



Ruto & 2 others (Suing as the legal representatives of the Estate of Peter Kipkorir Rotich (Deceased)) v Langat & 6 others (Environment & Land Case 51 & 52 of 2020 (Consolidated)) [2024] KEELC 863 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 863 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 51 & 52 OF 2020 (CONSOLIDATED)
A OMBWAYO, J
FEBRUARY 22, 2024**

BETWEEN

**LEAH JEPCHUMBA RUTO 1ST PLAINTIFF
PRISCILLA JERUTO BIRIR 2ND PLAINTIFF
SAMMY KIPKOECH ROTICH 3RD PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PETER
KIPKORIR ROTICH (DECEASED)**

AND

**RICHARD KIPNGENO LANGAT 1ST DEFENDANT
PETER KIGEN KIPRONO 2ND DEFENDANT
JOSEPH CHEGE MUTHAMA 3RD DEFENDANT
THE LAND REGISTRAR, NAKURU 4TH DEFENDANT
THE CHIEF LAND REGISTRAR 5TH DEFENDANT
THE HON ATTORNEY GENERAL 6TH DEFENDANT
DAVID KIBIWOT ACHIKWA 7TH DEFENDANT**

JUDGMENT

1. Leah Jepchumba Ruto, Priscilla Jeruto Birir, Sammy Kipkoech Rotich hereinafter referred to as the plaintiffs commenced this suit vide the plaint dated 9th September 2020 that was amended on 21st June, 2021. In the amended plaint, the plaintiffs aver that they are the legal representatives of the estate of Peter Kipkorir Rotich (deceased). That the said Peter Kipkorir Rotich (Deceased) was the registered



owner of a parcel of land known as Land Reference No. 13287/78 delineated on land survey plan number 143837 I.R No. 60749 measuring 4.048 hectares in Njoro Town.

2. The plaintiffs also aver that Peter Kipkorir Rotich died on 8th January 2014 and they commenced succession proceedings at the High Court at Nairobi Succession Cause No. 588 of 2014 where the suit property was listed as part of the deceased's property. That on 28th August 2020, the plaintiffs discovered a post on Facebook that had been put up by the 3rd Defendant of land being sold with pictures attached that resembled the suit property. That they got in touch with the 3rd defendant who took them to the suit property and showed them a title deed describing the property as Njoro/Ngata Block 27/11. That the suit property is known as LR No. 13287/78 and it is maintained at the Inland Registry at Nairobi Headquarters and not in Nakuru where the 4th defendant purported to issue a title to the 1st and 2nd defendants on 14th February 2020.
3. The plaintiffs further averred that the deceased never sold the suit property and that the 1st and 2nd defendants acquired the suit property fraudulently. The plaintiffs then set out the particulars of fraud against the defendants and averred that they later discovered that the 1st and 2nd defendants alleged that they purchased the suit property from the 7th defendant on 21st April 2016. That the 7th defendant allegedly acquired the suit property on 22nd February 1991 and on the other hand the suit property was transferred to their late father on 29th January 1993 from ADC. That the 7th defendant could not have obtained a title before a deed plan was prepared and a survey plan registered. That they have always been in possession of the suit property where they have been planting and harvesting wheat. That the title held by the 7th defendant is a forgery. The plaintiffs then set out particulars of illegality and fraud against the 7th defendant and sought the following orders;
 - a. A declaration that the legitimate title for the suit property is Land Reference Number 13287/78, delineated on Land Survey Plan Number 143837, I.R. No. 60749 and measuring 4.048 Hectares held by Peter Kipkorir Rotich (deceased).
 - b. A declaration that the Title No. Njoro/Ngata Block 27/11 is incapable of conferring any lawful interest or any legal title to the 1st and 2nd Defendants and is therefore bad, defective, null and void.
 - c. A declaration that Peter Kipkorir Rotich (deceased) is the legitimate and bonafide owner of the property known as Land Reference Number 13287/78, delineated on Land Survey Plan Number 143837, LR. No. 60749 and measuring 4.048 Hectares.
 - d. A declaration that the 1st and 2nd Defendants registration as proprietors of Title No. Njoro/Ngata Block 27/11 was obtained through fraud, is illegal, null and void.
 - e. A declaration that the decision by the 4th Defendant to issue a new title deed Title No. Njoro/Ngata Block 27/11 to the 1st and 2nd Defendants while there exists a title over the suit property Land Reference Number 13287/78, delineated on Land Survey Plan Number 143837, I.R. No. 60749 was illegal, unprocedural and therefore null and void.
 - f. An order of permanent injunction restraining the defendants/respondents, their agents, servants, employees or any other person acting through them from trespassing, transferring, selling, charging, leasing, disposing of, alienating or in any other manner interfering with the suit property known as Land Reference Number 13287/78 or otherwise known as Title No. Njoro/Ngata Block 27/11.
 - g. An order of inhibition inhibiting the registration of any dealings on the title deed known as Title No. Njoro/Ngata Block 27/11.



- h. An order directing the 1st and 2nd Defendants to surrender in Court the original title deed on the suit property otherwise known as Title No. Njoro/Ngata Block 27/11.
 - i. An order directing the 4th and 5th Defendants to rectify the Land Register by deleting and/or cancelling the registration of the 1st and 2nd Defendants as proprietors of Title No. Njoro/Ngata Block 27/11.
 - j. General damages for trespass.
 - k. Costs of the suit and interest.
 - l. Any other relief that the Court may deem fit to grant in the interest justice.
 - m. A declaration that the 7th Defendant obtained the certificate of title for Land Reference Number 13287/78 through forgery and fraud and therefore the same is illegal, null and void.
 - n. A declaration that the 7th defendant did not have a good title to Land Reference Number 13287/78 capable of transferring the same to the 1st and 2nd Defendant.
 - o. A declaration that neither the 7th Defendant nor the 1st or the 2nd Defendant ever acquired possession of the suit property.
 - p. The action by the 1st, 2nd and 4th Defendants to convert the title from Land Reference Number 13287/78 to Title No. Njoro/Ngata Block 27/11 was done unprocedurally and lacked consideration and therefore illegal, null and void.
4. The 1st and 2nd defendants filed their statement of defence and counterclaim on 21st June 2022. They denied the averments in the amended plaint and averred that they are the registered owners of land parcel No. Njoro/Ngata Block 27/11 measuring approximately 4.048 Ha. That they were registered as the owners on 14th February 2020.
5. They stated that vide an agreement for sale of land dated 21st April 2016 they purchased a parcel of land known as Land Reference No. 13287/78 I.R No. 60749 delineated on land survey plan No. 143837 measuring 4.048 Ha. That the transfer was effected on 26th April 2016 and later the property was converted from a leasehold to a freehold. That a surrender of lease was issued on 23rd January 2020 and the original title No. LR No. 13287/78 I.R No. 60749 was converted to land parcel No. Njoro/Ngata Block 27/11 measuring 4.048 Hectares.
6. The 1st and 2nd defendants stated that the certificate of title for I.R 60749 LR No. 13287/78 was issued to the 7th defendant on 22nd February 1991. They then denied the rest of the averments in the amended plaint and sought that the plaintiff's suit be dismissed with costs.
7. In their counterclaim, the 1st and 2nd defendants reiterated their averments in their statement of defence and set out particulars of fraud, illegality and forgery against the plaintiffs and sought the following orders;
- a. A declaration be and is hereby issued that Richard Kipng'eno Lang'at and Peter Kigen Kiprono the Plaintiffs in the Counter-Claim are the registered proprietors of all that piece of land known as Njoro/Ngata Block measuring approximately 4.048HA situated in the North of Njoro Town in Nakuru County and duly registered in the Nakuru District Lands Registry on 14 February, 2020;
 - b. A permanent injunction restraining the Defendants, their agents, servants, employees or any other person acting through them from trespassing, transferring, selling, charging, leasing,



disposing of, alienating or in any other manner interfering with all that parcel of land known as Njoro/Ngata Block measuring approximately 4.048HA situated in the North of Njoro Town in Nakuru County and duly registered in the Nakuru District Lands Registry on 14th February, 2020;

- c. An eviction Order be and is hereby issued against the Defendants from the parcel of land known as Njoro/Ngata Block 27/11 measuring approximately 4.048 Hectares situated in the North of Njoro Town in Nakuru County and duly registered in the Nakuru District Lands Registry on 14th February, 2020;
 - d. Damages suffered as a result of the injunction orders prohibiting dealings in the suit property;
 - e. Costs of this suit.
 - f. Any such further and/or other reliefs as this honourable court deems fit to grant.
8. The plaintiffs in ELC E52 of 2020, are the 1st and 2nd defendants in ELC E51 of 2020 while the plaintiffs in the present matter are the defendants in ELC E52 of 2020. They filed their amended plaint on 21st June 2022. The averments in the plaint are similar to the contents of their statement of defence and counter claim and sought the for the following orders;
- a. A declaration be and is hereby issued that Richard Kipng'eno Lang'at and Peter Kigen Kiprono the Plaintiffs in the counterclaim are the registered proprietors of all that piece of land known as Njoro/Ngata Block measuring approximately 4.048 Ha situated in the North of Njoro Town in Nakuru County and duly registered in the Nakuru District Lands Registry on 14th February, 2020.
 - b. A permanent injunction restraining the defendants, their agents, servants, employees or any other person acting through them from trespassing, transferring, selling, charging, leasing, disposing of, alienating or in any other manner interfering with all that parcel of land known as Njoro/Ngata Block measuring approximately 4.048 Ha situated in the North of Njoro Town in Nakuru County and duly registered in the Nakuru District Lands Registry on 14th February, 2020.
 - c. An eviction order against the Defendant from the parcel of land known as Njoro/Ngata Block 27/11 measuring 4.048 hectare.
 - d. Damages suffered as a result of the injunction orders prohibiting dealings in the suit property.
 - e. Costs of this suit.
 - f. Any other relief that this honourable court shall deem fit and just to grant.
9. The plaintiffs in ELC E51 of 2020 who are the defendants in ELC E52 of 2020 filed their statement of defence and counterclaim on 2nd June 2022. They denied the averments in the amended plaint and sought that the amended plaint be dismissed with costs. In their counterclaim, they reiterated their averments in the plaint filed in ELC E51 of 2020, set out particulars of fraud against the defendants, particulars of illegality and fraud against the 7th Defendant. The orders sought in their counterclaim are the exact replica of the orders sought in their amended plaint dated 21st June, 2021.

Plaintiff's Evidence

10. Leah Jepchirchir Rutto testified as PW1. She adopted her witness statement dated 9th September 2020 and filed on 10th September 2020 as part of her evidence. She also produced the documents in her list



of documents dated 5th June 2022 as PEX 1 to PEX 19 and prayed for judgement as per the amended plaint. Upon cross examination she confirmed that her late father had purchased the suit property from the Agricultural Development Corporation and had shown them the title deed and the deed plan. She also confirmed that even though the land was in Nakuru, the register was in Nairobi. She admitted that her late father had bought the land in the early 1990's.

11. When she was referred to a copy of the certificate of title for LR No. 13287/78 that was produced as PEX2, she confirmed that the information contained thereon can be confirmed at the registry and when they wrote the letters produced as PEX 8(a) & (b), they never received a response. That even though her father worked at state house, that was not the reason why he got the land. That the transfer was dated 1990 but the day and month was not clear. She admitted that the transfer was registered on 19th October 1993 at 10:45 hrs but it did not have her father's signature.
12. PW1 confirmed that the certificate of title did not have a condition of lease. She also confirmed that the purchase price was paid in 1994 after transfer of title. That the receipt that was on page 27 on her bundle of documents was issued after her father had obtained his certificate. That on 28th August 1996, ADC wrote a letter to them showing the purchase price and admitted that she did not have completion documents.
13. Upon re-examination she admitted that the certificate of title has a memorandum which had three conditions. That the transfer was made to Peter Kipkorir Rotich. That she was eighteen years old when her father acquired the property and that she had the original title which was stamped at the Central Registry Nairobi and that the receipt issued in 1994 was given to her late father.
14. Rodgers Karungu testified as PW2. It was his evidence that he was an Advocate of the High Court of Kenya and a Director Legal Operation Secretary at the ADC. He testified that he received summons to produce the original title register of the suit property and surrendered title number LR 13287/IR 40236 to court.
15. He also testified that the title register was for LR 13287. It was his evidence that in the year 1990 the Agricultural Development Corporation had a farm known as Ngata Farm which was 6000 acres. That the ministry decided to sell the said land and one Peter Rotich purchased a portion of it through allotment.
16. When he was referred to the certificate of title for LR No. 13287/78 that was produced as PEX2, he testified that the title No. was 60749. That the suit property had an acreage of 4.048 Ha which was the same acreage as indicated in the mother title. That Peter Kipkorir did not sign the transfer as it was to be signed by the transferee only. That the receipts were dated after transfer because the allotment were done first. It was his evidence that the titles were processed even before payment and he produced the title as PEX 20.
17. On cross examination by Mr Ogada, PW2 informed the court that he was the custodian of the register and that the entire parcel was allocated and ADC remained with nothing. He confirmed that when the last parcel is allocated, the register is closed and the mother title ceases to exist.
18. He also stated that every subdivision is captured in the mother title such that every time there is an entry, the mother title is updated. That the mother title could only remain with the registrar. He confirmed that the registrar had a green card and a title together with a parcel file. That the allocation spurned more than twenty years and that when information is required from the mother title then they would submit the title.



19. He reiterated ADC has been in possession of the mother title since 3rd May, 1985 and the last entry was No. 186 on 27th June 2016. He admitted that when a document has an erasure, it is supposed to be countersigned and sealed with a deed of erasure. He also admitted that titles would be processed by ADC and the title was like a logbook. He further admitted that the old format did not have a place to sign but the new format has a place for the transferrer to sign.
20. He confirmed that ADC was transferring various parcels of land that had varied sizes and even though the company transferred the land, there was no completion of transfer. He also confirmed that there were some people who were on the land but were not on the register. Those people had allotment letters but were not registered. He further confirmed that everyone in the register had a title.
21. He admitted that he could not tell the position of 132287/78 as the entries were done by the registrar. He also admitted that the certificate of title did not have a seal and neither was the transfer dated. When he was asked if he had any completion documents, he stated that he only brought the documents that had been requested by the court.
22. He confirmed that the transfer was done on 19th October 1993 and the receipt for the purchase price issued on 13th April 1994. He admitted that the purchase price was paid two years after the title had been issued. He also admitted that the logo of ADC could change depending on the documents. He further admitted that land in Kenya appreciates in value but the letter at page 28 showed that the land had depreciated. That the sale was subsidized to Kshs. 50,000/=.
23. Upon cross examination by Ms. Nyambura, he reiterated that ADC was in possession of the mother title because the process of allocation was ongoing. That he had seen the signature on record but he was not able to show that the signature belonged to the Land Registrar.
24. Upon re-examination, he stated that there was a survey plan at page 26 of the plaintiff's bundle. That the deed plan was no. 143837 which was the same as the one on the certificate of title. He stated that a certificate of title was different from a title deed. He also stated that the title deed is registered under the repealed Registered Land Act while the Certificate of Title was issued under the Registration of Titles Act.
25. When he was referred to page 27 he stated that the receipt was handwritten and reiterated that the logos are different and depend on the documents. That even though the purchase price was Kshs. 50,000/=, there were other miscellaneous payments that made it Kshs. 65,000/=. That the transferors were issued with Certificates of title by the Registrar. The Plaintiff's case was then closed.

Defendants Evidence

26. Silas Kibii testified as DW1. It was his evidence that he was an advocate of the High Court of Kenya who had drafted the sale agreement dated 21st April 2016. That the vendor was David Kibiwot Achikwa while the purchasers were Richard Kipyegon Langat and Peter Kigen Kiprono. The sale agreement was for land I.R No. 60749 measuring 4.048 Ha. That the terms of the sale agreement were fulfilled and even though he did not prepare the transfer, he attested to the same. That the parties on the transfer were the same as those on the sale agreement and it was dated 26th April 2016. He produced the sale agreement as DEX 1.
27. Upon cross examination by Mr Musesia, he admitted that the certificate of title that he was shown was registered under the Registration of Titles Act. He also admitted that he did not do any search and neither of the parties showed him any certificate of search.



28. When he was referred to the Certificate of Title at page 27, he reiterated that David Kibiwot Achukwa was the vendor and the purchase price was Kshs. 20,000,000/=. He admitted that he did not know how the purchase price was paid as he did not seek any proof of payment as there was no complaint by either of the parties to the agreement. He reiterated that he did not prepare the transfer documents as they were drawn by Osundwa & Co. Advocates.
29. He admitted that the title did not show if it was a freehold or a leasehold but the transfer showed it to be a leasehold. He also admitted that he did not read the documents he attested and that the Memorandum at page 27 and 42 were not the same and neither did he draw the surrender.
30. He confirmed that the transfer was received on 20th July, 2016 and it was registered on the same day while the surrender was entered in the register on 17th February 2020. That the title was to be issued after the date of surrender.
31. Upon re-examination, he informed the court that he did not ask for a search because the parties had agreed. He reiterated that he drew the sale agreement and attested to the transfer and the surrender. He also stated that whoever drafted the transfer, ought to have also done a memorandum and that it has a provision for the land registrar to put a stamp. That the transfer forms have a Kenya Revenue Authority Stamp, a seal from the Lands Department and that stamp duty was paid.
32. Richard Kipngeno Langat testified as DW2. It was his evidence that he was constructing on land parcel No. Ngata/Ngata Block 27/11 which was 10 acres in size. He then adopted his witness statement filed on 21st June 2022 as part of his evidence and produced the documents on his list of documents as DEX 1 to DEX 11.
33. Upon cross examination by Mr. Musesia, he confirmed that he together with Peter Kigen purchased the suit property from David Kibiwot Achikwa. He also confirmed that David Kibiwot Achikwa informed them that he had land at Ngata and so they sent someone who saw the land and confirmed that it was vacant. That they did a search which confirmed that the land was registered in the name of David Kibiwott Achikwa. That another search was also done in Nairobi but it got lost.
34. He admitted that David Kibiwott Achikwa gave him the certificate of title for the suit property and even though the name of the seller in the agreement was Kibiwot with a single 't', he has always referred to him as Kibiwott with a double 't'. That Achikwa told them that he had acquired the suit property from ADC. That on 19th October 1993, Peter Kipkorir Rotich was registered as the owner of the suit property and his name was also in the certificate of lease that had been produced as Exhibit PEX 20.
35. He also admitted that he had not seen any document that showed that the suit property had been transferred from ADC to David Kibiwot Achikwa. He further admitted that there was no land survey plan in the name of David Kibiwott Achikwa and that the purchase price of Kshs. 20,000,000 was paid in instalments. That he got the purchase price from his businesses and had paid Kshs. 5,000,000/= in 2016.
36. He confirmed that when they purchased the suit property, it was a leasehold and they converted it to a freehold title. He admitted that he could not differentiate between a leasehold and a freehold. That the consent was at the lands office and that they paid stamp duty. That they paid rates and he had a receipt issued on 27th August 2020. That even though they entered into the agreement in 2016, they did not pay rates.
37. He admitted that he did not have the consent to transfer and when they tried to take possession in 2016 and put up a fence, they were stopped. That the conversion of the suit property from a leasehold to a freehold was done in Nairobi and a register was opened. That he got a title deed on 14th February,



- 2020 and the surrender was registered on 17th February, 2020. That he had never done any conversion and if he was to sell the suit property, he could not have known where the suit property came from.
38. He confirmed that the transaction was done by Osundwa but admitted that he could not remember if they wrote to the Chief Land Registrar. He also admitted that they never gazetted the land and neither did he have any document to show that the title was closed. He further admitted that he had been charged in criminal case No. 2998 of 2017 for forgery and that the case is ongoing.
 39. He confirmed that Peter Kipkorir Rotich died in 2014 and admitted that he did not know whether the land belonged to Rotich. He denied that he told Joseph Chege to sell the land and admitted that he never served the 7th Defendant any demand notice.
 40. Upon further cross examination by Ms. Nyambura, he admitted that the search that was done in Nairobi by Peter Kigen but it was lost.
 41. Upon re-examination he stated that at page 43 of his bundle was a letter by the Chief Land Registrar. That the name of Peter Kipkorir Rotich was not indicated as the land was referred to as former ADC Ngata. When he was referred to page 82 of the plaintiffs bundle, he confirmed that IR 13287/78 did not have the name of Peter Kipkorir as the owner. The acreage was 0.1425(ha).
 42. He also stated that he was surprised to learn that the title was also the register. He further stated that the name of Achikwa was not in the title. That the criminal case and the present suit are not related and that the criminal case is ongoing. The complainant in the criminal case was Josiah Njuguna whom he had sued in another case.
 43. Erick Mwenda testified as DW3. It was his evidence that he is the Land Registrar Nakuru. He testified that he registered land parcel No. Ngata/Ngata Block 27/11 on 14th February 2020. That he received a surrender, a transfer, the Registry Index Map and a consent.
 44. He testified that the proprietor of the land as per the green card was Richard Kipngeno Langat and Peter Kigen Kiprotich. He also testified that he registered the title as per the documents he received and that it was not correct to state that the documents were procured improperly. That the title was issued under the *Land Registration Act* and was No. 2806818.
 45. Upon cross examination by Ms. Nyambura, he told the court that he did not have any personal interest in the suit property and reiterated that he worked with the documents that were taken to him.
 46. Upon further cross examination by Mr. Muesia he admitted that he had been a land registrar since the year 2016 and he was among the four registrars in the Nakuru Lands Registry. He admitted that they received summons to enter appearance on 16th September 2020 but had not seen the pleadings in the matter. He further admitted that he was the head of the Land Registration Office and all documents ought to go to his office. He also admitted that he had issued a title but the present matter came to his attention a day before he gave evidence.
 47. When he was referred to the 4th, 5th and 6th defendants defence, he confirmed that at paragraph 6 they denied having issued the title. He admitted that he was not aware that the suit property had been converted from a leasehold to a freehold. He further admitted that if there is a leasehold, the Commissioner of Lands must be involved. He confirmed that he was not aware of the duration of the conversion but admitted that he did not have a copy of the letter.
 48. He confirmed that the block number was amended and admitted that he did not have any letter from the Director of Surveys. He further admitted that he only received a letter and a surrender with the



- surrender being done after the title had been issued. He admitted that the Chief Land Registrar did not sign the surrender. That the certificate of title was registered under the Registration of Titles Act.
49. He admitted that he was not aware that the land belonged to ADC and that when one looks at the records, he is able to know if the land was converted from a certificate of title to a title deed.
50. Upon re-examination, he stated that the information about the title would have only come from Nairobi Central Registry. He also stated that he was never shown the title for David Kibiwott Achikwa and that the reason why he did not have the surrender and the transfer was because they were at the Land Registration Nairobi. That the chief land registrar should answer questions as to the surrender.
51. This marked the close of the defendants case.

Submissions

52. The plaintiffs filed their submissions on 24th November 2023 while the 1st and 2nd defendants filed their submissions on 6th February 2024.
53. The plaintiffs in their submissions identified the following issues for determination;
- Who between the deceased and the David Kibiwott Achikwa, the 7th defendant is the bonafide owner of Land Reference Number 13287/78, delineated on land survey plan number 143837, IR No. 60749 measuring 4.048 hectares?
 - Whether the 7th defendant had a good title to pass to the 1st and 2nd defendants.
 - Whether the surrender by the 1st and 2nd defendants and the conversion of title by the 4th and 5th defendants was illegal, null and void.
 - Whether the resultant title deed upon conversion being title no. Njoro/Ngata Block 27/11 which is held by the 1st and 2nd defendants be cancelled.
 - Whether an order of permanent injunction should be issued against the defendants.
 - What orders should the court issue.
54. On the first issue, the plaintiffs submitted that they produced a copy of a certificate of title which showed Peter Kipkorir Rotich (deceased) was registered as the owner of the suit property on 19th October 1993. The plaintiffs submitted that on the other hand the 1st and 2nd defendants produced a copy of certificate of title purportedly issued to the 7th defendant on 22nd February, 1991. It was their submissions that since there were two certificates of title that were purported to be of the same property, each party had to prove the root of their title.
55. The plaintiffs relied on the cases of *Munyu Maina vs Hiram Gathiba Maina* Civil Appeal No. 239 of 2009, Hubert L Martin & 2 others vs Margaret J. Kamar & 5 Others [2016]eKLR and submitted that they produced documents that show how the deceased acquired the suit property while the 7th defendant did not participate in the proceedings to prove the root of his title and neither did the 1st and 2nd defendants call him to give his evidence. The plaintiffs relied on the case of WW vs Severin Kinyanjui Njoroge & another [2021] eKLR and submitted that even though the 1st and 2nd defendants claim that the 7th defendant's title was issued first in time, he still has to prove the root of his title which he did not do.
56. With regard to the second issue, the plaintiffs relied on the case of Kamau James Njendu v Serah Wanjiru & another [2018] and reiterated that since the 7th defendant did not demonstrate the root of



- his title, he did not pass a good title to the 1st and 2nd defendants. The plaintiffs also relied on the case of *Benja Properties Limited vs Syedna Mohammed Burhannudin Sahed & 4 others* [2015]eKLR and submitted that the 1st and 2nd defendants did not call the Chief Land Registrar to show how the 7th defendant acquired his certificate of title.
57. With regard to the third issue, the plaintiffs submitted that the 1st and 2nd defendants alleged that upon purchase of the suit property, they converted it from a leasehold to a freehold and yet the certificate of title produced by the plaintiffs clearly indicated that the suit property was agricultural land. The plaintiffs relied on the cases of *Sirikwa Squatters Group vs Commissioner of Lands & 9 others* [2017]eKLR, *Fanikiwa Limited vs Sirikwa Squatters Group & 17 Others (Civil Appeal 45 & 44 of 2017(consolidated) [2022] KECA 1286 (KLR)* and submitted that even though the 1st and 2nd defendants alleged to have converted the title from leasehold to freehold, they could not explain the alleged process that they followed. It was the plaintiffs' submissions that DW1 admitted that the suit property was not gazetted for purposes of conversion and neither did he write to the Commissioner of Lands seeking for approval of the conversion. It was also the plaintiffs' submissions that the surrender to the government in consideration of conversion of the suit property to Njoro/Ngata Block 27/11 was dated 17th February 2020 and yet the title deed had already been issued on 14th February 2020 which showed that the title was issued even before the surrender was done.
58. On the fourth issue, the plaintiffs relied on Section 80 of the [Land Registration Act](#) and submitted that the 7th defendant was never registered as the owner of the suit property and since the root of his title was not established the court should order for the cancellation of land title No. Njoro/Ngata Block 27/11.
59. With regard to the fifth issue, the plaintiffs relied on Order 40 Rules 1, 2, 3 and 4, *Giella vs Cassman Brown and Co. Ltd* [1973] 358 and sought that a permanent injunction be issued. On the sixth issue, the plaintiffs relied on the case of *Miller v Minister of Pension* [1947] ALL ER 373 and submitted that their orders in the amended plaint be granted and those sought in the counterclaim dismissed.
60. The 1st and 2nd defendants on the other hand identified the following issues for determination;
- a. Whether the 1st and 2nd defendants are the registered proprietors of all that parcel of land described as Njoro/Ngata Block 27/11 formerly LR No. 13287/78.
 - b. Whether LR No. 13287/78 was compulsorily acquired and the plaintiff compensated hence a grounded proof of ownership.
 - c. Whether the plaintiffs have proved their case on a balance of probability.
 - d. Whether a permanent injunction should issue restraining the plaintiffs, their agents, servants, employees or any other person acting through them from trespassing, transferring, selling, charging, leasing, disposing of, alienating or in any other manner interfering with all that parcel of land known as Njoro/Ngata Block 27/11 measuring approximately 4.048 ha situated in the North of Njoro town in Nakuru County.
 - e. An eviction order be issued against the plaintiffs from parcel No. Njoro/Ngata Block 27/11.
 - f. Damages suffered as a result of the injunction orders prohibiting dealings in the suit property.
 - g. Costs of this suit.
61. On the first issue, the 1st and 2nd defendants relied on Section 28 of the [Land Registration Act](#) and submitted that they produced a transfer instrument registered on 28th July 2016 which transferred the interests in the suit property from the 7th defendant to the 1st and 2nd defendants. They submitted that



the said conveyance was registered as presentation No. 1901 on 20th July, 2016 by C.K Ng'etich of No. 212. It was further their submissions that they were issued with a title deed in their joint names on 14th February 2020.

62. The 1st and 2nd defendants submitted that on the root of the 7th defendant's title, the 7th defendant acquired the suit property from the Agricultural Development Corporation as per the transfer and title in their list of documents. It was their submissions that the Chief Lands Registrar could not issue two titles with respect to the same property and since the 7th defendant's title was first in time, the burden was on the plaintiffs to explain how they acquired the subsequent title.
63. They relied on the case of Joseph Kiprotich Bor vs Tabutany Chepkoech Chebusit [2021] eKLR among other cases and submitted that the torrens system guarantees that where there are two titles, the first in time prevails. They relied on the case of Wibeso Investments Limited & another vs Tamarind Meadows Limited & 5 Others [2020]eKLR and sought that the title issued to the plaintiffs be nullified.
64. The 1st and 2nd defendants submitted that they converted LR No. 13287/78 to Njoro/Ngata Block 27/11 through an instrument of surrender. They relied on Section 2 of the Registration of Titles Act, the case of Petition No. 32 (E036) of 2022(Consolidated with Petitions Nos 35 (E038) & 36(E039) of 2022) Fanikiwa Limited vs Sirikwa Squatters Group and submitted that they did not convert the property from a leasehold to a freehold as alleged by the plaintiffs but they instead converted the Certificate of Title to a Title deed. They submitted that the parcels of land around the Ngata area are being converted to LRA.
65. They submitted that there was no compulsory acquisition of land around Ngata area of Njoro even though the plaintiffs alleged that the same was done and they were allegedly compensated. They relied on Sections 107 to 126 of the Land Act and the case of Peter Musimba v National Land Commission and 4 Others [2016] eKLR in support of their arguments. They submitted that since the plaintiffs are not the registered owners of the suit property they would not have been compensated.
66. On the third issue, the 1st and 2nd defendants relied on the case of Nathoo v Musyoka & another (Environment and Land Case Civil Suit 161 of 2017) [2022] KEELC 3986 (KLR) (21ST JULY 2022) (Judgement) and submitted that the receipts produced by the plaintiffs for payment of the purchase price for the suit property were issued after the certificate of title was issued. One such receipt was issued on 13th April 1994 while the certificate of title had already been issued on 19th October 1993. They also submit that it is not clear what was the purchase price that was paid by the plaintiffs father.
67. It was the 1st and 2nd defendants submissions that the mother title that was purportedly produced by the plaintiffs was irregular because the title was surrendered to the registrar for safe keeping. They relied on Section 70 of the Registration of Titles Act, the cases of Charles Karathe Kiarie & others vs Administrators of Estate of John Wallace Mathare(deceased) & 5 others [2013]eKLR, Evanson Wambugu Gachugi vs Simon Wainaina Gatwiki & 2 Others [2014]eKLR and argued that the document purported to be brought to court was not the mother title and sought that the court does not rely on it. On the fourth issue, they submit that they are the registered owners of the suit property and so they sought that a permanent injunction be issued against the plaintiffs to stop them from interfering in any manner with land parcel No. Njoro/Ngata Block 27/11 together with an eviction order and damages for their property that was destroyed.

Analysis and determination

68. After considering the pleadings and the evidence, I am of the view that the following issues arise for determination;



- a. Who between the plaintiffs and the 1st and 2nd defendants are the owners of the suit property.
- b. Whether the plaintiffs are entitled to the orders sought.
- c. Whether the 1st and 2nd defendants are entitled to the orders sought in their counterclaim.

a. Who between the plaintiffs and the 1st and 2nd defendants are the owners of the suit property. ___

