



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 73 OF 2014

DAVID K. BETT.....PLAINTIFF

VERSUS

SAMSON KIPKEMBOI.....DEFENDANT

J U D G M E N T

(a) Pleadings (Plaint)

By Plaint amended on 12.5.2016, David K. Bett (*hereinafter referred to as the plaintiff*) has come to court against Samson Kipkemboi (*hereinafter referred to as the defendant*) claiming that at all material times to this suit, the plaintiff was and is the lawful registered owner/alottee of all the parcel of land known as Plot No.51 under the Chepkumia Exchange Programme situated at Chepkumia, Nandi South District.

The Chepkumia Exchange Programme was Government Land Exchange Programme or project in 2001 whereupon the plaintiff was allocated plot No. 51. The plaintiff was allocated plot No. 51 to the extent of approximately 5.46 Hectares or 13.5 Acres. The plaintiff took immediate vacant possession and fenced off his parcel for private enjoyment, usage and benefit. The plaintiff continued, undisturbed, enjoying the vacant possession usage and benefit of the suit land

On or about December 2013, the defendant illegally, unlawfully and without any colour of right whatsoever entered upon the suit land uprooting and destroying the existing fence in the process and leaving behind a trail of wanton destruction.

The defendant proceeded to put up a new fence, totally ignoring the original beacons and as a result fenced off the plaintiff's parcel of land making it his own.

In the process, the plaintiff was and is unable to access his parcel of land, the appurtenances, fixtures and crops thereon and has been denied his proprietary rights and interest.

The plaintiff contends that the defendant's conduct and actions of trespassing by entering upon, uprooting, destroying the fence and proceeding to put up a new fence are unlawful. Illegal, tainted with malice, wrongful and null and void.

The particulars of illegality, malice and wrong doing on the part of the defendant *inter alia*, trespassing onto and entering the plaintiff's parcel of land without having any claim whatsoever, whether express or implied of any disposition thereof and uprooting, destroying and laying to waste the fence erected by the plaintiff without any permission, court order or otherwise. Cutting the plaintiff off from accessing his parcel of land from usage and enjoyment without any reason whatsoever. Erecting a fence without following the beacons set at the time of allocation in 2001. Carrying and continuing to carry out acts of waste and enjoying profits a prendre without consent, license or permission from the plaintiff.

Further, particulars of malice are engaging and continuing to engage in acts that are out rightly inconsistent with the plaintiff's proprietary and legal rights and allowing his servants, agents and/or personal representatives to continue with the illegal occupation, usage and taking profits a prendre. According to the plaintiff, the transactions done and steps taken in acquiring the said suit land are void ab-initio and are incapable of confirming any legal interest over the suit land on the defendant.

The plaintiff avers that the defendant has acted fraudulently and / or with fraudulence and forgery, which fraud has had negative results upon the plaintiff.

The particulars of fraud on the part of the defendant are causing the plaintiff's name to be removed from the register and causing himself to be entered into the register as the allottee to plot No. 51 without any allotment letters. Causing and/or preparing an allotment in his name. Causing a sign or signing or purporting to put a signature of then district commissioner. Purporting issue to himself without authority an allotment letter in his favour having one issued to the plaintiff cancelled. Preparing and signing an allotment letter to the suit land without

authority. Causing himself to be registered as the allottee of the suit land.

The plaintiff states that he never sold, allotted and / or conferred an interest over the suit land to the defendant. The documents held and / or used by the defendant in purportedly acquiring the suit land are forgeries. By reasons of the foregoing, and as a result of the defendant's actions, the plaintiff as the registered owner/allottee, has been deprived of the use of land parcel No. 51 at Chepkumia under the Chepkumia exchange programme of 2001 and suffered prejudice and irreparable loss and damages particularized as loss of user, loss of occupancy and possession, loss of profits a prendre, loss in destruction of fence, fencing materials, appurtenances and fixtures thereon.

The plaintiff's further claim against the defendant is for a declaration that the defendant's actions were and are unlawful, illegal and vitiated by the law and for a permanent injunction and for the restoration of fence along the former established boundary as from the allocation time in December, 2001.

