



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT ELDORET

E & L CASE NO. 447 OF 2012

THOMAS AGURE ARAP NDONEE.....PLAINTIFF

VERSUS

KIPSEREM ARAP KEMBOI.....1ST DEFENDANT

PETER SAWE BIAMAH.....2ND DEFENDANT

MOSES KIPNGETICH

(All sued as Trustees of Kapsengere Dispensary)....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

INTRODUCTION

Thomas Agure Arap Ndonee (*hereinafter referred to as the plaintiff*) has come to court by way of originating summons against Kipserem Arap Kemboi, Peter Sawe Biamah and Moses Kipngetch (*hereinafter referred to as defendants*) for declaration and reliefs that the registration of land title number NANDI KAPSENGERE/319 into the names of *Peter Sawe Biana, Moses Kipngetch (TRUSTEES) of Kapsengere Dispensary* to the exclusion of the plaintiff was fraudulently procured and is therefore null and void and of no effect; and a further declaration that the said title ought as of right to have been registered in the names of the plaintiff and an order directing the District Land Registrar, Nandi to rectify the register under the provisions of Section 143 of the Land Act to reflect the ownership of title number NANDI/KAPSENGERE/319 as under names of *the plaintiff*

The originating summons is supported by the affidavit of the plaintiff who states that he is the legal and rightful owner of all that parcel of land known as Nandi/Kapsengere/319 measuring 024 hectares since 1922 and that he has continuously stayed and lived on the said land to date. Sometimes in May 2006, a stranger invaded his said land and put up a building claiming that the land had been allocated/transferred to 1st respondent who in turn transferred to the 2nd respondent. That he proceeded and reported the fraud at Kapsabet Criminal Investigation department for them to carry out investigations as O.B. No. 18/18/05/06 and that he conducted a search at Kapsabet Lands Office where he was issued with a Search Certificate which indicates the 2nd, 3rd and 4th respondents are registered as trustees for Kapsengere Dispensary a fact that was strange to him. That he has never transferred his said land to anybody else as he has been the owner ever since 1922 and he has done a lot of developments on the land and the alleged transfer and subsequent registration in the names of the 1st, 2nd and 3rd respondents by the 4th

respondent agents if fraudulent and ought to be canceled and the land be registered in his names and stands to suffer irreparable loss and damage if the said unlawful registration is not canceled. That the said illegal registration was done on 10th November 2005 while he has lived and owned the land since 1922.

The 1st respondent filed a replying affidavit stating that prior to transferring the suit land to the 2nd and 3rd respondents, he was the legal and rightful owner and annexed his title deed for the land. That the allegation of "legal and rightful owner" made by the plaintiff are misplaced, untenable and have no legal basis. The applicant is a stranger to him hence his allegation of occupation of the suit land is false and cannot be legally proved. That as the legal owner of land parcel number Nandi/Kapsengere/319, he had all the rights to sell, transfer or give out the land as a gift to anybody of his choice as there is no law barring him from doing so. That he transferred the suit land to the 2nd and 3rd respondents; and they were subsequently registered as the trustees of the Kapsengere dispensary which is a community project funded by the government.

PLAINTIFF'S EVIDENCE

When the matter came up for hearing, the plaintiff's witness statement was adopted wherein he states that the land parcel in issue is his land. It was initially owned by his mother, the late **Salome Chemwor** who died in 1988. When the adjudication process was ongoing, he was working in Pembeni farm in Kitale as a guard. He instructed the first defendant who is the son to his late sister called **Cherotich Chepundonei** who died in 1947 to represent him in the process instead the said 1st defendant went and registered the land under his name between 1979 and 1982. In the year 1983, when the plaintiff pressurized him to give the number of land he declined. Cherotich left behind three young children namely, 1st Defendant, Kimutai and Chepngeny. They quarreled several times and eventually managed to call a family meeting in 1984 ostensibly to iron out the issue. The plaintiff then demanded to be given his number but he was told that there was an objection. That he could not understand what was being said and sensed that something was not right and he walked out of the meeting together with other relatives. That he felt that there was a deliberate attempt to create a case where none existed. He went to his mother that evening very disappointed and told her what had transpired and she was very mad. She immediately proceeded to the 1st defendant's house and started demanding the land parcel number.

