his parcel of land comprised in L.R NO. KERICHO/KABIANGA/1129 in favour his father namely, SERONEI ROP (Deceased), then the registered proprietor of that property known as L.R NO. KERICHO/KABIANGA/1128; in the year 1986 or thereabouts, and had the said properties' respective registers duly amended.

4. In his counterclaim, the 1st Defendant claims that the Plaintiff has without any colour of right encroached on his parcel of land comprised in L.R NO. KERICHO/KABIANGA/2407 previously comprised in L.R NO. KERICHO/KABIANGA/1128 and is currently picking tea planted in the said parcel.

5. The Plaintiff filed her Reply to the Defendant's Amended Statement of Defence and Defence to Counterclaim on 26th April 2016. In the said Reply, she denies the 1st Defendant's averments set out in the Defence and Counterclaim dated 15th April, 2015.

6. The 4th and 5th Defendants filed their Defence dated 23rd May, 2014 on 26th May, 2014, where they both deny the Plaintiff's claim.

7. The 2nd and 3rd Defendants never entered appearance and therefore did not participate in these proceedings.

8. In order to put this case into perspective, it is necessary to give a brief background.

9. The Plaintiff instituted this suit in her capacity as the Administratrix of the estate of Kimalel Matingwony (deceased), the registered proprietor of all that parcel of land known as L.R NO. KERICHO/KABIANGA/1129. She produced a copy of the Grant of letters of administration and the original title deed in respect of L.R NO. KERICHO/KABIANGA/1129 as plaintiff's exhibits 3 and 7 respectively.

10. The 1st Defendant is sued in his capacity as the administrator of the estate of Seronei Rop (Deceased) who was originally registered as the proprietor of all that parcel of land known as L.R NO. KERICHO/KABIANGA/1128. The said parcel has now been sub-divided into L.R NO. KERICHO/KABIANGA/2406 and 2407.

11. He is also sued in his personal capacity as the registered proprietor of one of the resultant portions i.e L.R NO. KERICHO/KABIANGA/2407, from the sub-division of L.R NO. KERICHO/KABIANGA/1128.

12. The Plaintiff's claim is premised on alleged fraud, perpetuated by the 1st Defendant and his father; in respect of the entries made in the registers of the properties known as L.R NO. KERICHO/KABIANGA/1129, registered in the name of Kimalel Matingwony (deceased), who was her husband, and, L.R NO. KERICHO/KABIANGA/1128; registered in the name of Seronei Rop Deceased, the 1st Defendant's father.

13. The particulars of fraud pleaded against the 1st Defendant in the Further Further Amended Plaintiff and the Reply to Defence and Defence to Counterclaim are as follows:

i. Connived with his deceased father namely; Seronei Rop to cause the registers in respect of L.R numbers KERICHO/KABIANGA/1129 & 1128 to be altered so as to reflect the acreages of 2.0 Ha /2.8 Ha and 13.2 Ha, respectively, when he knew very well that was not the case.

ii. Fraudulently misrepresented to the Registrar in custody of the said titles that they were entitled to 4.0 ha or 4.8 Ha of the Plaintiff's husband's property comprised in L.R NO. KERICHO/KABIANGA/1129.

iii. Colluded with the said Seronei Rop to cause further sub-division of the property L.R NO. KERICHO/KABIANGA/1128 to further alienate and/or defeat the plaintiff's deceased husband's interest therein.

The Plaintiff's evidence

14. It was the plaintiff's testimony that her husband was the registered proprietor of that parcel of land known as L.R NO. KERICHO/KABIANGA/1129 whose acreage was fraudulently reduced from 6.8 Ha to 2.0 Ha through the fraudulent acts of the 1st Defendant and his father which in essence occasioned the enhancement of the acreage of their parcel of land known as L.R NO. KERICHO/KABIANGA/1128 from 8.4Ha to 13.2 Ha at the expense of her late husband's parcel.

