



**Korir v Langat (Guardian ad litem of Susan Cherotich Chumo - Legal representative of the Estate of the Late Chepkwony Arap Chumo) (Environment & Land Case 75 of 2018) [2024] KEELC 844 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 844 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 75 OF 2018  
MC OUNDO, J  
FEBRUARY 22, 2024**

**BETWEEN**

**JULIUS CHELOGOI A KORIR ..... PLAINTIFF**

**AND**

**WESLY KIPYEGON LANGAT (GUARDIAN AD LITEM OF SUSAN  
CHEROTICH CHUMO - LEGAL REPRESENTATIVE OF THE ESTATE OF THE  
LATE CHEPKWONY ARAP CHUMO) ..... DEFENDANT**

**JUDGMENT**

1. Vide a Plaint dated the 3<sup>rd</sup> September, 2018, the Plaintiff herein stated that in the year 198 5, he had been allocated plot No. Kericho/Kipchorian/Lesirwa Block 1/92 (the suit land) and registered as its proprietor as a result of being a member of Lesirwa Farm Estate and after having paid the requisite membership fees. That he had been issued with membership number 111 and had also paid the share capital to Agricultural Finance Corporation (AFC). That after various attempts to process the title from the lands offices, in the year 2014, he had come to learn that the suit land had however been registered jointly in his name and that of the late Chepkwony Arap Chumo.
2. That in the year 2016, after the demise of the said Chepkwony Arap Chumo, the Defendant herein had proceeded to apply for Letters of Administration in Kericho Succession Cause No. 261 of 2016 wherein the suit land had been listed as the only property forming part of the deceased's estate. That the Defendant had fraudulently caused the suit land to be registered in the name of the late Chepkwony Arap Chumo as a joint owner while listing it as part of her estate without informing him despite knowledge that the Plaintiff was the sole owner of the land.
3. The Plaintiff thus sought for an order declaring the records in the lands registry in respect to the suit property be rectified and a title be issued in his name. he also sought for costs for the suit



4. On 4<sup>th</sup> February, 2019, when the matter came up for mention to confirm compliance, the court was informed that the Defendant was mentally challenged hence the need to substitute her. Subsequently, through an application dated 13<sup>th</sup> March, 2019 the Defendant' was substituted by her Guardian ad litem, one Wesley Kipyegon Langat.
5. The Defendant, through her Guardian ad litem filed a Statement of Defence dated 24<sup>th</sup> April, 2019 denying the contents of the Plaint while putting the Plaintiff to strict proof thereof. She stated that the Plaintiff and the her husband, the late Chepkwony Arap Chumo were the sons of Arap Masai hence the Plaintiff had been registered as a member of Lesirwa farm estate in trust for himself and the said Chepkwony Arap Chumo (Deceased) upon the instruction of their father Arap Masai who had paid a sum of Kshs. 1200/= on behalf of his sons from the dowry payment received during the betrothal of his daughter. It was the Defendant's contention that the suit land was family land.
6. The Defendant further contended that the Plaintiff's claim was statutorily time barred, incompetent, bad in law, misconceived, frivolous, vexatious, scandalous and an abuse of the process of court hence the same should be struck out for want of jurisdiction.
7. The matter having been certified ready for hearing, proceeded for hearing on 14<sup>th</sup> February, 2022 wherein Josiah Kiprotich Koech testified as PW1 on behalf of the Plaintiff herein to the effect that he was a farmer and lived on Leriswa farm. That the Plaintiff, who had given him the Power of Attorney to represent him, was his father. He produced the Power of Attorney dated 30<sup>th</sup> October, 2019 as Pf exhibit 1.
8. He adopted the Plaintiff's witness statement dated 25<sup>th</sup> September, 2018 as his evidence in chief before proceeding to testify that he knew the Defendant herein and was aware of the facts of the case which was in relation to land parcel No. Kericho/Kipchorian/Lesirwa Block 1/92 (suit land). He also confirmed that there had not been a title deed issued. That the Plaintiff had bought the suit land through shares in Lesirwa Farm Estate Society whereby he had been given membership No.111 and this had been after he had paid a membership fee of Kshs. 1200/= on 25<sup>th</sup> February, 1968. That the said society had even trained the Plaintiff at Kabianga Training College before he became a milk recorder.
9. His evidence was that the Plaintiff had bought the suit land in the year 1968 from the Society using his salary after having worked in Tendet, Nakuru and Kipkelion where he had worked for an Indian. That the Plaintiff had also worked for George and Arap Sang Joshua and when the said George and Joshua separated after having divided a white settlers land, he had been employed by Joshua Sang for whom he had worked with a long period of time.
10. He reiterated that the Plaintiff who had bought the suit land on loan had paid a membership fee of Kshs. 1200/=-, then Kshs.150/= and later Kshs. 950/=-. He produced a bundle of twelve (12) receipts as Pf exhibit 2 (a-1) before proceeding to testify that initially, Lariswa farm had been communal but later had been subdivided into 3 blocks wherein the Plaintiff had been given Land Parcel number Kericho/ Kipchorian/Lesirwa Block 1/92 in block 1(the suit land).
11. That he had known that the register of members of Lesirwa Farm Estates had 118 members but he could not tell why the said register currently contained 200 members. He confirmed that the register of Lesirwa Society which was in court contained names of members who had completed the payment of membership fees of Kshs. 1200/=-. That the Society's secretary had been the custodian of the said register. That from the register in the Land office, Kericho he had confirmed that both the Plaintiff and Chepkwony Chumo's names had been registered as proprietors of the suit land. He contended that Chepkwony's name had been inserted therein after another name was deleted. He maintained that the suit land belonged to one person and not two people.