An argument ensued and the 1st Defendant blatantly told her that he was not going to surrender the number. He told his mother to go and stay elsewhere specifically Solomon's land. His mother went back the following morning to demand the number but in vain. The next day, the 1st defendant went to Moi's Bridge where he got a casual job from his sister-in-law. He locked his house and disappeared and came back in 2005. He went to Jimmy Choge and sold the land secretly without their knowledge under the assistance of the second defendant and third defendants. The third defendant is a relative to 1st defendant's wife and are friends since childhood. All this time, the plaintiff was in occupation of the land. He got to learn about the transfer to the school through a letter copied to him, written by second defendant addressed to the OCS, Kapkerer advising him that they had acquired the land and that construction was due to start. When he got the letter, he immediately called his son Solomon Chemwor who was in Nairobi. He sent him a copy of the letter through Akamba and the latter told him that he took a copy to the Advocates who later filed a case in 2005/2006. The case was filed in Nairobi but later transferred to Kisumu then back to Eldoret. His prayer is that he be given his land back. He claims to have been residing on the suit land since 1924 when he was born. All his children were born there while he was residing on the suit land. He is the only son of the late Salome Chemwor. On cross examination by Mr Kitur, he states that he filed an objection during adjudication but he did not have the documents. Moreover, he states that he does not have another parcel of land in Kipchemwor where he has built a house as the same belongs to his children.

Solomon Chemwor Choge (PW2) a son to the plaintiff testified that the land in issue Nandi/Kapsengere/319 was initially registered in the name of the first defendant who is a nephew to the plaintiff, a son to his sister, **Cherotich Chepundonei** who left behind three children while still at tender age; Agong'o Arap Mutai Cheng'eny Anwana and the 1st defendant. The plaintiff took over the young orphans to his care and custody until they became adults. Between 1977 and 1984, while his father was

working in Moi's bridge, the first defendant was at home. That time lands were being registered, their grandmother who was too old and ill sent the 1st defendant's to represent the plaintiff in the lands office. Instead of registering it in the name of The plaintiff, he presented his own name for land in Kapsengere. He was also instructed to register the other land in Soi in the name of Agong'o Arap Mutai but he registered it in his own name and subsequently sold it. The title documents of the land registered at Kapsengere were kept by the 1st defendant as the plaintiff's mother who is the defendant's grandmother was too old. He was told by his grandmother to write to the plaintiff telling him that he had registered the two parcels of land in the latter's name but he lied to her that he had written to him. When The plaintiff came home in 1985 and inquired on the issue of the registration, the 1st defendant refused to disclose the land reference number and also to give out the registration documents claiming that the land was his.

He states further that he was born on the land in 1957 and that the land belonged to his father because he was also born on the land in 1922. The plaintiff's father was Ndonee Arap Chemwor whilst his mother was Salome Chemwor both deceased and buried on the suit land. The 1st defendant was brought up on the said parcel of land and that was left on the parcel of land as a custodian when the plaintiff went to work in Kitale. When this witness was 18 years old there was a decree in the area that all land in the registration area be registered. The plaintiff instructed the 1st defendant to register the suit land in the name of the plaintiff which instructions were witnessed by Salome Chemwor but the 1st defendant did the contrary and registered the land in his name. He later transferred the property to second and third defendants as trustees of Kapsengere Dispensary. The plaintiff raised an objection by filing objection proceedings in Kapsengere District but due to biased position taken by the translator, one Moses Kipngetch, The plaintiff abandoned the objection proceedings and did not appeal to the minister.

PW3 was Paul Kipkoeh Chemogong who states that he resides in the same village with the plaintiff and he is his neighbour. That he was born in that village and grew up in the same village. Their family and Salome's were great friends and that during market days and other days when they were young their mother used to take them to Salome while the former was away to the market (Kiboswa market). That at Salome Chemwor's, they could meet and play with other children from other families who were also brought to Salome to care for them while their parents were away. When their parents came back from the market, they would bring Salome some gifts like unga, fish etc. All along while growing up, he has known that this land in question was occupied by Salome and he has known it to belong to the plaintiff. They used to play together and also grew up with the 1st Defendant and his sister. At a point in time the people from the Land's office came to register the lands, they were led by Moses Kipngetch as the area assistant chief. At that time (1977-1980), the plaintiff was working in Moi's bridge and the 1st defendant was at home with Salome his grandmother. And that the 1st defendant was the one who did the registration of the land.