15. The Plaintiff testified that when she filed Succession proceedings in respect of her late husband's estate, the 1st Defendant lodged an Objection which was however dismissed. See produced copies of the Judgment and Ruling of High Court in Succession cause no 75 of 2001, as exhibits 4, 5 and 6. She stated that she has not been able to complete distribution of her late husband's estate owing to the discovery of the reduction of the acreage in respect of the deceased's land.

16. She testified that her husband had a boundary dispute with the 1st Defendant's father namely Seronei Rop in the year 1991 which was never resolved. The Plaintiff also states that the 1st Defendant took advantage of the demise of her husband and encroached on her parcel of land in the year 1997, planted tea and has remained in its occupation to date leaving her with only 5 acres which was allocated to her by an order of this honourable court.

17. The Plaintiff further stated that her husband never transferred any part of his land comprised in L.R NO. KERICHO/KABIANGA/1129

to the 1st Defendant and his father.

18. PW 2, JOSEPH KIPROTICH RONO, corroborated the plaintiff's evidence and stated that he is related to the Plaintiff's husband (Kimalael Matingwony (Deceased) who in turn was a step brother to the 1st Defendant's father namely, SERONEI ROP (Deceased). He stated that there was a dispute between the Plaintiff's late husband and the said SERONEI ROP (Deceased over the common boundaries of their respective parcels lands i.e L.R NO. KERICHO/KABIANGA/1128 and 1129.

19. He further testified that, the 1st Defendant later encroached on the Plaintiff's land after her husband's demise and has retained its possession to date.

20. PW 3, CHARLES MORARA AYIENDA, a civil servant attached to the Ministry of Lands testified that he is the Chief Land Registration Officer attached to Kericho Land Registry charged with effecting registration of all registrable interests in land, determination of land boundary disputes and having custody of all land records.

21. He produced copies of the registers in respect of the parcels of land in dispute namely, L.R NO.'S KERICHO/KABIANGA/1128 and 1129, on the one hand and those of, L.R NO'S. KERICHO/KABIANGA/2406 and 2407 resultant from the sub-division of L.R NO. KERICHO/KABIANGA/1128; as Plaintiff's exhibits 11, 12, 13 and 14, respectively.

22. It was his testimony that the register in respect of L.R NO. KERICHO/KABIANGA/1128 was opened in the year 1970 in favour of Seronei Rop (the 1st Defendant's father) and its acreage appears to have been altered and/or amended to read 13.2 Ha, as opposed to 8.4 Ha, which was its initial acreage as indicated during first registration.

23. He stated that the alteration though signed was not dated and was not in any event effected by the person who opened the register. He further stated that, the purpose of the alteration was not indicated.

24. He testified that the register in respect of L.R NO. KERICHO/KABIANGA/1129 was similarly opened in the year 1970 in favour of Kimalael Matingwony (Deceased) and its acreage was initially indicated to be 6.8 Ha but was later altered to read 2.0 Ha.

25. Similarly, he observed that the alteration though signed was neither dated nor was its purpose indicated. He testified that alterations of acreage can be effected upon resolution of boundary disputes and that in this case the alteration occasioned a reduction of acreage in respect of L.R NO. KERICHO/KABIANGA/1129 by 4.8 Ha.

26. It was his testimony that rectification of registers in terms of acreage can be effected to correct errors arising from land adjudication but in this case there was no such evidence.

27. He also testified that the documents required in order to effect rectification are; a duly executed transfer, Land Control Board Consent and Mutation Forms. He stated that these records were not traced in the records at the Lands office.

28. He stated that the dimensions of the properties herein to wit, L.R numbers KERICHO/KABIANGA/1128 and 1129 are contained in the Registry Index Map (RIM) specifically sheets number 2 and 6.

29. He stated that it is a requirement that before rectification is effected a notice be issued to the party who is likely to be adversely affected. During cross examination by Ms. Langat for the 4th and 5th Defendants, he concluded that the amendments to the suit land registers were irregular as the reason for their amendment was not indicated.