12. That he knew Chepkwony Arap Chumo as the original Defendant's husband. That although the original Defendant lay claim to 6 acres of the suit land, this was not acceptable unless he proved that he had acquired the suit land jointly with the Plaintiff. He produced the Society Register as Pf exhibit 3.
13. He reiterated his evidence that the Plaintiff had solely paid for the suit land and had not signed any agreement to the effect that he had acquired the said property jointly with someone else. He also reiterated that Mr. Chepkwony Chumo had not been a member of the Lesirwa Society hence it would not have been possible for him to have been given land by the society.
14. His testimony was that Chepkwony Chumo's name had been illegally inserted in the register of members. That they had tried to solve the issue at home as a village although he could not remember the person who had convened the said meeting because it had been a long time ago. That they had also gone before the District Commissioner in Kipkelion who had advised them to go to court.
15. That he who was aware of a letter dated 10<sup>th</sup> March, 2015 that had been written by the Deputy County Commission Kipkelion Sub-district, a letter dated 6<sup>th</sup> November, 2014 and another dated the 14<sup>th</sup> March 2015. That there had also been minutes of the meeting which had been chaired by the District Commissioner on 25<sup>th</sup> March, 2015. He produced the Letters dated 10<sup>th</sup> March, 2015, 6<sup>th</sup> November, 2014 and 14<sup>th</sup> March, 2015 together with the minutes of a meeting that had been held on 25<sup>th</sup> March, 2015 as Pf exhibit 4 (a-c) and Pf exhibit 5 respectively. He sought that the court solves their dispute.
16. On cross-examination, he confirmed that he was 45 years old having been born in the year 1972. He admitted that it had been the Plaintiff who had informed him of the events herein as had occurred between the year 1968 and 1972. He also admitted that although Chepkwony Arap Chumo was his relative, he did not know how they were related or when he died. That he knew the original Defendant herein with whom they had been living with on the same land. That while growing up, he had been seeing the Defendant who had another parcel of land which she often visited. He clarified that they had been living on the suit land for many years while the Defendant had been living on two parcels of land interchangeably.
17. He reiterated that there had been a long-standing dispute between his family and the Defendant's family which dispute they had tried to resolve through the Chief and the District Commissioner. When he was referred to the Defendant's list of documents, specifically the minutes of 27<sup>th</sup> May, 2009, and upon the resolution therein having been read to him, he stated that he had no knowledge of the findings therein since there had been many threats. He confirmed that he had been present in the said meeting but that they had been threatened.
18. When he was referred to a document dated 20<sup>th</sup> June, 2010, he stated that whereas his name was missing from the said document, the Plaintiff's name was contained therein as the first person. That it was not correct to state that the family members had agreed that the land be sub-divided. He also confirmed that his brother Joel had been present at the meeting.
19. When he was referred to paragraph (e) of the Pf exhibit 5, his response was that an elder could not determine ownership of the land. On reading paragraph (e) of the said document, he stated that he was not aware that Chepkwony Arap Chumo was the Plaintiff's brother. He was further referred to Pf exhibit 3 wherein he confirmed that the register was an extract from the land registry. That whilst it had been true that they lived with the Defendant and her children on the suit land, the said Defendant had another parcel of land.
20. His evidence further was that whereas the officials of the society had not recorded their statements, they had been threatened wherein they had asked PW1 to obtain a court's order summoning them to



- testify because they had been afraid for their lives. That the said officials were witnesses because they had worked with the Plaintiff. He reiterated that the Plaintiff had been member No. 111 in the society. He explained that he could not bring a register book of Lesirwa Co-operative society because he was not a member but the society's officials would avail it when they attended court to testify.
21. When he was examined by the court, he stated that he had come to court to seek justice. That he had been threatened by Chief Sammy Keino of Leiwar location as well as the Assistant Chief one Paul Mibei. That they had not recorded a statement at the Police Station since the nearest police station was Kipkelion. He confirmed that the Defendant had not threatened him.
  22. PW2, Shadrack Kiptoo Barno testified to the effect that he lived in Kipkelion West at Chepkecher. He adopted his Witness Statement dated 4<sup>th</sup> October, 2019 as his evidence in chief before proceeding to testify that he had been a Secretary at Lesirwa farm from the year 1972 to the year 1978. He confirmed that the Plaintiff had been a member at the farm who he had registered as member No. 111. That it had been a practice at the farm that once somebody paid the money, he would be given a receipt which he (PW2) would record and give the person a membership number. He confirmed that all members totaled to 117.
  23. He explained that Lesirwa farm was a Co-operative Society which was involved in selling maize and milk and that the whole land had belonged to the society before it was subdivided. That the society had taken a loan from the Agricultural Finance Corporation and after the said loan was paid, the land had been sub-divided amongst its members according to their shares. He confirmed that the Plaintiff had been a committee member in the society. That although he (PW2) had left the society before the survey had been done, yet at the time, the Plaintiff had been given plot No. 92.
  24. His evidence was that he had neither seen Chepkwony Arap Chumo nor was he known to him. That if indeed the said Chepkwony had given him money, he would have known him. That whereas he only knew some of the members amongst the 117 members of the society, it was not true that Chepkwony and the Plaintiff had been partners. That there had been people who had used to insert other people's names in the register hence when the Plaintiff went to procure his title deed, he had been shocked to learn of the two names appearing against the suit land. The witness confirmed that all receipts had been written in the Plaintiff's name thus he did not know how the second name had been inserted in the register.
  25. On being cross-examined, he confirmed that he had been the Secretary of Lesirwa Co-operative Society from the year 1972 to the year 1978 and that at the time he left the said society, there had been 117 members of which he would not have known everybody. That whereas he did not know the Plaintiff's family and relatives, yet he knew the said Plaintiff as a member and a committee member of the society.
  26. When he was referred to Pf exhibit 3, he stated that whilst it had been indicated that the Plaintiff and Chepkwony were registered as one, the said registration had not been done in his office. He admitted that he was not in a position to know what had transpired after the year 1978, since he had already left the society. He confirmed that he went to the District Commissioner's office in Kipkelion and told them everything he knew but did not know the conclusions drawn therein although he could not remember the year that the said meeting had been held. He also confirmed that he had not availed the register of members because he had left all the documents in the office when he left the society.
  27. Lawrence Kiptait Bor testified as PW3 on 2<sup>nd</sup> October, 2023 to the effect that he lived at Lesirwa location and was a pastor of Africa Gospel Unity Church. That he was in court because of issues touching on the Plaintiff land number 92. He adopted his witness statement dated 24<sup>th</sup> February, 2022 as his evidence in chief and proceeded to testify that the Plaintiff had been a member of Lesirwa 'B'. he confirmed that he had also been a member of the group then and was still a member to date.



28. That when the survey was being done, he had been a secretary to the survey. He explained that the group had started around the year 1976 and reiterated that the Plaintiff, being a member of the said group, used to give monthly contributions when members met every month for purposes of giving out their contributions. That whereas Chepkwony Arap Chumo was the Plaintiff's brother, the said Chepkwony had not been a member of the group and neither had their father Daniel Masai been. That whilst he did not know if Daniel Masai made the Plaintiff the head of the family, Chepkwony Arap Chumo never attended their meetings. That he did not know if the said Chepkwony made any contributions as everybody had paid for their share. He confirmed that the group had 117 members and they had a register.
29. When he was referred to Pf exhibit 3, he confirmed that the same was the register and that two names had been registered against the suit land. That the law of the group had prescribed that only one person was to be registered but registration of two family members was possible if the family so agreed. That he did not know if the family had agreed to have Chepkwony also registered.
30. His evidence was that a person who had not contributed could not be registered in the register and that even where there had been many siblings, only one could be registered. That after the distribution of the land and everybody having gotten their share, the society closed although he could not remember when this happened. He confirmed that the society had been established in the year 1968 and that it had been the Elders who had measured the land before a professional surveyor placed the beacons. That the portion of land awarded to a member depended on the contributions he had made as one share was an equivalent of 17 acres.
31. His evidence was that after a member got their acreage of land it had been upon the family to decide on how the same would be shared. That at the end of the exercise, if a member had not completed paying the loan, the members would divide his share (of the remaining loan) hence sometimes members did not get the full 17 acres. He also confirmed that members were issued with receipts whenever they made their contributions.
32. On cross-examination, he reiterated that he was a pastor of African Gospel Church and had been in the committee of the survey although he could not remember the exact year. That stated that he did not keep the register of the members since he was just a member. When he was referred to Pf exhibit 3, he confirmed that Chepkwony Arap Chumo and the Plaintiff were brothers and that Daniel Masai had been their father. That a family could share the land and that in those days, a father could send the son to be registered as a member. Further that even the family could send the children to register during survey. He also confirmed that there were some women members in the society.
33. That whilst he could not remember attending the meeting at the District Officers' office in Kipkelion, he had heard about the dispute between Chepkwony and the Plaintiff. He confirmed that his Identity Card number was 7653492. On being probed further, he confirmed that he had attended the said meeting at the District Officer's office but could not remember the dates since he had been sick for a period of over 3 years and had been on medication and neither could he remember what had been decided therein since he had only heard that the suit land was to be divided between the Plaintiff and Chepkwony with one person taking 6 acres and the one 9 acres.
34. When he was referred to the minutes dated 27<sup>th</sup> May, 2009 marked as Df MFI 1, he confirmed that the two families had lived on the disputed land but on separate portions. He reiterated that he had been in the committee of survey which had been a smaller committee hence he could only remember that the society had started in the year 1968. He confirmed that the Plaintiff and Chepkwony had been registered as the proprietors of the suit property.



35. In re-examination, he testified that he did not know if the Plaintiff used to make the contribution on behalf of the family since he used to attend the society's meetings alone. When he was referred to Df MFI 1, he reiterated that he could not remember the outcome of the said meeting although the issue therein had been with regards to the sub-division of the suit land.
36. His evidence was that only members used to attend the meetings and the name on the membership register had been that of the Plaintiff as the said register only contain names of the members. He confirmed that the Plaintiff and Chepkwony's families had lived on the suit land but on different portions. That he only knew that Chepkwony had been the elder brother to the plaintiff.
37. That he could not tell if the Plaintiff had allowed Chepkwony on the suit land. That after the meeting at the District Officer's office, the Plaintiff and the said Chepkwony as well as their children had not been living in peace.

**The Plaintiff thus closed his case.**

38. DW1, Wesley Kipyegon Langat testified on behalf of the original Defendant as her appointed guardian ad litem to the effect that he lived in Lesirwa farm within Kipkelion West in Lesirwa Location, Lesirwa Sub-location. That he knew the Plaintiff who was his deceased father's (Chepkwony Arap Chumo's) younger brother.
39. He adopted his witness statement dated 24<sup>th</sup> April, 2019 then proceeded to produce an Order dated 11<sup>th</sup> March, 2019 appointing him as guardian Ad litem to the Original Defendant as Df exhibit 2. He then proceeded to testify that the suit land herein had not been the Plaintiff's sole land, but family land. That the said land had been bought by David Masai through the Plaintiff since the said David was old and could not go to the society's meetings. That he thus used to send the Plaintiff to make payments on his behalf.
40. His evidence was that David Masai used to work with the white settlers while they had been living on the suit land. That they had lived with the Plaintiff on the suit land although they had sub-divided the said land. He confirmed that although the land had been registered to the Plaintiff and Chepkwony Arap Chumo yet the Plaintiff wanted to evict them from thereon.
41. That whereas the name on the payment receipts had been the Plaintiff's, the money used in the said payments had not been his but had come from proceeds of farm produce like milk from the cows that were reared by David Masai and which milk had been sold at Kipchorian Co-operative, that there had also been maize which used to be taken to Kenya Farmers Association (KFA). That the selling of the said farm produce had occurred from the year 1971 to the year 1974 whereby a bag of maize cost Kshs. 80/= hence 20 bags of maize would be Kshs. 1600/= . That in that manner, they had repaid the loan until they completed.
42. His further evidence had been that they had a dispute with the Plaintiff which dispute they had gone before the District Officer's office in the year 2009. When he was referred to DMFI 1, he confirmed that the said meeting had been held on 26<sup>th</sup> May, 2009 but the minutes of the meeting had been signed by the District Commissioner on 27<sup>th</sup> May 2009. He produced the said minutes of the meeting as Df exhibit 1 and proceeded to testify that the resolutions of the said meeting had been that the title deed to the suit land be released bearing the Plaintiff and Chepkwony's names as registered proprietors and afterwards a fresh sub-division be connected.
43. That they had then held another meeting on 22<sup>nd</sup> June, 2010 at the Chief's office in Lesirwa Location where the Plaintiff and his son called Joel Langat had been present and where it had been agreed that the original Defendant proceeds with the succession cause for the estate of Chepkwony Arap Chumo