He later learnt that the 1st defendant had registered the plaintiff's land in his name. as a result of which the plaintiff lodged objection proceedings and he does not know how it was concluded. In his view, the land belongs to the plaintiff because in their custom, the first defendant was a son to the plaintiff's sister, and as the only male member of that family, the plaintiff was the one entitled to this land as beneficiary of Salome. Furthermore, the first defendant, his brother and sister had their land left to them by their father in Soi which in fact is registered in his name.

On cross examination by ***Wabwire learned state counsel***, he states that during demarcation, he was dealing with his land and not theirs. There were elders that dealt with the land who also dealt with disputes and hailed from the Kapsengere village.

The land adjudication process was done between 1979 to 1983 and that the plaintiff complained that the first defendant had taken his land. He does not now what happened later. But he can see a title in the name of the defendant. As at now, the land has a hospital in construction.

PW4 was Jotham Korir who states that he lives at Kipsakech, Kapsengere sub-location in Nandi County. He is a farmer and he knows the plaintiff. They were students at Kapsengere Primary School. He knows the first defendant as the nephew to the plaintiff. Salome the mother to the plaintiff and grandmother to the first defendant was buried on the disputed land. He is a Terik, who are also Tiriki of Nyangori.

According to Terik, one can be buried anywhere. The land belongs to the plaintiff and will be buried on the disputed land when he dies and that the first defendant should be buried on his father's land.

On Cross examination by Mr. Wabwire he states that he lives at Kipsakech village near Kapsengere a distance of about half a kilometre and knows the land very well but not the title number. The land has a hospital wherein a slab was done. The plaintiff is not on the ground and has not built on the land. There is another land that belongs to his son where the plaintiff has built a house. He states that he does not know any other land that belongs to the plaintiff and states that when the plaintiff was evicted by the government, he went to his son's land. The land adjudication was done in the year 1979 but he does not know the person that was allocated the land during adjudication. He knows the defendant who is older than him and lived on the disputed land. During registration, the plaintiff was not living on the parcel of land. Salome and the first defendant were living on the land. The plaintiff had a wife and children who were grown up. One of them is Solomon Chemwor Choge. He had an Identity Card. He was not living on the land. The plaintiff's wife was staying at Chemor with his son while the plaintiff was alone in Kitale. The Chemor's land belonged to the plaintiff's son. He believes that a grandmother cannot give land to her grandchild if she has a son. The land belonged to the plaintiff's father. Salome was the plaintiff's mother. The land was inherited by plaintiff. During demarcation, the village elders were present.

On re-examination by Aseso he states that he does not know whether the plaintiff had another parcel of land. He was chased away when the hospital was being constructed, before putting up the slab.

PW5 was Grace Jerubet Chepkwony, a daughter of Thomas Agure who states that the plaintiff is her father and that the 1st defendant is her cousin. She states that the land in Kapsengere is their family land and that they were born there and they grew up, married while on it. Around 1985, she learnt from the plaintiff that the first defendant had registered the land in his name fraudulently. She went home to confirm what she had heard and found her grandmother Salome who confirmed that the first defendant had stolen the land and she had chased him away. She told her that she would not allow him back home. At the time of their grandmother's death in 1988, the first defendant never attended her funeral despite being notified of the same. According to this witness Land No. 319 belongs to her father. Salome her grandmother was buried on 319. The land in Kipchemor belongs to the plaintiff's sons. They were born in 319 and that her dowry was paid at a meeting on parcel **No NANDI/ KAPSENGERE 319.** Her mother is alive and lives at Kipchimor.

On cross examination by Mr Wabwire, she states that Land **NANDI/ KIPCHIMOR/785** belongs to the sons of the plaintiff. The defendant registered himself as the proprietor of the suit-land in 1983. Her brothers were in school at the time of registration of **NANDI/ KIPCHIMOR/785** in 1970. The boys looked for the land for themselves. However she agrees that she does not know how they acquired the land and agrees that it could be their fathers. During land registration, she was called by her grandmother who was living at **No NANDI/ KAPSENGERE 319.** Her mother also used to stay on **NANDI/ KAPSENGERE 319** and was told that the defendant had taken over the land. Her father also used to stay on the parcel of land but had gone to work far away when adjudication was done. From 1986, her father knew that the land was registered in the 1st defendant's name. He was informed that the defendant had stolen the land.

PW1 was recalled after the court was informed that he appears to have misled the court by stating that he did not have another parcel of land. On recall he states that he has no other parcel of land save the suit land. He has never been issued with a title deed. The only land he knows is in Kipchemor. The number is familiar but title has never been issued. **On cross examination by Wabwire,** he states that the land known as **NANDI/ KIPCHIMOR/785** belonged to his children. His sons looked for the title in 1970. The title was issued to the plaintiff because he was old. He admitted that the land was registered in his name but it belonged to his children. During adjudication, he went for adjudication himself and not his sons and was registered owner though the land belongs to his children.