30. During cross examination by Mr. Miruka for the 1st Defendant, he stated that he did not know the name of the officer who effected the amendments and further stated that if he was approached with an application for a search in respect of the subject properties he would demand to see the original title deed before issuing it.

31. PW 4, GEOFFREY KOMEN KIBOWEN, the District Surveyor, Kericho, stated that he is in charge of the RIM amendment center for Kericho and Bomet Counties and he is charged with implementing directions of the Land Registrar upon determination of disputes.

32. He stated that the documents required before sub-division are Land Control Board Consent and Mutation Forms from a licensed or Government surveyor. He further stated that upon receipt of these documents, he issues new numbers. That amendments to the RIM may be effected when there is a combination of titles or where there is a change in boundaries and that the amendments would be effected upon approval by the Land Registrar and himself.

33. He then proceeded to produce the maps in respect of the parcels herein i.e L.R NO. KERICHO/KABIANGA/1128 and 1129 as Plaintiff's exhibits 15 (a) and (b) contained in sheet no's 2 and 6.

34. In his further testimony, he stated that it was not able to trace records showing that parcel no. 1128 was closed on sub-division. He stated that the records would be contained in the Mutation register where the following information would be noted; the serial number, land control board consent number, amendment fees paid, new numbers issued, the name of the surveyor who did the sub-divisions or combination and the officer who issued the new numbers.

35. It was his testimony that the said mutation register comes in three sets, one is kept in his office and others are kept at the Lands Registrar's office and the Amendment Centre. He stated that the cartographer in charge of maps draws changes to the RIM upon approval and he then validates the changes.

36. He stated that the RIM had various amendments none of which affected the disputed parcels herein, L.R NO. KERICHO/KABIANGA/1128 and 1129. He stated that the mutation form relating to sub-division of L.R NO. KERICHO/KABIANGA/1128 could not be found and that he could not authenticate the copy submitted to him. With respect to parcels numbers 1128 and 1129 he stated that he could not ascertain whether there was review of their common boundaries.

37. It was his testimony that he could neither tell the surveyor who signed or drew the mutation form nor the Land Registrar who signed it. He also stated that in the instant case, there was a purported change of common boundary whose effect changed the acreage of the parcels in dispute (1128 and 1129) but the affected parties did not surrender their titles for amendment.

38. In conclusion he testified that without the amendment to the RIM, the existing parcels are 1128 and 1129 whose acreages remain the same as indicated during first registration.

39. During cross-examination he stated that he could not verify whether the Mutation Forms submitted by the 1st Defendant were ever registered as there were many documents missing from the records.

40. In re-examination, he clarified that the mutation forms in respect of parcel no. 1128 and 1129 did not bear a stamp from his office and that without amendment of the map one cannot claim to have a valid title as it ordinarily has to be supported by a map.

Defendant's case

41. In his defence, the 1st Defendant reiterated that he held a valid title in respect of L.R NO. KERICHO/KABIANGA/2407. He claims to have been in occupation of the said parcel over a long period of time and states that he planted tea before he acquired title to the same.

42. It was his testimony that his family never had any dispute with the Plaintiff's husband (Kimalel Matingwony (deceased) prior to his demise in the year 1996 and that the Plaintiff only started claiming the land after her husband's death.

43. He stated that elders deliberated on the Plaintiff's claim and resolved that Kimalel Matingwony (deceased) should reside in the 5 acres that was donated to him by his brothers.

44. He further claimed that Plaintiff was in illegal occupation of his land and prayed for compensation.

45. During cross-examination, he stated that their land (L.R NO. KERICHO/KABIANGA/1128) measured 34 acres when titles were first issued. He stated that he did not know the original acreage in respect of parcel number 1129 but knew that it comprises 5 acres on the ground.

46. On being referred to the Judgment and Ruling of the court in Kericho High Court Succession Cause No. 75 of 2001, he denied that he had stated that he was entitled to the 5 acres owned by Kimalel Matingwony, the Plaintiff's husband, and conceded that he did not mention that Kimalel had another wife namely Recho (DW 2) in the said proceedings but instead stated that Kimalel had a wife named Anna.

47. On being referred to the mutation form in respect of parcel no. 1128 and 1129 he conceded that the same did not bear any rubberstamp and there was no indication that it was registered.

48. In his further testimony he denied having asked for 5 acres comprised in Kimalel's land during the objection proceedings and reiterated that Kimalel had been given some land for free since had he had already sold all his land.

49. He conceded that the tea payment slips did not show the plot number where the tea was located.

50. DW 2, RECHO CHEPKWONY claimed that Kimalel was her husband but she could not remember when he died. She stated that she had no recollection of having instructed an advocate to file objection proceedings against the issuance of the Grant of Letters of Administration to the Plaintiff in Succession cause no. 75 of 2001 though she knew Mr. Motanya as her advocate.

51. She refuted claims of having been party to a plot hatched by the 1st Defendant to deny the Plaintiff her rightful interest in Kimalel's estate.

52. DW 3, DINA CHEMUTAI CHIRCHIR, in essence corroborated the evidence submitted by her husband, the 1st Defendant herein. She indicated however that there was no dispute between them and the Plaintiff prior to the Plaintiff's husband's demise in the year 1986. She further testified that the Plaintiff rebuffed the elders' efforts to resolve her claim over the subject parcels.

53. During cross-examination, she stated that 5 acres had been donated to the Plaintiff's husband after he sold off his entire land to one Chepkwony Arap Sime.

54. DW4, JOHN KIPTOO CHERUIYOT reiterated the foregoing testimony and claimed that Kimalel Matingwony(deceased), the Plaintiff's husband had sold off his entire land to one Chepkwony Sime, squandered the proceeds thereof and became destitute upon which his brothers donated 5 acres of land to him to save him from destitution.

55. During cross examination he stated that he did not know where the parcels of land donated to the Plaintiff's husband was drawn from. He however stated that the Plaintiff's husband's land that is L.R NO. KERICHO/KABIANGA/1129 measures 17 acres.

56. DW 5, RACHEL CHIRCHIR on her part claimed that the dispute herein begun after the demise of the Plaintiff's husband.

57. DW 6, OMOLLO MARGARET ANITA, the Deputy Land Registrar, Kericho, testified that before sub-divisions are effected Land Control Board consent has to be procured and mutation forms must be prepared.

During cross examination, she stated that she could not vouch for the authenticity of the titles resulting from the sub-division of L.R NO. KERICHO/KABIANGA/1128 i.e L.R NO. KERICHO/KABIANGA/2406 and 2407.

58. DW 7, GEOFFREY KIBOWEN, District Surveyor, Kericho was recalled and produced the photocopy of the mutation form in respect of the sub-division of L.R NO. KERICHO/KABIANGA/1128. In cross examination, he admitted that the Mutation Form in respect of L.R NO. KERICHO/KABIANGA/1128 and 1129 though signed was not stamped and that he could not vouch for its authenticity.

59. He stated that a proper mutation form bears the date it was received in the presentation book, number and the fees payable. With respect to the suit land, he stated that said Mutation Form did not meet these requirements and was apparently prepared to effect a change in the common boundary of the said parcels i.e 1128 and 1129. It was his testimony that the parties affected were expected to present a written expression of interest to that effect, a fact which cannot be ascertained in the instant case. He testified that ordinarily, a surveyor would go to the ground and prepare the mutation forms to facilitate the amendment of the RIM. He further stated that this was not done in both cases that is in respect of the alteration of boundary between 1128 and 1129 and sub-division of parcel number 1128. He stated that the said sub-divisions do not exist in their maps/records.

60. DW 8, DAVID CHEPKWONY, an accountant working at Togat Tea Factory testified and produced tea growers certificate/licence issued in favour of the 1st Defendant.