- and then obtain a title deed. That it had also been agreed upon that the Original Defendant takes 6.3 acres while the Plaintiff takes 9.7 acres whereupon both parties had signed an agreement. He produced the said Agreement as Df exhibit 3 and confirmed that he had been present in the said meeting.
44. That subsequently, they had filed a Succession Cause in relation to the estate of Chepkwony Arap Chumo wherein his mother, the Original Defendant herein had been issued Letters of Administration dated the 13<sup>th</sup> March, 2015 which he produced as Df exhibit 4. His evidence was that after the meeting on the sub-division of the suit land, they had asked a surveyor to sub-divide the suit land whereby whereas they got a portion measuring 6.3 acres, the Plaintiff got a portion measuring 9.7 acres.
  45. That resultantly, Chepkwony Arap Chumo had paid the survey fees and had been issued with a receipt. He produced the said receipt dated 13<sup>th</sup> December, 1994 as Df exhibit 5(a) before testifying that the Original Defendant herein had also paid some survey money on 20<sup>th</sup> October, 2011 which receipt he produced as Df exhibit 5 (b). He maintained that the receipts that the Plaintiff produced had not been on his own behalf but on behalf of the family.
  46. When he was referred to Pf exhibit 3, he confirmed that the same had been the register of Lesirwa farm and that the suit land which was family land had been land parcel No. Kericho/Kipchorian/Lesirwa Block/1/92 which had been registered in the names of both the Plaintiff who was his uncle, and Chepkwony Arap Chumo.
  47. He explained that William Arap Bor who had been the first Chairman of Lesirwa Co-op Society and who used to register and keep records of the society had died while the suit was ongoing although he had already recorded his statement. He maintained that the suit land belonged to the families of both the Plaintiff and the Original Defendant and the same should be divided according to how they had agreed as a family.
  48. Upon being referred to Df Exhibit 1, he confirmed that the Plaintiff, Joseah Koech, himself and the Plaintiff's son known as Joel Langat had been present in the that meeting where both the chief and the District Officer had also been present.
  49. On cross-examination, he confirmed that the deceased William Kibor was the founder of the society and that he was the one who had registered Chepkwony Arap Chumo's name on the register. That at the time, he had been old enough to know that the members of the society had included Chepkwony Arap Chumo and the Plaintiff herein and that the said Chepkwony Arap Chmo had been registered as a member of the society in the year 1968.
  50. He admitted that he had been in court when PW3 was testifying but it was not true that only members were registered as some members used to send someone to be registered on their behalf. That whereas he had not been a member of the society and did not understand the guidelines therein, yet he had maintained that the Plaintiff had been sent to the society by David Masai who used to give him the money to make the payments.
  51. His evidence was that his Advocate had receipts to show that Chepkwony Arap Chumo had been making payments to the society but on being probed further, he testified that the said Chepkwony Arap Chumo had been a member of the society by virtue of being a family member. He explained that David Masai was the Plaintiff and Chepkwony Arap Chumo's father and he used to send his children to make payments at the society and that all family members would give their contributions.
  52. His evidence was that although the Plaintiff used to record milk at Joshua Sang's place, the money used to pay for the suit land had come from Kipchorian Co-operative society. He however acknowledged



- that he did not have any documentary evidence to prove that the said money had indeed come from Kipchorian Co-operative and Kenya Farmers Association.(KFA)
53. When he was referred to Df exhibit 1, he confirmed that the minutes of the meeting had been typed but the handwritten ones had remained at the District Officers' office. That although there had been handwritten and typed minutes, the attendance had been handwritten and that the handwritten minutes did not bear the stamp of the District Officer like the typed minutes.
  54. Upon being referred to Df exhibit 3, he confirmed that the Plaintiff's signature contained the name Korir but in Df exhibit 1, the Plaintiff's signature did not contain the name Korir. Further that in Df exhibit 3 it had been indicated that the Plaintiff had been accompanied by his son. That the five sons were the original Defendant's but the Plaintiff's sons did not endorse the agreement. He confirmed that Joel Langat was the Plaintiff's son who had signed the agreement although his Identity Card number had not been indicated.
  55. When he was shown Pf exhibit 3, he acknowledged that two names had been registered against the suit land and that it was not true that there had been a name that had been deleted as the register had been like that since then. On being referred to Pf exhibit 5(a), he confirmed that the same was a receipt dated 13<sup>th</sup> December, 1994 for the payment of the survey fees after the agreement. That the minutes in Df Exhibit 1 had been dated 27<sup>th</sup> January, 2009 while the ones in Df exhibit 4 had been dated 22<sup>nd</sup> June, 2010. He maintained that Chepkwony Arap Chumo had paid the survey fee for the suit land in the year 1994. That the said Chepkwony Arap Chumo used to work on the farm but later started farming at home. He maintained that the Plaintiff used to make payment at the society as a trustee of the family and that in those days there were no documents to prove the same as the agreements were based on trust.
  56. In re-examination, he confirmed that the survey fee that had been paid as evidenced by the receipt dated 13<sup>th</sup> December, 1994 had been for the whole suit land and that in the year 1994, a survey had been done on the whole land whereupon Chepkwony Arap Chumo paid for the survey fee. That after the agreement, they had conducted another survey wherein in the year 2011 where the survey fee had been paid by the original Defendant for the separate parcels of land that is 6.3 acres and 9.7 acres respectively as evidenced by the receipt produced as Df exhibit 5 (b). That the receipts of Kipchorian Co-operative Society now Kenya Farmers Association (KFA) got lost having been issued a long time ago.
  57. He was referred to Df exhibit 5 where he confirmed that although the body of the minutes had been typed, the attendance could not be typed since it had signatures. When referred to Df exhibit 3, he confirmed that the Original although the Defendant's five sons were in attendant, yet the said Original Defendant had signed on their behalf.
  58. When he was examined by the court, he confirmed that when the Plaintiff was paying for the suit land, he used to work as a milk recorder. That the suit land used to be a white man's land but they had been living on it as family because David Masai used to work there as a shamba boy for the white settlers until he retired. That they also used to farm on the said land. That David Masai had divided the suit land between the Plaintiff and Chepkwony Arap Chumo since he only had two sons. That after the dispute had arisen over the suit land, they had agreed that the Plaintiff gets a bigger portion of the suit land since he had the receipts.
  59. Samwel Kipkurgat Keino testified as DW2 to the effect that he lived in Lesirwa, was a farmer and a retired senior Chief of Lesirwa Location. That he understood the case before court. That he knew the Plaintiff and the Original Defendant herein as well as their family. That the Plaintiff was a brother in



law to the Original Defendant whose husband was called Chepkwony Arap Chumo. That whereas there were several farms in the location, they lived in the same farm called Lesirwa farm.

60. He adopted his witness statement dated 8<sup>th</sup> May, 2019 as his evidence in chief and proceeded to testify that the parties herein had a dispute when he was a chief. That although there had been several meetings, the one he could remember was held on 22<sup>nd</sup> June, 2010 wherein he had tried to bring all the family together because in the year 2009 the said family had been to the District Officer's office. That in the meeting held on 22<sup>nd</sup> June 2010, the family had entered into an agreement of an equal date wherein he and the parties herein had signed. That in the said agreement, it had been agreed that the Plaintiff gets a portion of the suit land measuring 9.7 acres while the Defendant gets a portion of the suit land measuring 6.3 acres. That the said agreement which had been written in his office had been witnessed by himself, Joel Langat who was the Plaintiff's son to Julius Korir, Sammy Sang who was a son to Julius' sister. He explained that Wesley Kipyegon Langat and Robert Langat were the original Defendant's son and that Joseph Langat was the same person as Wesley Langat. He reiterated that the Plaintiff and Chepkwony Arap Chumo were brothers and that they lived together on the suit land.
61. That pursuant to the signing of the agreement, the family had looked for a surveyor from the District wherein survey had been conducted in his and his Assistant Chief, Paul Mibei's presence. That the said Paul Mibei was now the chief. That the suit land was known as Kericho/Kipchorain /Lesirwa block 1/92.
62. That since he had wanted to know the history of the suit land, he had made a copy of the register which register had earlier been produced as Pf exhibit 3. That from the said register, the registered proprietors of the suit land were the Plaintiff and Chepkwony A. Chumo. That the purpose of the meeting that they had held had been for the family to know their respective acreage where the difference in the acreage had been as a result of the use of 'give and take method' which had caused the disagreement in the family.
63. He confirmed that the agreement had been mutual hence when the surveyor came on land, they did not need security and that the families were now living on the suit land as had been agreed. That after the agreement, there ought to have been a succession of the estate of Chepkwony Arap Chumo so that they could get the title deeds. That he had written a letter to the parties herein, Pf exhibit 3, for purposes of conducting a succession.
64. On being cross-examined, he confirmed that the Plaintiff and the Original Defendant's families had gone to his office after having met at the District Commissioner's Office so that he could disclose the names for purposes of succession. When he was referred to Df exhibit 4, he confirmed that the Plaintiff was present in the said meeting while the Original Defendant's family had been represented by her four sons. That only one of the Plaintiff's sons had been present during the making of the agreement.
65. He reiterated that the purpose of the agreement had been to disclose the heirs of the deceased. That there had been an oversight since in the said agreement Joel's, Identity Card number had not been indicated neither was he disclosed as the Plaintiff's son. Further that Kiplangat, the Original Defendant's son did not append his signature against his name.
66. That although his Assistant Chief had been the one who had attended the meeting with the parties herein at the District Officer's office, he knew that they had agreed despite having not been given the minutes. That when they brought the report, the parties herein had informed him that they had concluded their agreement.
67. When he was referred to Df exhibit 1, he confirmed that the attached part of the minutes had been handwritten and that the District Officer had not signed. That in his agreement, he had written the



- Plaintiff's name as Julius Korir while in the minutes of the meeting at the District Officer's office, the word Korir was missing from the Plaintiff's name. He admitted that he did not know what had transpired at the District Officer's office.
68. He confirmed that he photocopied Pf exhibit 3 at the lands office and that the said register indicated that two names had been registered against the suit land. That he could not see any rectification on the said register since the parties herein had mutually agreed on the mode of subdivision.
69. That whereas Chepkwony Arap Chumo was the Plaintiff's elder brother, it was not a must that the eldest son must get a bigger share, in fact normally all children were given an equal share of land. He confirmed that they had gone together with the surveyor to sub-divide the land. That whilst he had not brought a surveyor's report, he knew that the land had been sub-divided and that his work had been only to supervise.
70. In re-examination, he confirmed that the Plaintiff had signed the agreement of 22<sup>nd</sup> June 2010 and that he did not attend the meeting at the District Officer's office because he had been on leave thus he did not know what had transpired in the said meeting. He confirmed that the parties herein had gone to his office to record the agreement. He further confirmed that he had supervised the survey for purposes of ensuring actualization of what the parties herein had agreed on. He also confirmed that the register from the land Registry showed that two names had been registered against the suit land.
71. DW3, Paul Kipsang Mibei testified to the effect that he was the area chief of Lesirwa location and lived in Lesirwa in a village called Ngendanel. That in the year 2009 he had been an Assistant Chief of Lesirwa Sub-location and that he knew the Plaintiff and the Original Defendant. That the Plaintiff and Chepkwony Arap Chumo were siblings. That the Original Defendant was Chepkwony Arap Chumo's wife and all of them lived in Lesirwa in a village called Lingisha on the same piece of land. That although he had not been in conduct of the parties' case, he had listened to the chief conducting the same.
72. His evidence was that as an Assistant Chief, on the 26<sup>th</sup> May, 2005, he had attended a meeting held by the District Officer in Kipkelion on behalf of the chief who was on leave. That the meeting had been held to resolve the issue between the Plaintiff and the Original Defendant's family who had been disputing over the suit land after they had sought for the issuance of a title. He confirmed that the suit land had been registered to both the Plaintiff and Chepkwony Arap Chumo. That the District Officer, Mr. Gishongo had chaired the said meeting where a resolution had been reached and the minutes of the meeting signed by the said District Officer. Upon reading Df exh 1, the said minutes, he confirmed that some of the people who had attended the meeting included the first Chairman of Lesirwa, the Plaintiff and his son Joseah and that the people who had been present had written their names and appended their signatures.
73. He adopted his witness statement dated the 8<sup>th</sup> May, 2019 as his evidence in chief before proceeding to testify that after the discussion, an agreement had been reached that the suit land be shared in the proportion of 9.7 acres and 6.3 acres between the Plaintiff and the Original Defendant respectively. And although he had not been there when the agreement had been signed at the chief's office, the two families had been living in compliance with the agreement to date after the Plaintiff had sourced the surveyor who had surveyed the land in his presence.
74. He had also confirmed that Pf exhibit 3 was the Register for Lesirwa which contained the names of the Plaintiff's and Chepkwony Arap Chumo and their membership number to verify its authenticity.
75. His further evidence was that before he became an Assistant Chief, he had been a secretary to Lesirwa Farm. That the exercise was hurriedly done between the year 1993 and the year 1994 since the members



- had wanted to get titles. He confirmed that the suit land had been registered to two parties and lived there ever since and who occasionally would have a dispute and then agree later.
76. On cross-examination, he confirmed that the Plaintiff and the Original Defendant's families had agreed to live together and had been living together to date. When he was referred to Df exhibit 1, he confirmed that the chairman in the said meeting had been a District Officer known as Chambo who unfortunately had not signed the attendance but had signed the minutes. He acknowledged that the meeting had not been specified and also that whilst the typed minutes had a stamp, the attendance sheet had not been stamped.
77. He also confirmed that he had been an Assistant Secretary at Lesirwa farm in the year 1994 while Lawrence Bore had been the secretary. He further confirmed that only members had been registered in the Register after their contribution and allotment of a membership number. That Chepkwony Arap Chumo and the Plaintiff's membership number was 92 and therefore he was not aware of a number 111. That contributions had been made during the meetings.
78. His testimony had been that Chepkwony Arap Chumo had attended the meetings and had been the one who had brought the contribution of the survey fee. That in as far as the issue on shares was concerned, he was not in a position to know about the contributions because he was young. When he was referred to Df exhibit 5 (b), he confirmed that although the same only showed the original Defendant's name, both parties herein had contributed.
79. He confirmed that he had been present when the shares of 6.3 acres and 9.7 acres had been made in relation to the previous meeting where the parties herein had agreed to that effect. Upon being referred to Df exhibit 1, he confirmed that he had been there when the Plaintiff appended his signature. He also confirmed that the minutes of meeting at the chief's office indicated the Plaintiff's name as Korir but he had not been present at the said meeting.
80. In re-examination, reiterated that the people in the attendance sheet had been present and he had seen them wherein the Distract Officer had signed the main minutes. He also reiterated that the membership number of the Plaintiff and Chepkwony Arap Chumo as per the register was No. 92 and that it had been the Plaintiff who had looked for the surveyor wherein both parties had contributed the survey fee. He however could not tell how much each party had contributed.
81. The Defence closed his case and parties were directed to file their written submissions to which I shall herein summarize as follows;

### **Plaintiff's Submissions**

82. The Plaintiff, vide his written submission dated 16<sup>th</sup> October, 2023 framed two issues for determination to wit;
- i. Whether the Plaintiff was registered as a member of Lesirwa farm in trust for the estate of Arap Masai.
  - ii. Who should bear the costs of the suit.
83. On the first issue for determination as to whether the Plaintiff was registered as a member of Lesirwa farm in trust for the estate of Arap Maasai, after summarizing the parties case as adduced in court, the Plaintiff submitted that he had joined as a member of Lesirwa Farm Estate sometime in the year 1968 wherein upon paying a membership fee/share capital of Kshs 1200/= he had been given membership No. 111. That he had paid the rest of the money on diverse dates including the survey fees totaling to Kshs. 6550/= and upon a sub-division being conducted on the whole farm, he had been allocated Plot



- Number Kericho/Kipchorian/Lesirwa Block 1/92 (the suit land herein) wherein he had subsequently been registered as its proprietor.
84. That after failed attempts on processing the title to the suit land, upon visiting the Kericho lands office in the year 2014, he had discovered that his land had been jointly registered in his name and that of Chepkwony A. Chumo (deceased) who had not purchased it. That the said registration to Chepkwony A. Chumo was therefore fraudulent as he was not even a member of Lesirwa Farm Estates.
  85. That through a Power of Attorney No. 2321 registered on the 31<sup>st</sup> October, 2019 he had allowed his son Kiprotich Joseah Koech to act on his behalf in respect of the instant suit who had produced documentary evidence in support of his case.
  86. The Plaintiff also reiterated PW2 and PW3's evidence as adduced in court to submit that it had been conclusive that he was the sole proprietor of the suit land herein.
  87. The Plaintiff refuted the defence case that the suit land belonged to his family and that of the late Chepkwony A. Chumo in the proportion of 9.7 acres and 6.3 acres respectively. And further that it had been purchased by Daniel Masai who used to send him to the Lesirwa Farm meetings and hence the payments he had made had been on behalf of the family as a trustee the cause such payment had been proceeds from the sale of the family maize and milk.
  88. The Plaintiff's argument was that the typed and hand written minutes dated 27<sup>th</sup> May, 2009 produced by the Defendant had been manufactured to make it look like he had agreed to give the Original Defendant a portion of the measuring 6.3 acres. That there had been a glaring gap as the handwritten minutes had allegedly been signed by the District Officer but not signed by the secretary while the typed minutes had not been signed by the District Officer and neither did it bear his official stamp.
  89. The Plaintiff further submitted that his signature on the said minutes and the signature on the agreement dated 22<sup>nd</sup> June, 2010 were different which clearly indicated that he had not endorsed the either of the documents nor agreed to give away his property.
  90. The Plaintiff's further submission was that it had not been clear where a receipt for payment of survey fees dated 13<sup>th</sup> December, 1994 and issued to Chepkwony Chumo had emanated from. Secondly were he a member of Lesirwa Farm Estate, he (Defendant) would have produced receipts for payment of shares. That the receipts herein produced as having been allegedly issued to the Original Defendant did not indicate where it they had originated from or who had paid and for what purpose. The Plaintiff thus urged the court to find that the said receipts did not carry any probative value to the case hence should be disregarded. That the register of members that seemed to have been tampered with had the name Chepkwony A. Chumo as a member of Lesirwa Farm despite him not making any contribution as no receipts had been produced to that effect.
  91. The Plaintiff also submitted that had he attended the meetings of the Lesirwa Farm Estate on behalf of the family, then the name of Chepkwony A. Chumo had been unlawfully and un-procedurally placed in the register of members. that this was buttressed by the fact that DW2 and DW3 who allegedly had been present during the signing of the agreement before the District Officer could neither explain the glaring difference in signatures nor give the formula used to arrive at the mode of distribution where the elder son had agreed to take lesser portion of the suit as compared to that of the younger son.
  92. The Plaintiff place his reliance on the decision in the case of Alice Wairimu Macharia v Kirigo Philip Macharia [2019] eKLR to submit that the Defendant had failed to prove the basic requirement of creation of trust. That the suit land had not been ancestral land but had been obtained through his hard work as a member of Lesirwa Farm Estate. That no documents had been produced by the Defendant in



support of their position that they had contributed to the suit land's acquisition to justify the insertion of the name Chepkwony A. Chumo into the membership register of Lesirwa Farm Estates. Further Reliance was placed on the combination of decisions in the case of Njenga Chogera vs. Maria Wanjira Kimani & 2Others [2015] eKLR, Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR and Juletabi African Adventure Limited & another vs. Christopher Michael Lockley [2017] eKLR.

93. The Plaintiff then placed reliance on the decision by Supreme Court of Kenya's decision in the case of Isack M'inanga Kiebia v Isaaya Theuri M'Lintari & another [2018] eKLR to submit that the said court had established the principles to be ascertained a party claiming to be entitled vide a customary trust which included, proof that the property was ancestral property, that at the point of demarcation a member had been elected to hold the same in trust for them and that the said member was now holding the same in trust for them. Reliance was also placed in a combination of decisions in the case of Ngugi vs. Kamau & Another (Environmental & Land Case 36 of 2020) [2022] KEELC 2261 (KLR) (23 June 2022) (Judgement) and Moses Mbugua v Mary Nyambura Ngethe [2012] eKLR to buttress his position.
94. That the burden of proving that the suit land had been ancestral land, and that the Plaintiff was registered as a member of Lesirwa Farm Estate in trust laid squarely on the Defendant but she had failed to discharge the said burden. That the Defendant had also not been clear as to whose favour the said trust had been registered, whether it was the entire family or just for Chepkwony A. Chumo. That indeed the Defendant had failed to tender any evidence that they were entitled to be registered as beneficiaries of the suit land.
95. That it had been clear from the evidence presented, that the suit land had neither been a clan, communal or family land nor had it been inherited from the family lineage. That the evidence on record, in particular the bundles of receipts produced by the Plaintiff had shown that he had been the sole contributor to the acquisition of the suit land and thus ought to be registered solely as its indefeasible proprietor and not as a trustee.
96. As to who should bear the costs of the instant suit, it was the Plaintiff's submissions that it was trite law that costs follow the event thus he having proved his case to the required threshold, he ought to be awarded the costs of the suit.

#### **Defendant's Submissions.**

97. The Defendant, vide their written submission dated 7<sup>th</sup> November 2023 in opposition of the Plaintiff's suit, first pointed out that the reliefs being sought by the Plaintiff against him could not be executed since in his suit, the Plaintiff had failed to specify the Parcel number of the land that he wished the registrar to rectify. That the entire suit was therefore ambiguous and ought to be struck out with costs.
98. The Defendant then went on to frame two issues for determination as:
  - i. Whether the Plaintiff was a trustee for the family of Arap Masai (now deceased) during the payment of Settlement Fund Trust (SFT) loan in respect of the suit land known as Kericho/ Kipchorian/Lesirwa Block 1/92 measuring approximately 16 acres and if so, is the suit land a family land created by customary trust.
  - ii. Who will bear the costs of the suit?
99. On the first issue for determination, the Defendant submitted that it was not in contest that the Plaintiff and Chepkwony Arap Chumo (Deceased) were the sons of Arap Masai (Deceased).



100. The Defendant then proceeded to give a brief history of the matter in question submitting that in the 1960s Arap Masai had been a member of Lesirwa Farm whereupon he had bestowed the trust to the Plaintiff to register himself as a member of the said Lesirwa Farm Estate on behalf of the family. That the said Arap Masai had also given the Plaintiff Kshs. 1,200/= as the registration fee and which money had been obtained from the sale of the cows paid as dowry of his married daughters. That the Plaintiff had continued to repay the Settlement Funds Trustee loan, over the years from the family income that had been obtained from the sale of maize and other family income for.
101. That in the year 1990s, Lesirwa farm was demarcated and given to bonafide members including the family of the Plaintiff and the Defendant herein hence the Plaintiff and one Chepkwony A. Chumo had been legally registered as co-owners of the suit land. However, in the year 2009, a dispute had arisen over the suit land wherein the Plaintiff had claimed that he had purchased the entire suit land. That this culminated to family land dispute meetings between the Plaintiff and the Defendant at Kipkelion District Officer's Office on 26<sup>th</sup> February, 2009 in which the minutes of the meeting were prepared and signed by the District Officer on 26<sup>th</sup> May, 2009 which minutes were produced in evidence by the Defendant.
102. That the said meeting had been attended by both the Plaintiff and the Defendant whereby both the family members had agreed that the title deed to the suit land bearing the two names be released and afterwards a fresh subdivision be done immediately. The Defendant contended that the District Officer had already appended his signature on page two of the minutes hence the lack of his signature on page three of the said minutes. Further that as a result of the said meeting, a written agreement dated 22<sup>nd</sup> June 2010 was executed by the Plaintiff and the Defendant whereby they agreed to share the suit land, as per the agreement adduced in court, 9.7 acres for the Plaintiff and 6.3 acres for the Defendant.
103. Thereafter, a Surveyor had been paid by the Defendant on behalf of the family and a subdivision carried out as per the said agreement, whereby the parties herein had been living and utilizing their rightful portions of the suit land to date.
104. The Defendant thus submitted that whilst the entire payment of the loan over the suit land had been made by the Plaintiff, he had done so as a trustee of the family of Arap Masai and on behalf of the Defendant herein. That the evidence on record had showed that there had been existence of customary trust between the Plaintiff and the Defendant in acquisition of the suit property since the Plaintiff had been paying the Settlement Fund Trust loan on behalf of the family of Arap Masai who then were the owners of the suit land herein.
105. The Defendant's reliance was hinged on the decided case of Michael Chelimo Kipkirui vs. Julius Kiprop Kirui & Another [2018] eKLR, where the Court cited with approval the Supreme Court case of Isaac M'inanga Kiebia vs. Isaaya Theuri MLintari & Others [2018] eKLR, to submit that in the instant suit, the parties herein had been joint registered owners of the suit land as evidenced in the uncontested certified register produced by the Plaintiff hence the said Plaintiff and the Defendant were bonafide co-owners.
106. The Defendant thus urged the court to find that the Plaintiff had paid the Settlement Fund Trust loan and other land rates of the suit land as a trustee of the family land which amounted to customary trust. That subsequently, the Plaintiff's suit had not been proved on a balance of probabilities hence the same ought to be dismissed with costs.
107. Regarding costs of the suit, it was the Defendant's submissions that the same follows event and the Plaintiff's suit being without merit, the cost of the instant suit should be borne by the said Plaintiff.



## **Determination.**

108. I have carefully considered the Plaintiff's claim against Defendant, the Defendant's defence, the evidence, the submissions as well as the applicable law and the authorities herein cited. To put the matter into perspective, by a deed dated the 30<sup>th</sup> October 2019 which was registered as No. 2321 on 31<sup>st</sup> October 2019, the original Plaintiff donated the Power of Attorney to Josiah Kiprotich Koech who testified on his behalf as PW1. On the other hand, following the death of Chepkwony Arap Chumo on 15<sup>th</sup> October 1999, Letters of Administration to his estate had been issued to his wife Susan Cherotich Chumo who had initially defended the suit as his legal representative. Subsequently vide an order dated 11<sup>th</sup> March 2019, Wesley Kipyegon Langat had been appointed as her guardian ad litem wherein he had testified on her behalf as DW1.
109. Briefly this is a case where siblings are squabbling over a parcel of land referred to as No. Kericho/Kipchorian/Lesirwa Block 1/92 although no documentary evidence had been provided to confirm that such a land is in existence.
110. The history and facts of the matter in question as I understand and which are not in contention are that one David Masai, who is the father to both the Plaintiff and one Chepkwony Arap Chumo had worked on a white man's land as a shamba boy and on which land he had lived with his family.
111. That the suit land herein allegedly being No. Kericho/Kipchorian/Lesirwa Block 1/92 was part and parcel of a larger tract of land that had initially belonged to Lesirwa Co-operative Society which society had started around the year 1968 and had sold milk and maize. That to be eligible for membership to the society, one had to pay a monthly contribution during the society's monthly meetings where his/her name would then be entered in a register herein produced as Pf exh 3. From the evidence adduced, it had been the Plaintiff who had attended the societies meetings and made the monthly contributions and therefore his name had been automatically included in the society's register as member No. 92 bearing membership No. 111.
112. It is also not in dispute that Lesirwa Cooperative Society had taken a loan from the Settlement Fund Trustee where upon repayment, it had been decided to subdivide the land amongst its members according to the shares contributed wherein one share was an equivalent of 17 acres. After this exercise was completed and the land distributed, the society closed down.
113. It is also not in dispute that pursuant to the distribution of the land, the Plaintiff herein lay claim to the suit land herein which claim in turn resulted into a land dispute between him and the late Chepkwony Arap Chumo's family which dispute ended up at the District Officer's office at Kipkellion on the 25<sup>th</sup> May 2009, wherein vide the minutes signed on the 27<sup>th</sup> September 2009 and 22<sup>nd</sup> June 2010, produced as Df exh 1 and Df exh 3 respectively, it had been agreed that the suit land be divided into two wherein the Plaintiff would receive 9.7 acres while the Defendant's family would receive 6.3 acres.
114. Lastly, in it is not in dispute that pursuant to this agreement a survey had been conducted where both parties had contributed to the surveyor's fee and after subdivision, the parties had been living on their respective parcels of land to date.
115. The bone of contention therefore comes in as follows: The Plaintiff's claim was that since he had contributed to the society wherein he had made a payment of membership fee of Kshs. 1200/= on 25<sup>th</sup> February, 1968, he had solely bought the suit land through his membership shares in Lesirwa Farm Estate Society. That despite this, he had discovered that although Chepkwony Arap Chumo who was not a member of the society, he had fraudulently caused his name to be recorded alongside his name in the Members Registry. That subsequently his search at the land registry had also revealed that the



- Chepkwony Arap Chumo had been jointly registered as proprietor of the suit land. He thus sought for an order declaring the records in the lands registry in respect to the suit property be rectified and a title be issued in his name.
116. The Defendant's case on the other hand was that the suit property herein was family land. That mzee David Masai, who was the father to both the Plaintiff and one Chepkwony Arap Chumo and who lived with his family and worked as shamba boy on a white man's land, had given part of the proceeds from the dowry paid for his married daughters to the Plaintiff to pay the registration fee to the society. That the Plaintiff had then continued to repay the Settlement Funds Trustee loan, over the years from the family income that had been obtained from the sale of farm produce from the family land. That Chepkwony Arap Chmo had also been registered as a member of the society in the year 1968 and suit land was therefore not an individual parcel of land but family land and that the Plaintiff had therefore held it in trust for the estate of Arap Maasai.
117. The issue that stands out for determination is whether the Plaintiff has established his claim on a balance of probabilities.
118. I have anxiously considered the evidence adduced and the arguments herein laid in pursuit of this matter. The bone of contention is centered on a parcel of land allegedly registered as No. Kericho/ Kipchorian/Lesirwa Block 1/92, the Plaintiff laying claim to it by virtue of having solely bought it through share contribution in Lesirwa Co-operative Society wherein he had been allocated plot No. 92 Lesirwa Farm. That Chepkwony Arap Chumo's name had therefore been fraudulently inserted in the register as a joint proprietor. The Defendant's contention on the other hand was that the said parcel of land having been bought through the proceeds of family farm produce, the Plaintiff had held the same in trust for the estate of Arap Maasai.
119. It was held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR, that the statutorily, the sanctity of title to land is assured and protected under Section 24, 25 and 26 of the *Land Registration Act* 2012 produced as herein under';
120. Section 24 stipulates as follows:  
Subject to this Act—
- (a) a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
121. Section 25 of the act provides:
- (1) The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
122. The court is aware of the attribute of Section 26(1) of the *Land Registration Act* which provide that a Title to land 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. The court is also aware that such Title shall not be absolute and indefeasible because it can be impeached where it is shown to have been obtained through fraud, misrepresentation, illegally, un-procedurally or through a corrupt scheme.
123. Indeed Section 26(1) of the *Land Registration Act* provides as follows:
- “the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts 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 the 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
  - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.
124. The Plaintiff’s case is founded on the allegation that the Defendant’s registration to land parcel No. Kericho/Kipchorian/Lesirwa Block 1/92 as a joint proprietor was fraudulent. That the records in the lands registry in respect to the suit property should therefore be rectified and a title issued in his name.
125. I appreciate that under Section 107 and 108 of the *Evidence Act*, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which (s)he asserts, must prove that those facts exist.
126. 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”.
127. In the case of *Arthi Highway Developers Ltd vs West End Buthery Ltd & Others* C.A Civil Appeal No. 246 of 2013 (2015 eKLR), the Court of Appeal cited the following passage from *Bullen & Leake* precedents pleadings 13<sup>th</sup> edition at Page 427:
- “The statement of the 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 .... 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



..... 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”.

128. The standard of proof on the issue of fraud is very clear in law wherein a party pleading the same is expected to go a notch higher than the mere balance of probability threshold as was held in the cases of Mahendra Shah vs Barclays Bank International Ltd & Another [1979] eKLR and in the case of Davy vs Garrette [1978] Ch.473 at pg 469, where it had been held that it was not allowable to leave fraud to be inferred from the facts.
129. Having said that, and in consideration of the case before me, I find that the Plaintiff has not annexed a copy of the title deed, or any other document of title, in relation to the suit parcel of land, as required by law to show who the past or the current registered proprietor is/are. Indeed I have not seen any extract of the title and therefore I am sure of what is contained in the register.
130. As the matter stands, nobody knows who the registered owner of the land claimed by the Plaintiff is, what acreage the alleged land measures, when he or the Defendant or anybody else for that matter were registered as proprietors of the said suit land, when the impugned cause of action transpired and of importance whether such a parcel of land is in existence. In short of there was no history, of the registration of the alleged suit land, presented. The court cannot therefore tell whether the Plaintiff is entitled to benefit from the orders so sought to rectify such register. Parties shall be held liable on their pleadings. I find that the Plaintiff has not proved his case to the required standard of probabilities, and I proceed to dismiss his suit. Since parties herein are family members, there shall be no orders to costs.

It is ordered.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**M.C. OUNDO**