(b) Pleadings (defence and counter claim)

The defendant on his part responded by filing amended statement of Defence and counter claim stating that he is a businessman carrying out business within Nandi County and also in Mombasa amongst other counties within the Republic of Kenya. He is aware that there are 2 allotment letters to plot No.51 one of which is in the name of Sammy Kibiwott, the defendant's brother. The defendant admits that Chepkumia Land Exchange Programme was a Government Land Exchange Programme but is a stranger to whether or not the plaintiff was allocated Plot No. 51.

The defendant states that there are two allotments to Plot No.51 one of which is in the name of one Sammy Kibiwot the defendant's brother and that he is a stranger to whether or not the plaintiff was allocated Plot No. 51. He reiterates that Chepkumia Land Exchange Programme was a Government Land Exchange Programme.

The defendant avers that there are two allotments for plot No. 51 each with different acreage one having 5.46 Ha (13.5 Acres) and the other 5 acres. The defendant denies in particular that he illegally, unlawfully and without colour of right entered the suit land and uprooted and destroyed the existing fence and caused wanton destruction. The defendant denies that he fenced off the plaintiff's parcel thereby annexing it without due regard to the original beacons.

The defendant avers that the plaintiff sold land parcel No.51 to one CONSEIL JOEL KIPKOECH KIRUI and in the circumstances paragraph 10 of the amended plaint is false he having sold the land to an unsuspecting purchaser. The defendant denies trespassing, uprooting, destroying the fence and erecting a new fence unlawfully and/or illegally and further denies the particulars of illegality, malice and wrong doing.

The defendant denies having acted fraudulently or at all or forged any document

The defendant more particularly denies that the plaintiff suffered loss of user of the suit land, loss of occupancy and possession of the suit land, loss of profits a prendre, loss in destruction of fence, fencing materials.

The defendant contends that there are suits being Kapsabet PMCC No. 11 of 2007 and Kapsabet PMCC. No. 12 of 2007 which are still pending over the same subject matter and the matters have been left hanging in the subordinate Court due to lack of jurisdiction but the same have not been Dismissed as alleged by the plaintiff. Reasons whereof the defendant prays that the suit be dismissed with costs.

In the Counterclaim, the defendant prays for a permanent injunction to issue against the defendant, his servants, agents and any other person through whom he may act against trespassing, destroying fences, uprooting beacons, ploughing, planting, harvesting, grazing transferring selling, leasing and/or in any other way dealing with Plot No.55 Chepkumia under the Chepkumia Land Exchange Programme.

The defendant prays that the plaintiff be ordered to replace uprooted beacons and to restore the boundary fence at the plaintiff's own expense and be condemned to meet the costs of restoration of the uprooted beacons and replacement of the boundary fence to its original position.

He states that there are other previous proceedings pending before the Kapsabet Principal Magistrate's Court being KAPSABET PMCC, NO.11 OF 2007 between the same parties and the same subject matter.

(c) Plaintiff's Evidence

When the matter came for hearing, ***PW1 David K Bett***, the plaintiff herein testified that he resides in Nandi County, Saniak Sub-location and practices dairy farming. He has been a director of Kenya Cooperative Creameries for a long period of time. He has sued the defendant in respect of parcel No. 51 which measures 13.5 acres. He was allotted the said parcel of land on 4.12.2001 and that the allotment letter was issued by one Ngyoni. He produced the "allotment letter" as P.Ex.1.

Upon allocation, he took possession immediately from 2002 – 2013 December. He cultivated the land and planted maize since 2001 and continued peacefully until 2013 December when people led by the defendant interfered with his possession and destroyed everything. They chased his people from the land hence he came to this court. Initially he was sued in Kapsabet in case No. 11 of 2007. The case was dismissed because of jurisdiction. He states that his parcels of land are No. 51 and No. 55 and that they are one and the same thing. He states that his allotment letter was only for plot No. 51 but included 55

On cross examination by Mr. Otieno, he states that the allotment letter was issued on 4.12.2001 for 5.4 Ha. His allotment was in hectares despite the fact that other allotment letters were in acres. The defendant never lived in the land until 2013. He did not have the list of allotment. He claims to have sold 9 acres of the land to a third party.