61. On being cross examined he admitted that he could not verify that the tea owned by the 1st Defendant was actually planted on the suit land as they neither confirmed the records relating to the land at the Ministry of Lands office nor with the Surveys Department.

Issues for determination

62. Arising from the pleadings, evidence and rival submissions, the following issues emerge for determination:

- i. Whether alterations and /or amendments affecting the suit parcels of land were perpetuated by fraud on the part of the Seroney Rop and the 4th defendant
- ii. Whether the plaintiff is entitled to the reliefs sought.

Analysis and Determination

63. With regard to the first issue I must state that fraud is a serious allegation that must be pleaded, particularized and proved to a standard higher than on a balance of probabilities.

64. The courts have repeatedly held that allegations of fraud must be strictly proved. In the case of **Koinange & 13 Others V. Charles Karuga Koinange 1986 KLR** at page 23 Justice Amin citing the case of **Ratilal Patel Makanji (1957) EA 314** observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. 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 balance of probabilities is required”

65. Furthermore in the case of **Vijay Morjaria .v. Nansingh Madhusingh Darbar& another [2000]eKLR (Civil Appeal No. 106 of 2000)** Tunoi JA (as he then was) stated as follows:-

“...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

66. This decision was upheld by the Court of Appeal in Nairobi in the case of **Kinyanjui Kamau .v. George Kamau Njoroge [2015] eKLR(Civil Appeal No 132 of 2005)** where it was stated that:

“to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.”

67. The Court of Appeal in the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** in considering the issue of fraud observed as follows:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen

& Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

see Insurance Company of East Africa vs. The Attorney General &3 Others Hccc135/1998.

Whether there was fraud is, however, a matter of evidence.”

68. In the Further, Further Amended Plaintiff filed in court on the 14th June 2014 the Plaintiff has set out the particulars of fraud perpetrated by the late Seronei Rop and the 4th defendants at paragraphs 8 and 8A thereof. The said acts of fraud resulted in the alteration of the register in respect of land parcel number KERICH0/KABIANGA/1129 to reflect 2.0 Hectares instead of 6.8 hectares. She has further pleaded that the late Seronei Rop caused the sub-division of land parcel number KERICH0/KABIANGA/1128 into two portions and caused the resultant parcels, KERICH0/KABIANGA/2406 comprising 12 hectares to be transferred to himself and KERICH0/KABIANGA/2407 comprising 1.2 hectares to be transferred to the 2nd defendant.

69. In his submissions, Mr. Koech learned Counsel for the plaintiff has urged the court to find that fraud has been proved by the plaintiff based on the five reasons set out in her evidence.

70. Firstly, he has submitted that the said amendments as observed by the District Lands Registrar, Kericho who testified as DW2 though signed, were not dated.

71. Secondly, the District Lands Registrar also stated there were no back up documents to support the said alteration.

72. Thirdly, the original title in respect of L.R NO. KERICH0/KABIANGA/1129 (Plaintiff’s Exhibit 7) required to effect the change in its acreage was never surrendered as is legally required to facilitate the issuance of new titles.

73. Fourthly, he submits that the purpose for which the amendments were effected was not indicated and therefore taking into account the evidence submitted, it is safe to assume that same were effected to fraudulently enhance the acreage in respect of the property known as L.R NO. KERICH0/KABIANGA/1128. He concludes that from the evidence on record it is obvious that the amendments were neither effected to correct errors occasioned during land adjudication process nor were they effected to alter the common boundary which are some of the reasons that usually result in alteration of acreage.

74. I have noted that the Mutation Form submitted by the Defendant in respect of L.R NO. KERICH0/KABIANGA/1128 and 1129 though purportedly prepared to effect a change in common boundary was not stamped and does not in fact bear any evidence of registration. DW 4, the District Surveyor did in fact concede that he could not vouch for its authenticity as there was no evidence that it was ever registered as claimed. He stated that the said forms did not form part of their records.

75. Fifthly, it is counsel’s submission that from the evidence of the District Surveyor, the Registry Index Maps were never amended to capture the purported changes and the resultant sub-divisions in respect of the enhanced parcel i.e L.R NO. KERICH0/KABIANGA/1128 that is parcel no’s 2406 and 2407 do not therefore exist on the ground.

76. The evidence on record points to the fact that the 1st Defendant and his father sub-divided the enhanced parcel i.e L.R NO. KERICH0/KABIANGA/1128 into L.R NO’S KERICH0/KABIANGA/2406 (registered in the name of 1st Defendant’s father) and, L.R NO. KERICH0/KABIANGA/2407 registered in the 1st Defendant’s name ostensibly with a view to alienating the Plaintiff’s interest therein.

77. It is clear from the evidence on record that even though the mutation forms in respect of parcel numbers 2406 and 2407 contain all the necessary ingredients of a proper mutation form, the same cannot be said of the mutation forms in respect of the original parcels number 1128 and 1129 as only photocopies of the mutation forms were produced. The receipts were also photocopies. The District surveyor who testified as DW7 admitted that the Mutation Form in respect of L.R NO. KERICH0/KABIANGA/1128 and 1129 though signed was not stamped and that he could not vouch for its authenticity.

78. To make matters worse, the 1st Defendant’s evidence is full of contradictions. In his Defence and Counterclaim, the 1st Defendant claims that the Plaintiff’s husband Kimalel Matingwony (Deceased) transferred part of his land to his father, Seronei Rop, also deceased. However, this was not borne out by the evidence as he failed to submit evidence of transfer forms or a sale agreement to that effect in support of this assertion.

79. In his testimony however, he contradicts the foregoing and asserts that the Plaintiff’s husband’s land only measured 5 acres when titles were issued whereas (L.R NO. KERICH0/KABIANGA/1129) measured 6.8 Ha when its register was opened as shown in plaintiff’s Exhibit

7 and 12 while L.R NO. KERICHO/KABIANGA/1128 measured 8.4 Ha.

80. The 1st Defendant further contradicts the foregoing by stating that the Plaintiff's husband had no land having sold all his entitlement to one Chepkwony Sime forcing his brothers to donate 5 acres of land to him.

81. However, from Plaintiff's exhibits 4, 5 and 6 which are copies of the Judgment and Ruling of the High Court in Kericho High Court Succession Cause no. 75 of 2001 in which the 1st Defendant had lodged objection proceedings, the 1st defendant stated that Kimalel Matingwony had bequeathed his land comprised in L.R NO. KERICHO/KABIANGA/1129 to him. This evidence is at variance with his pleadings and testimony in court.

82. Counsel for the 1st defendant has submitted that the plaintiff's evidence is contradictory as it is not clear when the alleged fraud took place. According to the plaintiff's Further, Further Amended Plaintiff, she pleads that the amendments were discovered in 1998 after her husband's death. I have noted from the plaintiff's evidence that she said that her husband was alive but ailing in 1988 and he eventually died in 1996. I have taken judicial notice that the plaintiff is old and illiterate and she may not remember the dates clearly. The records from the Lands Registry which were produced by PW 3 show that the amendments took place in 1988 but the plaintiff is emphatic that her late husband did not sanction them. It matters not when the fraudulent amendments took place, what matters is that they were made without the registered owner's consent and authority and were therefore fraudulent and unlawful.

83. The provisions of section 26 (a) of the Limitation of Actions Act Cap 22 of the Laws of Kenya state that where an action is based on fraud on the part of the Defendant or his agent, the period of limitation does not begin to run until the plaintiff has discovered the said fraud or could with reasonable diligence have discovered it. The plaintiff's evidence is that she discovered the fraud in 1997 and the suit is therefore not statute barred.

84. The main question that this court has to grapple with is whether the titles in respect of land parcel number KERICHO/KABIANGA/2406 and 2407 previously comprised in parcel number KERICHO/KABIANGA/1128 were lawfully acquired and if not, whether they ought to be rectified.