DEFENCE EVIDENCE

The defence called two witnesses. **DW1 was Mr. Kipserem Arap Kemboi** the first defendant who states that the land in issue is Nandi/Kapsengere/319 and that he was given the land by his grandmother, Salome Chemwor who told him that the land belonged to Sinde Arap Maragoy. According to DW1, the plaintiff is not saying the truth as the land was shown to the 1st defendant by his grandmother. The process of adjudication was concluded when he was given the land. No objection was registered and that he used to stay on the land with his grandmother. After adjudication, he was issued with the title. He was registered on 28.2.2005 and that Mr. Ndonee did not object. The defendant has never lived on the parcel of land as he sold it out to the Kapsengere Dispensary for Kshs.400,000/=. The dispensary belongs to the government of Kenya and is at the window level. The land was transferred to the dispensary following due process. He produced the application for consent of the Land Control Board. As at now, the land is already transferred in the name of the hospital through its trustees. According to the DW1, the plaintiff has another parcel of land.

On cross examination, he states that the land was given to him by his grandmother in the 1970s. He was 28 years old when the land was given to him. He claims that he did not get any land apart from the suit land. However, on further cross examination, he claims to know land No. Nandi/Kapsengere/865 which he admitted was his but sold to Evans Rono. He admitted to having obtained the parcels of land during adjudication. He obtained the parcels of land thus, Nandi/Kapsengere/865 and Nandi/Kapsengere/319 which he sold to Evans Rono and the dispensary respectively.

The defence called **DW2, Mr. Esau Aloo Otieno**, the Land Registrar, Nandi County. He states that he is aware of the transaction in respect of Nandi/Kapsengere/319. This is a first registration as adjudication was done in 1985. The records reached the registry on 25.2.2003. The land was registered in the name of Kipserem Arap Kemboi and title deed issued on 28.2.2005. On the 31.3.2005, Mr. Kipserem Arap Kemboi applied to Aldai Land Control Board to transfer the property to Kapsengere dispensary as a consideration of Kshs.400,000/=. The application was approved and letter of consent issued. The transfer was registered on 10.11.2005.

The Land Registrar, moreover, states that during land adjudication, the plaintiff objected but the objection was dismissed and no appeal was preferred. On cross examination by Mr. Aseso, the witness reiterates that there was an objection by the plaintiff which was dismissed but there are no proceedings. During land adjudication, an objection was filed and dismissed with costs. The right of appeal was given. He produced the adjudication record as Dex.10 as evidence with signature of the plaintiff showing that the plaintiff objected but the objection was dismissed and no appeal was recorded. He produce the original green card. He further states that on the 2.2.2009, one plaintiff presented a caution claiming beneficiary interest but he does not know who is in possession. The land belongs to Kapsengere Dispensary according to his documents.

PLAINTIFF'S SUBMISSIONS

The plaintiff filed submissions through the firm of Gicheru & Company. The ***gravamen*** of the submissions is that the suit parcel of land known as Nandi/Kapsengere/319 was unlawfully registered in the names of the 1st defendant on 26.2.2005 and subsequently in the names of the trustees of Kapsengere dispensary on the 10.11.2005. That the 1st defendant was holding the land in trust for the family and not on his own self and further therefore, that any transfer to Kapsengere dispensary was unlawful. The plaintiff submits that there was a case where the 1st defendant was registered subsequent to adjudication and was thus holding the land in trust. It is further submitted that it would have been out of character in the African setting that Salome Chemwor would give the 1st defendant the parcel of land and leave the other persons landless. It is also argued that the plaintiff was in occupation until 2005 when he was evicted.

The plaintiff further argues that the transfer of land from the 1st defendant to the 2nd and 3rd defendants is void *ab initio* as the transaction was contrary to the provisions of section 3 of the Law of Contract Act that provides that all transactions in land must be written. Moreover, that the consent of the Land Control Board was obtained at Aldai which is not within the geographical area of the suit land.

The plaintiff submits that the 1st registration is not sacred as it is impugned by fraud and/or misrepresentation as in the present case. He relies on the case of **John Teleyio Ole Samoyo Vs David Omwenga Maobe civil Appeal no 297 of 2009** where the Court of appeal upheld the principle of constructive trust where the respondent had left the suit parcel under care of the appellant but the latter converted the same and was found to have acquired the parcel of land in circumstances that made it inequitable for him to be allowed to retain the same.