69. Both the plaintiffs and the 1st and 2nd defendants have gone to great lengths trying to convince this court that they are the registered owners of the suit property. The plaintiffs case was that their deceased father Peter Kipkorir Rotich was the registered owner of LR No. 13287/78 IR No. 60749 measuring 4.048 Ha. It is also their case that he was registered as the owner on 29th January 1993 and that they have been in occupation since then to date. That in 2020 they saw a face book post by the 3rd defendant with pictures of the suit property indicating that it was for sale. When they contacted the 3rd defendant, he took them to the suit property and showed them a title deed for land parcel No. Njoro/Ngata Block 27/11 which was in the name of the 1st and 2nd defendants. They argued that their late father never sold the suit property and that the 1st and 2nd defendants acquired the suit property fraudulently.
70. In support of their case they produced a copy of the certificate of title for LR No. 13287/78 I.R No. 60749 that was issued on 19th October 1993. They also produced a copy of an allotment letter issued by the Agricultural Development Corporation dated 29th November 2021 issued to Peter Rotich. The said letter informed him that he had been allocated 10 acres at ADC Ngata which the Estate Manager and/or Divisional office Ngata was to show him the said plot. A copy of a transfer dated 29th January 1993 was also produced from the Agricultural Development Corporation to Peter Kipkorir Rotich for a consideration of Kshs. 50,000/=.
71. A copy of a receipt was produced that was issued by the Agricultural Development Corporation dated 13th April 1994 to Peter Kipkorir Rotich of Kshs. 65,000/= over LR No. 13087/78 Ngata. A copy of the letter dated 28th August 1995 was also produced that was written by Dr. W.K Kilele the Managing Director, Agricultural Development Corporation to Peter Kipkorir Rotich informing him that the purchase price of LR No. 13287/78 was Kshs. 50,000/= and that he was required to pay the said amount within one month.
72. There are a few discrepancies that can be noted in the said documents. They include the fact that Peter Kipkorir Rotich was registered as the owner of the suit property on 19th October 1993 and yet he paid Kshs. 65,000/= on 13th April 1994. On 28th August 1995 he received a letter that required him to pay Kshs. 50,000/= way after he had been issued with a certificate of title and paid Kshs. 65,000/=.
73. The plaintiffs also produced Grant No. 40236 which showed at entry No. 127 that on 19th October 1993, Peter Kipkorir Rotich was registered as the owner of LR No. 13287/79 which was a freehold.
74. The 1st and 2nd defendants case on the other hand was that they purchased the suit property from David Achikwa the 7th defendant on 21st April 2016 and a transfer effected to their name on 26th April 2016. It was also their case that sometime in the year 2020 they converted the suit property from a leasehold to a freehold and they were registered as the owners of land parcel No. Njoro/Ngata Block 27/11 on 14th February 2020. It was further their case that since David Achikwa was issued with a certificate of title on 22nd February 1991 for LR No. 13287/78 IR No. 60749 while the plaintiffs alleged that their father was issued with a certificate of title on 29th January 1993, his certificate of title was issued first in time and therefore his title is the only valid title.



75. In support of their case they produced a copy of certificate of title issued to David Kibiwot Achikwa for LR No. 13287/78 I.R No. 60749 on 22nd February 1991. On its face is a stamp of the Land Titles Registration Nairobi Kenya which indicated that it was registered as IR 60749/1 and presented on 22nd February 1991. Entry No. 2 on the said certificate of title was a transfer to Richard Kipngeno Langat and Peter Kigen Kiprono dated 20th July 2016. The presentation number is indicated as No. 1901 and it is signed by the Registrar C.K Ngetich. The next entry is dated 17th February 2020 and it was a surrender to the Republic of Kenya in consideration of conversion of the land to Njoro/Ngata Block 27/11. The presentation No. is 1800 and it is signed by the registrar O. Cattwright. Annexed also to the certificate of title is Deed Plan No. 143837.
76. The 1st and 2nd defendants also produced a land sale agreement between them and David Kibiwott Achikwa dated 21st April 2016 for land reference No. 13287/78 IR No. 60749 for a consideration of Kshs. 20,000,000/= . The sale agreement described the interest in the property as a freehold.
77. A copy of a surrender was equally produced and it was dated 2020. It indicated that Richard Kipngeno Langat and Peter Kigen Kiprono were desirous of converting LR No. 13287/78 IR 60749 and registering it under the Land Registration Act. It was further indicated that the Director of Surveys had designated the said parcel as Njoro/Ngata Block 27/11. It is indicated that the grantee was registered as lessee from the government of Kenya. It is only signed by Richard Kipngeno Langat and Peter Kigen Kiprono.
78. A copy of transfer dated 26th April 2016 was produced for land reference No. 13287/78. It is between David Kibiwott Achikwa and Richard Kipngeno Langat and Peter Kigen Kiprono. It had a stamp of the Land Titles Registry Nairobi which showed that it was registered as No. 60749/2 and was presented on 20th July 2016 and signed by the registrar of titles C.K Ngetich.
79. A copy of a letter dated 7th February was produced. The year was not legible and it was addressed to the District Land Registrar Nakuru County with the subject of the said letter being the surrender and transfer of Njoro/Ngata Block 27/11. It indicated that the surrender and transfer of the suit property was annexed to the said letter and it was meant for registration purposes.
80. A copy of title deed for land parcel No. Njoro/Ngata Block 27/11 was produced. It is registered in the names of Richard Kipngeno Langat and Peter Kigen Kiprono on 14th February 2020. It measured 4.048 Ha.
81. A copy of receipt issued by the County Government of Nakuru was produced that showed that the 1st and 2nd defendants had paid Kshs. 460/= as land rates for 27/11. As aforementioned, the plaintiffs alleged that the suit property LR No. 13287/78 was registered in the name of their late father Peter Kipkorir Rotich while the 1st and 2nd defendants alleged that David Achikwa the 7th defendant who sold to them the suit property was equally the registered owner of the suit property.
82. Essentially, this court has been presented with two certificates of title with each party alleging that they were the rightful owner. The court in *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR held as follows;
 31. A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they



need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

83. The plaintiffs alleged that their deceased father Peter Kipkorir Rotich had acquired the suit property from the Agricultural Development Corporation. The 1st and 2nd defendants also alleged that the 7th Defendant David Achikwa equally acquired the suit property from the Agricultural Development Corporation. Since both parties claim that the initial owners acquired the suit property from the Agricultural Development Corporation, the evidence of PW2 is crucial in the determination of the root of the said titles. Rodgers Karungu the Director Legal Operation Secretary at the Agricultural Development Corporation gave his evidence as PW2.
84. It was his evidence that the Agricultural Development Corporation acquired a farm known as Ngata Farm which was 6000 acres on 3rd May 1985. The land was put up for sale and the late Peter Rotich purchased through allotment LR No. 13287/78 whose size was 4.048 Ha. It was also his evidence that the title was LR 13287 and an entry of the said purchase was made at No. 127 of the mother title which he produced in court.
85. It was also his evidence that the Agricultural Development Corporation was the custodian of the Register and the original title while the green card was with the land registrar. It was further his evidence that every new entry was made on the mother title and that the last entry was number 186 and was done on 27th June 2016.
86. He admitted that the plaintiffs' documents had a few discrepancies to wit the receipt for payment of the purchase price was issued on 13th April 1994 and yet the transfer had already been done on 19th October 1993.
87. Regardless of the said discrepancies, he was able to confirm that Peter Kipkorir Rotich had purchased the suit property from the Agricultural Development Corporation.
88. Even though the 1st and 2nd defendants alleged that David Achikwa acquired the suit property from the Agricultural Development Corporation, no evidence in support of the said allegation was produced. There are no receipts for payment of the purchase price, there is no transfer and neither was his name on the mother title of the suit property that was produced by PW2. Therefore, other than the certificate of title that was produced in the name of David Achikwa, there are no other documents in support of his alleged ownership.
89. The 1st and 2nd defendants alleged that after they purchased the suit property, they converted it from a leasehold to a freehold and they were issued with a title deed for land parcel No. Njoro/Ngata Block 27/11. This was the evidence of Richard Kipng'eno Lang'at who testified as DW2. He testified that the suit property was a leasehold and that they paid for rates. A copy of the rates receipt dated 27th August 2020 was produced.
90. DW1's testimony was not in tandem with the documents that he produced. Even though he testified that the interest they acquired in the suit property was a leasehold, the sale agreement stated that the property was a freehold. It was also the plaintiffs' evidence that the suit property was a freehold. Grant No. 40236 that was produced by PW2 showed that the suit property was a freehold.



91. The 1st and 2nd defendants changed tune in their submissions and admitted that the suit property was a freehold and that they had applied to convert it from a title issued under the Registration of Titles Act to the *Land Registration Act* which lead to the issuance of a title deed for land parcel No. Njoro/Ngata Block 27/11 which was still a freehold. DW1 admitted that they got the title deed on 14th February 2020 while the surrender was registered on 17th February 2020.

92. Erick Mwenda, the Land Registrar, Nakuru testified that he registered the title for land parcel No. Njoro/Ngata Block 27/11 on 14th February 2020. He did the said registration upon receipt of a surrender, the Registry Index Map and a transfer. He admitted that since the property was a leasehold, the Commissioner of Lands must have been involved. He admitted that he had no letter from the Director of Surveys and neither did the Chief Land Registrar sign the surrender. He stated that a title deed should issue after a surrender but in the present case, the surrender was done after the title was issued. Section 44 of the Registration of Titles Act CAP 281 (now repealed) provides as follows:

"44. Whenever any lease which is required to be registered by the provisions of (1) this Act is intended to be surrendered, and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word "surrendered", with the date of surrender, and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar thereupon shall enter in the register a memorial recording the date of surrender and shall likewise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to intervening circumstances, if any, the land would have been then vested if no such lease had ever been executed; and production of the lease or counterpart bearing the endorsed memorandum shall be sufficient evidence that the lease has been so surrendered:

Provided that no lease subject to a charge shall be surrendered without the consent of the chargee.

93. The court in *Sirikwa Squatters Group v Commissioner of Lands & 9 others* [2017] eKLR held as follows;

"Section 44. Of the Registration of Titles Cap 281 (*repealed*) provides that whenever any lease which is required to be registered by the provisions of this Act is intended to be surrendered, and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word "surrendered", with the date of surrender, and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar thereupon shall enter in the register a memorial recording the date of surrender and shall likewise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to intervening circumstances, if any, the land would have been then vested if no such lease had ever been executed; and production of the lease or counterpart bearing the endorsed memorandum shall be sufficient evidence that the lease has been so surrendered:"



94. It is my view that essentially the Registration of Titles Act provides for the surrender of a leasehold title to the lessor and not a surrender of a freehold. As aforementioned, the 1st and 2nd defendants admitted that the suit property was a freehold in their submissions. They then argued that they converted the suit property from a freehold under the Registration of Titles Act to a freehold under the Land Registration Act. This argument is inconsistent with the surrender which was produced which clearly at paragraph 2 stated as follows;

"...grantee being registered as proprietor as Lessee from the government of the Republic of Kenya"

95. It is my view therefore that from the totality of the evidence produced, the said conversion done by the 1st and 2nd defendants from LR No. 13287/78 to Njoro/Ngata Block 27/11 was un procedural.

96. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR held as follows;

"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

97. Section 26 of the Land Registration Act provides as follows;

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

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original"

98. This court having found that the root of the title initially held by the 7th defendant, David Achikwa could not be explained, and this court having also found that the alleged surrender done by the 1st and 2nd defendants was un procedural given that the suit property was a freehold, it is my view that the title held by the 1st and 2nd defendants must be impeached. In the case of *Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR the court held as follows;

"It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme...I do not see how a person with a perfectly good title should be deprived of his title



by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

99. Section 80(1) of the *Land Registration Act* provides as follows;

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

100. This court is satisfied that the title held by the 1st and 2nd defendants was procured un procedurally and ought to be cancelled.

101. Consequently, it is the finding of this court that Peter Kipkorir Rotich(deceased) is the legitimate owner of LR No. 13287/78 IR No. 60749 measuring 4.048 Ha.

b. Whether the plaintiffs are entitled to the orders sought.

102. Given my finding on issue (a) above, the plaintiffs are entitled to the orders sought in their amended plaint dated 21st June 2021.

c. Whether the 1st and 2nd defendants are entitled to the orders sought in their counterclaim.

103. Having found that the plaintiffs have proved their case, the 1st and 2nd defendants are therefore not entitled to the orders sought in their counterclaim. In the upshot, the plaintiffs claim succeeds and is hereby granted with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF FEBRUARY 2024.

A.O.OMBWAYO

JUDGE