85. As was stated in the case of **Daudi Kiptugen v Commissioner Of Lands Nairobi Lands & 4 others [2015] eKLR** it is not enough to waive the certificate of title before this court. A party must prove that the same was lawfully acquired. The court stated as follows:-

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”

86. The law is extremely protective of title and provides limited circumstances in which title may be impeached. For this court to cancel a title, the conditions in section 26 of the Land Registration Act must have been fulfilled. The said section provides as follows:-

Section 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

87. In the case of **Elijah Makeri Nyangwra V Stephen Mungai Njuguna & Another [2013] eKLR** the learned J. Sila Munyao also proceeded to cancel the title and issued amongst other orders an injunction as prayed in the suit herein. This he did while appreciating the sanctity of title. He stated as follows:-

“As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

88. The learned J. Sila Munyao in the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** in considering a similar issue of a title deed obtained fraudulently stated as follows:-

“In our case, there is no doubt that in so far as the title of the 1st respondent is concerned, it was procured by way of fraud or misrepresentation, and there is no way that the 1st respondent could have procured title without his own involvement in the fraud or misrepresentation. The title of the 1st respondent is clearly impeachable by dint of the provisions of Section 26 (1) (a). It cannot be allowed to stand and must be cancelled. If it is cancelled then it follows that any subsequent transactions have to be

cancelled as well, for they were entered into by a party who had no capacity to do so, he not having a title in the first place.

The position that a fraudulent title cannot be allowed to stand has been affirmed in a number of other cases. They are several and it is not necessary to set them out here. I will only mention one where the point was clearly made, that is the Court of Appeal decision in the case of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR. This is a case where certain crooks fraudulently acquired title to land and later sold the same to other parties. The Environment and Land Court at Nairobi, cancelled all titles and ordered the land to revert back to the original owner. The decision was upheld by the Court of Appeal.”

89. From the foregoing, it is my finding that the plaintiff has proved fraud against the 1st defendant's father and the 4th defendant. The chain of fraud started from the alteration of the size of parcel number KERICHO/KABIANGA 1129 and the increase in the size of land parcel number KERICHO/KABIANGA 1128 followed by its subsequent sub-division into parcels number 2406 and 2407. The fraud could not have happened without the participation of the 1st Defendant's father and the Land Registrar. The titles resulting from the fraudulent transactions cannot be allowed to stand.

90. Flowing from my finding hereinabove, the 1st defendant's counterclaim is dismissed with costs. On the other hand, the plaintiff has proved her case on a balance of probabilities and is therefore entitled to the reliefs sought.

91. Accordingly, I enter judgment for the plaintiff and make the following final orders:

a. A declaration is hereby issued the 4.8 hectares of land comprised in that property known as KERICHO/KABIANGA/2406 or 2407 previously comprised in that property known as KERICHO/KABIANGA/1128 lawfully belongs to the plaintiff in her capacity as the Administratrix of the estate of Kimalel Matingwony (deceased).

b. The Land Registrar Kericho who is in custody of the relevant registers do forthwith proceed to rectify the said registers by cancelling the titles to land parcels no. KERICHO/KABIANGA/2406 and 2407 forthwith and restore the register and titles of land parcel numbers KERICHO/KABIANGA/1128 and KERICHO/KABIANGA/1129 in the manner in which they were before the purported sub-divisions, so as to reflect the acreage of parcel no. KERICHO/KABIANGA/1127 as 6.8 Hectares and parcel no. KERICHO/KABIANGA/1128 as 8.4 Hectares.

c. A perpetual injunction is hereby issued restraining the defendants whether by themselves, their agents and/or servants from entering and/or remaining on land parcel number KERICHO/KABIANGA/1129.

d. The costs of this suit shall be borne by the defendants.

Dated, signed and delivered at Kericho this 14th day of September 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Caleb Koech for the Plaintiff
2. Mr. Oboso for Mr. Miruka for the 1st Defendant
3. N/A for the 2nd – 5th Defendants
4. Court assistant – Rotich