DEFENDANT'S SUBMISSIONS

The defendants filed submissions through the firm of S. K. Kitur & Company Advocates. The gist of the submission is that Nandi/Kapsengere 319 was given to the 1st defendant by Salome Chemwor who was the defendant's grandmother and that he obtained title on 1st registration. The objection filed by the plaintiff during adjudication was dismissed. That at the time of sale, the 1st defendant had a valid title and that there were no encumbrances at the time of sale and transfer. The defendants further submit that there are no particulars of fraud in the originating summons and no single evidence was adduced by the plaintiff to prove fraud. Moreover, that there is no evidence of adverse possession.

DETERMINATION

I have considered the pleadings, evidence and submissions by the parties and do find the following issues ripe for determination:

- 1. Whether the plaintiff's claim is based on adverse possession and has it been proved?**
- 2. Whether the plaintiff's claim is based on customary trust and has it been proved?**
- 3. Whether the plaintiff's claim is based on fraud, and has it been proved?**
- 4. Whether the transfer of the property to the 2nd and 3rd defendants was null and void.**

1. WHETHER THE PLAINTIFF'S CLAIM IS BASED ON ADVERSE POSSESSION AND HAS IT BEEN DEMONSTRATED?

The suit herein is commenced by way of originating summons under the provision of Order XXXVI 3(d) and 7 of the Civil Procedure Rules before the Civil Procedure Rules were reviewed. The applicable rule is Order 37 RULE 7 of the Civil Procedure Rules, 2010 which provides as follows:

“7. Adverse possession [Order 37, Rule 7.]

- 1. An application under section 38 of the Limitation of Actions Act shall be made by originating summons.***
- 2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.***
- 3. The court shall direct on whom and in what manner the summons shall be served.”***

I have carefully gone through the pleadings and I do not discern any claim based on adverse possession. The Originating Summons is raising issues of fraud and therefore should have been commenced by way of plaint. That notwithstanding the plaintiff has not demonstrated that he has been in possession of the suit land for a period exceeding 12 years or at all after the first defendant was registered on 28th February 2005.

Section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be registered on account of his or her occupation of the land, openly

and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejectment but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38 (supra) to be registered as the proprietor of the land. This is what the doctrine of adverse possession means. Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. The land claimed by adverse possession need not be all the land comprised in the title; it may be a portion of it providing that the portion claimed is demarcated well enough to be identifiable. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time from running. I do find that the claim of adverse possession has not been established as the plaintiff has not been in possession of the suit parcel at all after the registration of the 1st Defendant.

2 WHETHER THE PLAINTIFF'S CLAIM IS BASED ON CUSTOMARY TRUST AND HAS IT BEEN PROVED?

The plaintiff has not pleaded Customary Trust and has invoked the wrong procedure for a claim based on trust, however he claims in the submissions that the 1st defendant was holding the land in trust for the family and not on his own self and further therefore, that any transfer to Kapsengere dispensary was unlawful. The plaintiff submits that there was a case where the 1st defendant was registered subsequent to adjudication and was thus holding the land in trust. It is further submitted that it would have been out of character in the African setting that Salome Chemwor would give the 1st defendant the parcel of land and leave the other persons landless. It is also argued that the plaintiff was in occupation until 2005 when he was evicted.

In KANYI VS. MUTHIORA, (1984) KLR, 712, the Court of Appeal held that registration of land in the name of a proprietor under the Registered Land Act did not extinguish rights under Kikuyu customary law and neither did it relieve the proprietor of his duties or obligations as trustee. The Court further stated that the trustee referred to in *section 28 of the Act* included a trustee under customary law.

In NJUGUNA VS. NJUGUNA, (2008) 1 KLR 889 the Court of Appeal had occasion to consider the concept of *muramati* in Kikuyu customary law and his obligations and responsibilities. The respondent in that appeal, the eldest son in a family, was registered as owner of a parcel of land which he held under customary law trust for himself and his six brothers. The land was divided into eight pieces. The other brothers were given one piece each, but the respondent took two pieces ostensibly because he was a *muramati*.