On re-examination by Mr. Omusundi, he stated that the list does not have his name and that he does not know where the list came from. **PW2 Andrew Saina**, a male adult of sound mind working for gain in Nandi Hills and living in Kapsabet both within Nandi County Stated that Mr. Bett has been his friend since 1990. On 19.12.2013 Bett approached him to go and put a fence on his land. As he was putting up the fence he was approached by one Mr. Andrew Mutai who asked him why he was fencing a land that did not belong to him and told him he was under instructions from the owner Mr. David K. Bett. He said the land did not belong to the plaintiff.

At about 11 a.m., Mutai Andrew returned with ten (10) people. At around 12 p.m., more people joined them. He could not ascertain the exact number. The leaders of the gang David Ngetich and Batilol who were holding pangas commanded the gang to destroy the fence that was ¾ complete and threw away the parts used in the construction of the fence. He knew Mr. Bett as the owner of the land since he had been visiting him as he cultivated that piece of land, plot No.51 in Chepkumia.

PW3 John Kipsang, a male adult individual of sound mind, ID Number 96952 of P.O. Box 6 Mumbo, residing in Kapkangani, Rebosoni Village Nandi county stated that he knew Mr. Bett very well since 2002 or thereabout when they acquired their parcels of land together. Mr. Bett was allocated Plot No. 51 and he was allocated plot No. 60 next to Mr. Bett. He had lived with Mr. Bett knowing him as the owner of the said land.

On 29th November 2013, he was at Mr. Bett's land grazing and cultivating. At around 11 a.m, a group of people came with barbed wires and posts and started fencing the land. He asked them why they were fencing Bett's land and they said he had no business in the land. One of them attacked him who he came to know later was called Evans Makani, he hit him with a steel metal claiming the land belonged to Mr. Samson Kipkemboi.

He had never seen the said Mr. Samson Kipkemboi or heard from him since 2002. He had only seen Mr. Bett who had been cultivating the land. He reported the assaults to the police and he was issued with a P3 form after being treated at Kapkangani Hospital.

PW4 Mr. Stephen Mutai, a male adult individual of sound mind and a community policing officer since 2003, ID No. 3290267 of P. O. Box 6 Mumbo stated that Mr. Bett has been his neighbour since 2002, when they were allocated land under the Chepkumia exchange program. He was allocated plot No. 57 and 58 under the program while Mr. Bett was allocated plot No. 51. He has known Mr. Bett as the owner of that piece of land for a period of more than 13 years.

On 29.11.2013, he was at his land when he heard fracas on Mr. Bett's land. He rushed there and found some goons attacking Mr. Kipsang who is also a neighbour. They claimed that Mr. Bett's land was theirs and had attacked Mr. Kipsang who had asked why they were fencing Mr. Bett's land.

He advised Mr. Kipsang to go for treatment. Upon further enquiry, he was told that one Mr. Samson Kemboi was alleging ownership of the title of land yet since time immemorial Mr. Bett had been occupying and cultivating the land. The goons continued to fence the land and on completion constructed a temporary house with iron sheets and left. It was his evidence that Mr. Bett was the owner of the land as they have been staying as neighbours for a long time and he knew no other person as the owner of the said land.

PW5, Barnabas Kiplimo, a resident of Kapsaret, a Civil Servant with Ministry of Lands stated that he was familiar with Chepkumia Area. He had been asked by the court to visit some parcels of land and prepared a report. He prepared a report on 30.9.2015 and submitted the same. The report was with regards to the case in court. The gravamen of the report is that the land in dispute is 12.05 acres. He also established that the portion was parcel No. 51 and parcel No. 55. On the ground, it is one unit and not two units.

From the evidence, he gathered on the ground, parcel No. 51 and 55 are one unit. The area is still a gazette Government forest but was changed into settlement after a survey. Most of the things were not done according to procedure.

On cross examination by Mr. Otieno, he stated that the acreage of 51 and 55 is 12.87 acres. The actual acreage 11.536 acres. He was not familiar with allotments. The ones he had come across was in acres. However, in the map, plot No. 51 was 6.34 acres. Plot No. 55 was 6.66 acres. Each of them was 5 acres on allocation. When He went to ground he positively identified the plots. He checked with the neighboring acres. He was told that generally in the area allocation was five acres. He did not see the allotment letters.

On re-examination, he stated that that from the office map 51 is 6.34 acres whereas 55 is 6.6 acres totaling to 13 acres. There was total confusion in general as the survey process was not concluded. The whole job started wrongly. The forest was not degazetted. The approach was wrong.

PW6 was Samuel Kiptella Chemelil, the valuer at Highlands valuers of 29 years' experience, who produced the relevant report dated 14th February 2007 showing that the value of plot No. 51 as 620,000/=. He did not visit the land. He was not able to state the occupancy. That was the close of plaintiff's case.

(d) Defendant's Evidence

When the matter came up for defence hearing, **DW1 Samson Kipkemboi**, the defendant himself stated on oaths that he was an adult male of sound mind and the defendant in the case. He is a resident of Mombasa but his home is in Lessos and was allocated a 5 acres piece of land in Chepkumia Exchange Programme.

The land is No. 55 and his new number was 602 and parcel No. 51` belonged to his brother Sammy Kibiwo. The parcel was allotted to him in December 2001 but he took possession in February 2002 and put his caretaker Abdi Keter on the land to look after it as he was away in Mombasa. He requested the surveyor to show him his exact portion which was done by the Kapsabet District Surveyor for the purpose. He had not fenced the parcel of land and that why the plaintiff encroached on his land.

He built a house for the caretaker and also a toilet on the land No.55. He then went back to Mombasa where he works. He later got a call that he was required to go before the District Officer, Kapsabet. He travelled back to Kapsabet from Mombasa to attend the meeting. Mr. Bett never turned up for the meeting though he was then one who had caused it to be arranged.

The District Officer told them to go and continue with their work. He went back to Mombasa and after about a month he was informed that he had been sued. He travelled from Mombasa to sort out the issue of the case filed against him. He engaged an advocate and has never seen or met David Bett.

On cross examination by Mr. Omusundi, learned counsel for the plaintiff he stated that he was in possession of plot No. 55 and not plot number 51 as plot number 51 belongs to his brother Sammy Kibiwot and that their names are in the members list where he is no 602. They have both fenced their plots.

DW2, Abdi Keter Ramadhan testified that he knew both parties and that the defendant was allocated plot No. 55 whilst the defendant was not allocated anything. He later became the caretaker of the land however, the defendant came and started clearing the land an act that made the defendant seek for the assistance of the District Commissioner. However, the defendant remains in possession of plot number 55. On cross examination by Mr. Omusundi, he states that he was allocated plot numbers 115 and 115 in the scheme which is far from the defendant's land.

DW3 Sammy Kibiwot an adult male of sound mind and a resident of Mombasa but whose home town is Kapsabet stated that he owns Plot No. 51 at Chepkumia Exchange Programme. He got allotment letter on 4.23.2001 and handed over his parcel to his caretaker Abdi Keter. After some time, he was informed that his land had been invaded by strangers. The surveyors had shown his caretaker the land boundaries.

He sent some money to his caretaker to have the site cleared and was told by his brother that someone was using his Plot No. 51. He also learned that his land was sold by David Bett to one Joel Kipkoech Kirui. He has now fenced his land on the ground but on paper it has been sold and has never seen the seller David Bett or the purchaser Joel Kipkoech Kirui. As per the records at the surveyor's office, Plot No. 51 was in his name and David Bett's was not on the list. His new number is 609.

On cross examination by Mr Omusundi, he states that the land no 51 was his but fenced with the plot No. 55 belonging to his brother. According to this witness, the plaintiff's allotment letter was not proper because it indicated that the land was comprised of 5.46 hectares and not acres and that the plaintiff's name was not in the list of beneficiaries.

DW4 Evans Muliango, a male adult of sound mind and a resident of Kapsabet stated that he was a neighbor of Samson Kipkemboi and saw the later go to the land one evening with wire, posts and fencing materials. He decided to go and check since he was a neighbour. Kipkemboi asked him to keep the materials at his place which he agreed and kept the materials until morning when he came for the same. He joined them to do the fencing work. They also erected a house and pit latrine. He has lived knowing the farm belongs to Samson Kipkemboi.

Later, he heard there was an issue involving the farm and that Bett had sold his parcel of land and the parcel belonging to Kipkemboi was part of the land that Bett intended to sell.

When the potential buyer heard of the issue revolving around the land and learned that the real owner was Samson and not Bett, he withdrew. They have planted trees on the said land under the instructions of Samson Kipkemboi who is the legal owner of the said land. He is still the caretaker of the said land belonging to Samson Kipkemboi.

On cross examination by Mr. Omusundi, he states that he was born in the 1980's and started taking care of the land in the year 2013. He has never seen the plaintiff save in court but started seeing the defendant in 2004.

DW5 was Stella Wanyela, the Assistant County Commissioner, Huduma Centre, Nandi an officer familiar with Chepkumia Exchange Programme which started in 2000 with issuance of letters of allotment in 2001. She came to know about the Programme in 2007. When the process was initiated, she was not there. She started handling the post briefly as the District Commissioner. She was posted to Mosoriot Division in December. The issues came to her desk as it was based in Kapsabet Division.

She could not tell the number of families involved but remembers that the Plot in dispute is Plot No. 51. In 2007, she could not tell how the plots were allocated. The plaintiff went to her office to complain that the defendant had occupied his Plot No. 51. She asked them to appear before her and the defendant appeared but the plaintiff did not appear. She asked the parties to appear before her on 21.2.2014 at 2.30 p.m. They were to avail original allotment letters. The allotment letters were produced by Samson but the plaintiff did not turn up.

In the year 2007, she managed to see the plaintiff's allotment letter. His allotment letter was measuring 5 Ha. She did not know initially how the sizes were being done.

and she had access to the relevant file and realized that there was a mistake. Later, she could not know the fake letter and the authentic letter. There were many people allotted land in Chepkumia Scheme. She was able to peruse the list and confirm that Plot No. 51 was not in David's name and that Plot No. 51 was 5 acres. She could identify the list of allottees which has 706 members. The list does not tally with allotment letters.

The list originates from the office of the Deputy County Commissioner, Nandi. There are 706 members. The defendant exists in the list at page as number 602. The name David K. Bett does not appear. But there is David Kipkoech Bett. He is number 678 at page 20. The two are not the same persons. She stated that she knew the plaintiff. The middle name was not his because he is not Kipkoech. The original list is at the District Commissioner's office and one list was sent to the Commissioner of Lands, Nairobi. She produced a certified copy of the list.

There were several disputes concerning allotment of the land. There was a dispute brought to their office when she was District Officer, Kapsabet. The plaintiff claimed that the defendant was illegally occupying his parcel. The plots in dispute were Plots No. 51 and 55. She wrote a letter to both parties and asked them to appear in her office. As per their records, the Plot No. 51 belongs to Samson Kipkemboi. It is approximately 5 acres.

On cross examination by Omusundi, she states that she began working in Nandi Division in 2007 as a District officer 3 and exited the office in September, 2007 and that she was there briefly. She went to Kosirai Division in Mosoriot as the District Officer, Mosoriot. The land in dispute is in Kapsabet Division.

The name of Samson Kipkemboi is No. 602 on the list. The parcel referred to is parcel No. 51. Parcel No. 602 does not appear anywhere. Sammy Kibiwot has parcel no 609. No. 51 and No. 55 are in different people's names. Not all persons have their three names indicated. The allocation was done by the government. She does not know the procedure. Bett showed her an allotment letter and that her evidence is purely based on records.

DW6 David Kipkoech, an adult male of sound mind and a resident of Kapsabet town gave evidence that he knows Samson Kipkemboi as a friend a family member and a businessman and David Bett as a former Director of the Defunct KCC. The farms in question No. 51 and 55 belonged to Sammy Kibiwot and Samson Kipkemboi respectively. Samson called and asked him to check at the surveys office whether David Bett's name was on the list of allottees. He went to the surveyor and was given the list of Chepkumia Exchange Programme and he noticed the name of David Bett did not feature there. He was told later that that David Bett had sold the two lands Nos. 51 and 55 to Joel Kipkoech Kirui. He rang Samson and informed him that the land had been sold.

Samson went to the land and evicted Joel who was shown the letter of allotment and the list of allottees. He requested for one month to remove his crops.

They went to buy posts and fenced off the farm to protect it from encroachers. The surveyor had shown them boundaries of the land. David Bett sent the village elder with a letter requiring Samson to go the District Officer's office. The village elder delayed with the letter for unknown reasons. At the District Officer's office, David Bett failed to turn up hence the District Officer called him but did not answer the phone.

After a few days, a plaint was thrown in Samson's parcel and his caretaker informed him of the same. Samson engaged an advocate to conduct his defence. They saw the allotment of David Bett which referred to No. 51. The allotment is false as it even referred to the farms acreage in hectares and not in acres as all other allotments were worded. On cross examination, he states that he knows the land in dispute belongs to the defendant as he was his caretaker.

DW 7 – John Simotwo Bor, an adult male of sound mind and a resident of Meteitei testified that he was allocated Plot No. 41 currently 624 at Chepkumia Exchange Programme which measured 20 acres. Samson's parcel was No. 55 and his brothers Sammy Kibiwot had parcel No. 51. David Bett grabbed Samsons parcel of land in the year 2003 and later sold 11 acres of his land to Laban Rotich. The remaining 9 acres of his land was given to Joshua Kogo by Bethuel Kemei. Bethuel Kemei took his allotment from the District Commissioner's Office. Plot No. 55 belonged to Samson Kipkemboi and Plot No. 51 belonged to Sammy Kibiwot. David Bett had no share in the Chepkumia Exchange Programme. All the land he claimed therein was gabbled. Samson did not fight him because he did not have money to manipulate the process. David Bett used to be a director of KCC and he used his influence with the powers at the time to deprive him and others of their lands.

On cross examination, he states that he has a land dispute with the plaintiff and that he was not sure of the positions of plot No. 51 and 55. He clarified that he got 20 acres because he exchanged land with the school.

DW8 is Mr. Kitur, advocate of the High Court of Kenya who drew an agreement between the defendant and Conseil Joel Kipkoech Kirui in respect of Plot No. 51 Chepkumia Exchange Programme. He admits that the land in dispute was not registered and any registration regime of land and that it was still a gazetted government forest. Last was **DW9, Janet Nyamategenda** who produced the court files in respect of **Kapsabet Principal Magistrates Court Civil Case no 11 and 12 of 2007**

(e) Submissions by Counsel

Mr Omusundi learned counsel for the plaintiff submits that the plaintiff has acquired indefeasible titles over the land reference no Chepkumia No. 51 pursuant to the provisions of sections 24, 25, and 26 of the Land Registration Act No. 3 of 2012 particularly section 26 a and b of the said Act.

Mr. Otieno learned counsel submits that the starting point is the list dated 2.8.2002. the name of the defendant features as number 609. The name of the defendant's brother features as number 609. The name of the plaintiff does not feature in the list. The defendant refers to the letter of the District Commissioner addressed to the plaintiff dated 30.6.2006 that refers to the plaintiff as an intruder on plots number 41, 51 and 55. The defendant submits that he is the allottee of plot No. 55 and not 51 as the letter belongs to his brother. According to the defendant, Plot No. 51 and 55 measures 6.34 acres and 6.66 acres respectively. According to the defendant, the allotment letters of the plaintiff are not genuine. The defendant prays that the suit should be dismissed with costs.

Analysis and Determination.

I have considered the pleadings, evidence on record and submissions of parties and do find that on the 2nd August 2002, the office of the President prepared a list of people who were to be allocated parcels of land in line with Chepkumia Exchange Programme, South Nandi Forest. The categories of people to be allocated land were those who surrendered their parcels of land to the Forest Department for conservation purposes and the landless, needy and deserving cases and public utilities such as schools. The list was described by T. L. Ngyoyoni, the then District Commissioner as the final list. The list has 706 members. It was produced as DEX.4. It is certified as a true copy

of the original by the Deputy County Commissioner, Nandi. The name of the plaintiff does not appear in the list. The list is dated 2.8.2002.

The plaintiff claims Plot No. 51 and Plot No. 55 and states that they are one and the same parcel of land. This court finds that Plot No. 51 and Plot No. 55 are separate plots of unregistered land. The two portions are still forest land that were allocated to Sammy Kibiwott and Samson Kipkemboi respectively. David K. Bett could not have been allocated the land as he was not in the members list of allottees that was prepared by the provincial administration as it then was. Moreover, Plot No. 55 was allocated to the defendant and not the plaintiff. There is no letter of allocation of plot no 55 to the plaintiff and therefore he could not claim that plot no 51 and 55 are one and the same thing.

The valuation report in respect of Plot No. 51 Chepkumia Exchange Programme was prepared by Highland Valuers who did not visit the parcel of land but relied on the statement of the plaintiff. The report is erroneous as it refers to a L. R. number that is false as the land in dispute is still forest land. It refers to the tenure of the land as freehold and yet the same is forest land. Lastly, it refers to a registered proprietor and yet there is no registered proprietor.

The extract of Chepkumia Exchange Programme shows that there were two portions of unregistered land thus, provisional plot No. 51 and provisional Plot No. 55. This court finds that the report by Barnabas Kiplimo dated 30th September, 2015 was done after survey of Plot No. 51 and Plot No. 55. He found that Plot No. 51 was 5 acres on allocation letter but 6.34 acres on the map whilst Plot No. 55 was 5 acres on allocation letter but 6.66 acres on the map and that there is no distinct boundary separating the two. On the issue of ownership of the plots, he states that the provincial administration as it then was, was better placed to state the owners. Stella Wanyella, the County administrator states that the owner of the plot No. 55 is the defendant whilst Plot No. 51 is owned by the plaintiff.

She managed to arbitrate between the parties and saw the allotment letter by the defendant first and concluded that the allotment letter by the defendant was genuine, as the plaintiff was summoned for the meeting to resolve the dispute but did not turn up but letter she saw the allotment letter issued to the plaintiff and was not able to know the authentic letter from the fake letter. However, she produced the list of beneficiaries that had the name of the defendant but not the plaintiff.

This court finds that the evidence of Stella Wanyella credible as the state was in charge of the allocation of the plots and it is yet to conclude the process of allocation of the plots to the members and registration of titles.

Save the allocation to members, the state is yet to degazette the forest and open registers under the Land Registration Act and therefore the submissions by Mr. Omusundi that **sections 24, 25, and 26 of the Land Registration Act no 3 of 2012 are applicable is not tenable in law.**

The upshot of the above is that the plaintiff has not proved his case on balance of probabilities that he is the registered owner of the plots and therefore, the suit is dismissed with costs.

The defendant has established that he is the allottee of the Plot No. 55 of the Chepkumia Exchange area and that Sammy Kibiwot the allottee of Plot No. 51. The plaintiff could not be an allottee as he is not in the members list of Chepkumia Exchange Programme. Moreover, Mr. Sammy Kibiwott is not a party to these proceedings and therefore no adverse order can be made against him in respect of plot No 51.

The court finds that plot no 51 is separate and distinct from plot no 55 and therefore the counterclaim succeeds in terms of prayers that a permanent injunction is hereby issued against the plaintiff, his servants, agents and any other person through whom he may act against trespassing, destroying fences, uprooting beacons, ploughing, planting, harvesting, grazing transferring selling, leasing and / or in any other way dealing with Plot No.55 Chepkumia under the Chepkumia Land Exchange Programme. The defendant is allowed to re-establish the boundary and fence. Orders accordingly.

Dated and delivered at Eldoret this 9th day of November, 2018.

A. OMBWAYO

JUDGE