On appeal challenging that distribution, the Court allowed the appeal holding that under Kikuyu customary law the eldest son inherits land as a *muramati* to hold it in trust for himself and the other heirs; that a *muramati* is not entitled automatically to an extra share or *uramati*, that the *muramati* has a duty to distribute the shares to the heirs in accordance with the wishes of the deceased or in accordance with the rules of intestacy; that the *muramati* is not entitled to any remuneration for his services because his duty is a moral obligation; that in certain specific circumstances the *muramati* may get a slightly larger share if he proves in the eyes of the *muhiriga* elders that he has been a good *muramati* and that the extra share is not a right but is given at the discretion of the elders. In the case before me, I do find that the 1st defendant being a nephew and younger to the plaintiff did not qualify to be treated as a trustee. Moreover, the fact that the plaintiff filed an objection to the registration of the first defendant as the proprietor of the suit land is not disputed which objection was heard and dismissed, the plaintiff was entitled to an appeal against the dismissal and that failure to do so meant that the plaintiff had accepted the outcome and therefore the issue of trustee or constructive trust does not arise.

1. WHETHER THE PLAINTIFF'S CLAIM IS BASED ON FRAUD, AND HAS IT BEEN PROVED?

The evidence on record does not prove fraud and no particulars of fraud have been pleaded. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, which provides:

***“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*”**

Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

***“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*”**

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

The *Court of Appeal in Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013] eKLR* considered the applicability of these provisions as follows;

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

As regards the standard of proof, I would refer to *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others* NAI Civil Appeal No. 215 of 1996(UR), where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.”

Likewise in *Rosemary Wanjiku Murithi v George Maina Ndinwa NYR Civil Appeal No. 9 of 2014 [2014] eKLR*, the Court of Appeal held that;

“Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.”

In the matter before me, the alleged fraud is not particularized and therefore difficult to discern. The first defendant was registered after an adjudication process which was not challenged to its ultimate conclusion. The plaintiff's objection was dismissed but he chose not to appeal. The Land Adjudication Act Cap 234 laws of Kenya is very elaborate on the adjudication process and provides as follows:-

“26. Objection to adjudication register

(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of

completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.

26A. No Objection Register

(1) When the time for objection under section 26(1) has expired, the adjudication officer shall prepare a No Objection Register in respect of any land not subject to an objection, and deliver the same to the Director of Land Adjudication who shall-

(a) certify thereon and on the duplicate adjudication register that the adjudication of the land set out therein has become final; and

(b) forward the No Objection Register together with a copy of the duplicate adjudication register to the Chief Land Registrar for the purpose of registration under section 28.

(2) The provisions of this section shall apply to all adjudication registers not yet finalized before its commencement.

[Act No. 7 of 2007, Sch.]

27. Finalization of adjudication register, subject to appeals

(1) The adjudication officer shall from time to time alter the adjudication register to conform with any determinations of objections under section 26 of this Act.

(2) If the adjudication officer considers that to alter the adjudication register would incur unreasonable expense, delay or inconvenience, he may, instead, recommend to the Minister that compensation be paid and the Minister may make such payment of compensation out of moneys provided by Parliament as he thinks fit.

(3) When all objections have been determined and the time for appeal under section 29 of this Act has expired, the adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall-

(a) alter the duplicate adjudication register accordingly; and then

(b) certify on the adjudication register and on the duplicate adjudication register that it has become final subject to the outstanding appeals; and

28. Action by Chief Land Registrar

Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register:

Provided that, where the land is affected by an appeal under section 29 of this act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination.

29. Appeal

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication. And the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall-

(a) alter the duplicate adjudication register to conform with the determinations; and

(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

The import of the foregoing is that the plaintiff lost his right to challenge the registration of the 1st defendant as proprietor when his objection was dismissed and he failed to appeal. Upon registration of the 1st defendant as the proprietor of the parcel of land as absolute owner his title became indefeasible. Section 26 of the *Land Registration Act* make the Certificate of Lease issued to him as conclusive evidence of proprietorship. Section 26 of the *Land Registration Act* stipulates that the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as *prima facie* evidence that the person named is proprietor of the land and is the absolute and indefeasible owner. I do not find any good reason to fault the 1st defendant's title to the suit property before transfer to the 2nd and 3rd defendants. I have considered the allegation that the transaction was contrary to the provisions of **Section 3 of the Law of Contract Act** that provides that all agreements in land must be written and that the consent of the Land Control Board was obtained at Aldai which is not within the geographical area of the suit land and do find that this issue can only be raised by way of a suit commenced by plaint and not Originating Summons. Ultimately, the suit is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE