



**Koloi & 4 others v Lokwee & 2 others (Environment & Land Case
10 of 2022) [2024] KEELC 712 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 10 OF 2022
FO NYAGAKA, J
FEBRUARY 16, 2024**

BETWEEN

**BARNABAS NYANGA KOLOI 1ST PLAINTIFF
EWAAR EWOI 2ND PLAINTIFF
ERUPE EWOI KAPOKOR 3RD PLAINTIFF
MUSA EBEI LOKAALA 4TH PLAINTIFF
BENSON LOKURUKA EBEI 5TH PLAINTIFF**

AND

**JACOB NGIROTIN LOKWEE 1ST DEFENDANT
JOHN LOOLIO KAAMAN 2ND DEFENDANT
EWOI FLORENCE ATABO 3RD DEFENDANT**

JUDGMENT

1. The Plaintiffs filed a suit by way of a Plaint dated 24/02/2022. It was brought on 28/02/2022. They prayed for the following reliefs:
 - a. A declaration that the suit property is the property of the Plaintiff's family and the purported sale between the Defendants is null and void;
 - b. A permanent injunction restraining the Defendants, their agents and/or servants from encroaching and/or dealing in any way with the demarcated plot in Loima (Naurenpuu) measuring 286.0901Ha as demarcated by the Turkana District Surveyor on 14th December 2011;
 - c. Costs of the suit.



2. The Defendants entered appearance on 10/03/2021 (sic) having appointed a firm of Advocates to act on their behalf. They filed their joint Statement of Defence dated 06/05/2022 on 09/05/2022. They denied all the averments set out in the Plaint. While they did not file any Counterclaim, they sought the following orders:
 - a. The Plaintiffs' suit be dismissed with costs in favor of the Defendants;
 - b. Declaration that 2.2745 hectares being part of the 1st Defendant's property belongs to the purchasers with value being 2nd and 3rd Defendants;
 - c. Permanent injunction restraining the Plaintiffs, their agents and/or servants from encroaching and/or dealing in any way with the plot in Loima (Naurenpuu) measuring 286.0901 hectares belonging to the Defendants.
3. I shall, in my analysis of the facts, come back to this unorthodox manner of a party seeking prayers in a Defence in the absence of a Counterclaim, the evidence and the law.
4. The Plaintiffs filed a Reply to Defence dated 20/05/2022 on 23/05/2022. They joined issue with the Defence and reiterated the averments in their Plaint. They prayed that the said Defence be dismissed and/or struck out with costs.

The Plaintiff's Case

5. The Plaintiffs brought this suit as representatives of the Kapokor Family. They pleaded that they were brothers and cousins in relation to each other. They called as PW1, the 1st Plaintiff and eldest grandson of the family. Prior to this, they had donated to him written authority to testify on their behalf. He relied on his witness statement dated 21/01/2022 and further witness statement dated 23/05/2022.
6. The Plaintiffs' evidence was that the said family was the owner of all that parcel of land in Loima (Naurenpuu) measuring 286.0901 Ha as demarcated by the Turkana District Surveyor on 14/12/2011. It is situated near Lodwar Girls. As at the time of suit the land was used for cattle grazing. A letter from the Ministry of Lands, Housing and Urban Development corroborated that evidence. He produced as PExh1 the letter dated 14/12/2011.
7. In 2017, the Plaintiffs received information that the 1st Defendant, a family friend and neighbor, was purporting to sell a portion of their property. In February 2018, the 2nd and 3rd Defendants commenced construction on the suit land. That led to the discovery by the Plaintiffs that the two Defendants had purchased the same from the 1st Defendant, giving rise to a dispute. They produced the sale agreement dated 17/08/2017 marked it as PExh2. The agreement was prepared before the Area Chief Lawrence Esuron.
8. The matter was reported to the Ministry of Lands in Loima Sub-county. Come 07/05/2019, a stop order was issued to the Defendants by Loima sub-county land administrator to stop any further development on the disputed land including delivering building materials. Furthermore, it made reference to the land dispute case at Naurenpuu in a meeting held on 02/05/2019 stating that the suit land belonged to the Kapokor family. The stop order dated 07/05/2019 was produced and marked as PExh3 while the Minutes of the meeting held on 02/05/2019 were produced and marked as PExh4.
9. The Minutes above captured chronologically the proceedings before Ministry of Lands, Energy, Housing and Urban Management; the Naurenpuu land dispute case. In attendance were the Plaintiffs' family and the 1st Defendant before the land administrator. Both parties extensively gave their evidence accordingly.



10. In their decision by majority, the elders found that had the 1st Defendant been the true owner, he would not have sold huge portion of land at a throw away price. Furthermore, to them the credibility of the Plaintiffs' witness was weighty. For those reasons, they declared that the suit land belonged to the Kapokor family.
11. On 10/05/2020, the 2nd and 3rd Defendants proceeded to place beacons on the suit land. In further violation of the stop order, they delivered sand and building stones on the suit land. As a result, the Plaintiffs approached the District Land Surveyor and applied for demarcation and subdivision of the suit land on 12/05/2020.
12. The above exercise was intercepted by the 3rd Defendant who claimed that he was the lawful proprietor of the suit land. He reported the matter to the police. The outcome of the investigations revealed that the 1st Defendant had fraudulently sold a portion of the suit land to the 2nd and 3rd Defendants.
13. Consequently, the 1st Defendant was arrested and charged with the offences of forcible detainer, giving false information to a person employed in the public service and obtaining money by false pretences in Lodwar Criminal Case No. 170 of 2020. The charge sheet was produced and marked PExh5. However, on 04/02/2022, the police mysteriously wrote to the ODPP advising that the matter be withdrawn. The letter dated 04/02/2022 was produced and marked PExh6.
14. According to the letter, the criminal case was initiated unlawfully and maliciously and was thus an abuse of the criminal justice system. It was recommended that further in-depth investigations be instituted a fresh since the police officers that initially handled the case had since been transferred. Following, the 2nd and 3rd Defendants moved onto the suit land and occupied the same. That they were developing the said land creating futility in their removal hence the suit.
15. PW1 recalled that he was, among others, charged in Lodwar Criminal Case No. 282 of 2020 with the offence of making a false document, namely minutes dated 10/09/2019. He was however acquitted under Section 215 of the Criminal Procedure Code. The case involved another piece of land. The complainant was one Elizabeth Anyala Love; not the Defendants herein. He produced the judgment marked PExh7.
16. PW1 narrated that the Defendants fraudulently caused the office of the Chief Nadapal location to oversee the sale of land. On 15/05/2020, the chief wrote to the Director Ministry of Lands Turkana County revoking the agreement of sale between the 1st and 2nd Defendants for reasons that the 1st Defendant falsified information regarding the property herein. For that reason, the sale was illegal. The letter dated 15/05/2020 produced as PExh8 further captured that the Kapokor family gave the 1st Defendant family the land temporarily while looking for their own place to stay afterwards.

The Defendants' Case

17. The 1st Defendant, DW1 adopted his witness statement dated 06/05/2022. His evidence was that in 1989, he moved with his family to Naurenpuu Loima sub-county where they have since settled. They obtained vacant possession of the suit property measuring 286.0901 ha as community land. That the Plaintiffs in particular, were not in occupation and/or possession. The Plaintiffs moved one (1) km as their neighbors in the recent past.
18. In 2017, DW1 embarked on selling 7.2547 ha to the 2nd and 3rd Defendants. The proceeds were intended to settle school fees. That the sale of land was further justified by the fact that he was physically disabled. His evidence was that the purchasers duly confirmed that the property was his. For this reason, they entered into a sale agreement in the presence of the area chief and three (3) elders.



19. DW1 was thus surprised to learn that the Plaintiffs accused him of illegally and fraudulently selling the suit land. In fact, it was his evidence that the 1st and 2nd Plaintiffs were well aware of the process from its genesis and only reported him to the police because they held a grudge with him. In his view, it was the 1st Plaintiff who was a fraudulent man since he was charged in court for falsifying a document.
20. He further contended that Kapokor family is amorphous and is not a natural or juristic person. As such, no one can lay claim to filing suit on their behalf.
21. DW1 testified that while he was charged in Lodwar Criminal Case No. 170 of 2020, the said case was withdrawn upon the realization that the charges were instituted in bad faith to frustrate and defraud the Defendants. He produced the letter dated 04/02/2022 from the police to the ODPP marked 1DExh4 corroborating this evidence. He questioned why the Plaintiffs only initiated execution proceedings in 2022 yet they had been in possession since 1989. In fact, the Plaintiffs were, in his view, malicious in destroying the beacons set up by him.
22. DW1 relied on the letter from the director of physical planning Turkana County to the County Criminal Investigation Officer (CCIO) Turkana County dated 22/06/2020 produced as 1DExh1 to put forward that the ministry of lands had not prior soft copy records of all surveys done before devolution. In fact, those records were destroyed by floods in 2019. It also confirmed that the Kapokor family had never surveyed the land since devolution. That there has never been any transfer or allotment of the said parcel of land. As such, the Plaintiffs' documents could not be authenticated.
23. It is to be noted that the above referenced letter was written in reference to "court orders No. 22 seeking information from our office in the Naurenpuu case between Eloo family and Kapokor family..."
24. For those reasons, the 1st Defendant discredited the Plaintiffs' case stating that it had not been proved to the required standard. He further denied service of the stop order and denied that he attended the meeting held on 02/05/2019. He denied erecting any structures but clarified that his father had set up beacons on the suit land. He thus prayed that the same be dismissed.
25. DW1 produced an agreement dated 09/04/2019 between complainant (3rd Defendant) on one part and Erupa Ewoi Kapokor and Joseph Enguron Ebei (the accused persons) on the other part marked it as 1DExh2. According to the agreement, the complainant was to be paid Kshs. 25,550.00 for two (2) damaged beacons in an out of court settlement. That the accused persons had removed the beacons thus prompting the complainant to lodge a complaint vide OB no. 66/03/04/2019.
26. DW1 produced as 1DExh3, a letter dated 28/10/2018 from the area chief Lawrence Esuron. It was reported that a portion the suit land, approximately measuring 7.2743 acres was sold by the 1st Defendant to the 2nd Defendant. In his testimony, DW1 stated that the purpose of the letter was to survey the land because he had sold the land to the 3rd Defendant for a sum of Kshs. 2,000,000.00. In his view, this letter confirmed that he was the owner of the suit land.
27. DW2 the 3rd Defendant adopted her witness statement dated 06/05/2022. She is the 2nd Defendant's wife. She also produced 1DExh1 as 2DExh1 and relied on 1DExh4 in support of her evidence.
28. She testified that in 2017, she was interested in purchasing a parcel of land together with the 2nd Defendant. It is then that she was introduced to the 1st Defendant who wanted to dispose of his community land with a view to raising school fees. That he informed her that he was the proprietor of the said parcel of land.
29. Following several inquiries, the 1st and 3rd Defendant met in July 2019 when she was shown the suit land. The 1st Defendant was in possession at that time. She added that there was no evidence of grazing



- or the Plaintiffs. She was also notified by the area chief that the land was community land and belonged to the 1st Defendant and his family. She did not, however, confirm from the Ministry of Lands. Satisfied with the state of the land, the parties agreed to dispose of the suit land at a consideration sum of Kshs. 2,000,000.00.
30. Vide an agreement dated 17/08/2017, before the area chief and three (3) elders, the agreement was executed between the 1st and 3rd Defendants. In it, the 1st Defendant sold a portion of the land, measuring approximately 7.2545 ha, to the 3rd Defendant. The 3rd Defendant paid a Kshs. 500,000.00 deposit while the balance was paid in installments.
 31. DW2 relied on 1DExh3 to state that the property was purchased from the 1st Defendant and would be surveyed. She then proceeded to the Ministry of Lands to ascertain the boundaries where it was confirmed that the property was free from any encumbrances or restrictions.
 32. On placing beacons with the land administrator, the 3rd Defendant testified that the Kapokor family destroyed them. This action led to a report at the police station where they were arrested. However, pursuant to the compensation agreement marked as 1DExh2, the parties settled the matter out of court.
 33. On 19/07/2018, the 3rd Defendant called a surveyor to demarcate the suit land. She discovered that the Plaintiffs' family erected their own beacons on the suit parcel of land. She maintained that the sale agreement between the 1st and 3rd Defendant was lawful and remained unchallenged. She stated that the Plaintiffs were not genuine as they should have filed suit in 1989. She reiterated the evidence of DW1 urging this court to dismiss the suit with costs.
 34. Finally, after settlement of the beacons dispute, DW2 wrote to the ministry of lands concerning the Plaintiffs' encroachment. The letter did not say that the Plaintiffs had documents in support of ownership. That she was not issued with a beacon certificate but had paid survey fees. She further stated that she was not aware of the meeting held on 02/05/2019. That if the 1st Defendant is not the owner of the suit land, she would have no claim for it.
 35. DW3, the 2nd Defendant and DW2's husband, adopted his witness statement dated 06/05/2022 as his evidence in chief. She was informed by his wife that the 1st Defendant was intent on disposing off a portion of the suit land. That his wife confirmed that indeed the suit land, measuring approximately 286.0901 ha, was vacant and belonged to the 1st Defendant.
 36. The 2nd Defendant communicated with the 1st Defendant and the area chief, one Lawrence Esuron, in conducting due diligence. It was confirmed that the land actually belonged to the 1st Defendant. Further confirmation was received from three (3) elders.
 37. Pursuant to an agreement for sale of land dated 17/08/2017, the 1st Defendant sold a portion of the suit land measuring 7.2547 ha to the 2nd and 3rd Defendants at a cost of Kshs. 2,000,000.00 a deposit of Kshs. 500,000.00 was made therein and survey conducted thereafter.
 38. In his view, the letter dated 25/10/2018 affirmed that the parcel of land was sold by the 1st Defendant to the 2nd Defendant. The beacons erected therein were in 2018 destroyed by the Kapokor family. The matter was reported at the police station where the 2nd Defendant was compensated vide an agreement dated 09/04/2019. Later, it was discovered that beacons had been erected contrary to their earlier agreement. The matter was reported at the ministry of lands but no response has been forthcoming.
 39. A demarcation exercise was on 12/05/2020 expropriated by the 3rd Defendant. He intended to record a statement at the police station. He maintained that they have never constructed on the suit premises.



He further stated that he was not aware of the meeting held on 02/05/2019. That if the 1st Defendant is not the owner of the suit land, he would have no claim for it. He denied neither being aware of, nor being served with the stop order. He reiterated the evidence of DW1 and DW2 together with the documentary evidence adduced to pray that the suit be dismissed with costs.

40. The Defendants also called DW4 Mark Mbadi Oyoo surveyor that had worked at Turkana County in 2011 as the district surveyor. His evidence was that as long as he was in service in Turkana County, the suit property had not been surveyed.
41. Looking at PExh1, DW4 remarked that the signature on the said document was not his. That no one could sign such a document except him as it was an offence. He added that the ownership, much as the same alluded to family ownership, ought to have been owned by an individual, a company or a registered entity. That if indeed it was family land, all members ought to have had their names recorded on the document. He further found the document not authentic for the reason that the rubber stamp was not the one he used when he was on duty at the said station.
42. DW4 further stripped off the veracity of PExh1 by stating that the same ought to have been preceded by a letter of allotment from the municipal council or a written request to the district surveyor and a Part Development Plan (PDP) from the directorate of physical planning. In addition, it ought to have been accompanied by a miscellaneous receipt from the treasury.
43. DW4 testified that the matter was reported at the police station where he recorded a statement. Specimen samples of his signatures were also taken. He added that the document lacked coordinates; which were crucial as to ascertain acreage, bearing and distance.

Written Submissions

44. At the close of the hearing, parties filed and exchanged written submissions. The Plaintiffs filed their joint written submissions dated 15/11/2023 on 27/11/2023. They submitted that the suit land was classified as community land as enshrined in Article 63 (2) of the Constitution. That being said, ownership could only be justified on the strength of a historical background of its acquisition since there is no document of title. They relied on their documentary evidence to urge this court that the suit land belongs to the Kapokor family.
45. The Plaintiffs placed heavy reliance on the evidence of the elders in the meeting of 02/05/2019, the letter of 15/05/2020, the stop order dated 07/05/2019 and the fact that they were first in time to submit that the court ought to rule in their favor. Looking at the defence evidence and Section 39(4) of the Community Land Act, they submitted that nothing negated the fact that they held title as a family by way of customary law.
46. Following, the Plaintiffs relied on the nemo dat quod non habet rule to conclude that the 1st Defendant could not pass title to the 2nd and 3rd Defendants since the suit land belonged to the Kapokor family. That they did not conduct due diligence as required to establish ownership of the suit land. Furthermore, nothing was adduced to justify an exception to the general rule. They thus prayed that the suit be allowed with costs.
47. The Defendants filed joint written submissions dated 13/12/2023 on that day. They submitted that the Plaintiffs are not the true owners of the suit land by dint of the evidence of DW4. They further accused the Plaintiffs of intentionally forging survey documentation to defeat the cause of justice. Furthermore, the same was fraudulent since it lacked coordinates to pin point the location.
48. They further accused the Plaintiffs of forging legal documents hence the suit in Lodwar Criminal Case no. 170 of 2020. That they failed to prove to the required standard the allegations preferred against



them. In particular, that the meeting of 02/05/2019 never occurred and in fact, the said minutes had been doctored.

49. On whether the 2nd and 3rd Defendants were *bona fide* purchasers of the suit land, the Defendants submitted in the affirmative. That the 1st Defendant had lived on the suit land peacefully and uninterrupted for more than thirty (30) years continuously. As a result, the 1st Defendant was the rightful owners and had the capacity to sell the suit land. Finally, they submitted that the Plaintiffs were not entitled to the reliefs sought. They thus urged this court to dismiss the suit with costs.

Analysis and disposition

50. I have carefully considered the pleadings, examined the evidence together with the submissions of the rival parties and analyzed the law applicable. According to the uncontroverted facts, the 1st Defendant sold a portion of the suit land measuring 7.2547 ha to the 2nd and 3rd Defendants who are a couple. This was done pursuant to a sale agreement dated 17/08/2017 produced by the parties herein marked PExh2. Both rival parties lay credence as to ownership bringing into fore the following issues for determination and the same shall be determined sequentially:

i. Whether the suit was properly filed?

51. In his evidence, the 1st Defendant averred that the suit was improper since the Kapokor family is amorphous and is not a natural or juristic person. As such, no one can lay claim to filing suit on their behalf.
52. Order 1, Rule 8 of the [Civil Procedure Rules](#), applicable to this court by dint of Section 19 (2) of the [Environment and Land Court Act](#), provides that proceedings may be commenced by any one or more persons as representing numerous persons having the same interests in any proceedings. The purpose of the above provision was enunciated by the Court of Appeal in the case of [Yiapas Ole Seese & 4 others vs. Sakita Ole Narok & 2 others](#) (2008) eKLR as follows:

“The whole purpose of provisions of Order 1 Rule 8 is to ensure that all persons with unlitigated similar cause of action who are desirous of having their cause determined are included in this suit for their own convenience and to obviate a multiplicity of suits. Hence the need to notify them of the Institution of the suit so that in case any of them wishes to take part he is given the opportunity to so so...Until notices under Order 1 Rule 8 [Civil Procedure Rules](#), are served, one may not know whether or not they will accept being treated as Plaintiffs. Services of the notice as we stated earlier. It to give them an opportunity to make an election whether or not to become parties.”

53. Amongst the documents filed in court, the Plaintiffs was an authority to plead. It was dated 21/02/2022. In it, the 2nd - 4th Plaintiffs authorized the 1st Plaintiff to swear and plead any statement of fact on their behalf and on behalf of the Kapokor family.
54. In this court’s view, there is compliance with the provisions of the Act. Contrary to the 1st Defendant’s allegations, the provision does not speak to a representation of a natural or juristic person but a representation of numerous people having the same interest. I therefore find that the Plaintiffs properly instituted the suit on behalf of the Kapokor family. I thereby dismiss the 1st Defendant’s allegations consequently.



ii. Whether the Defendants could seek relief without filing a Counterclaim?

55. In its Defence, the Defendant sought several prayers other than a prayer for dismissal of the suit. It is noteworthy that the prayers were sought absent a Counterclaim or other suit filed on their behalf. It cannot be overemphasized that pleadings play an important role in the determination of issues between disputants. Pleadings form the nerve centre of the life and strength or weakness of a suit and since parties cannot be permitted to adduce evidence outside of their pleadings, it is extremely grave, and seldom not fatal, for parties to transgress on the requirements of proper pleading.
56. The question this Court poses is: was the act of the Defendants praying for the reliefs sought absent of a counterclaim proper? Order 7, Rule 7 of the [Civil Procedure Rules](#) provides that where the Defendant seeks to rely upon any ground as supporting a right of Counterclaim, he shall, in his statement of Defence, state specifically that he does so by way of Counterclaim.
57. In other words, a Defendant cannot purport to seek a remedy without laying claim in the form of a Counterclaim. [Black's law Dictionary 11th Edition](#) defines a defence as one "which is alleged by a party proceeded against in an action or suit, as a reason why the Plaintiff should not recover or establish that which he seeks by his complaint or petition." That a Defence can only dispute or justify why the Plaintiff should not be awarded the reliefs sought. It cannot purport to claim in the same fashion as a Plaintiff.
58. Had the Defendants felt that they were entitled to certain prayers, they ought to have filed a Counterclaim which has been defined by [Black's law Dictionary 11th Edition](#) as a "claim for relief asserted against an opposing party after an original claim has been made."
59. Consequently, I find that the reliefs sought in the Defendants' statement of Defence as not only irregular but improper. They cannot stand on their own without a Counterclaim. It would be like a stone house built on sand or shaky ground: it will fall with a big bang. Thus the reliefs are hereby disregarded and dismissed.

iii. Whether the Plaintiffs' family are the lawful proprietors of the suit land?

60. According to the Plaintiffs, the suit land is owned by the Kapokor family; a fact vehemently opposed by the Defendants who put forward that the suit land was inherited by the 1st Defendant from his father and a portion of the same subsequently owned by the 2nd and 3rd Defendants.
61. The Plaintiffs' evidence was that the Kapokor family is the owner of all that parcel of land in Loima (Naurenpuu) measuring 286.0901 Ha as demarcated by the Turkana District Surveyor on 14/12/2011 situated near Lodwar Girls. The said land is used for cattle grazing. A letter from the ministry of lands, housing and urban development, dated 14/12/2011 was produced and marked PExh1.
62. In further justification of ownership, evidence was led by the Plaintiffs as to state that on 02/05/2019, when it was clear that the Kapokor family and the 1st Defendant were claiming ownership of the suit land, parties were heard before the ministry of lands, energy, housing and urban management. They appeared before the land administrator.
63. In their decision by majority, as captured in the minutes marked PExh4, the elders found that had the 1st Defendant been the true owner, he would not have sold huge portion of land at a throw away price. Furthermore, the credibility of the Plaintiffs' witness of the was weighty. For those reasons, they declared that the suit land belonged to the Kapokor family. On the strength of those proceeding, the ministry of lands issued a stop order on 07/05/2019 [PExh3], directing the Defendants to stop any further development on the disputed land including delivering building materials.



64. On 15/05/2020, the chief wrote, PExh8, to the Director Ministry of Lands Turkana County revoking the agreement of sale between the 1st and 2nd Defendants for reasons that the 1st Defendant falsified information regarding the property herein. For that reason, the sale was illegal. The letter further captured that the Kapokor family gave the 1st Defendant family the land temporarily while looking for their own place to stay afterwards.
65. The 1st Defendant on the other hand testified that in 1989, he moved with his family to Naurenpuu Loima sub-county where they have since settled. They obtained vacant possession of the suit property measuring 286.0901 ha as community land. That the Plaintiffs in particular, were not in occupation and/or possession. The Plaintiffs moved one (1) km as their neighbors in the recent past.
66. DW1 relied on the letter from the Director of Physical Planning Turkana County to the CCIO Turkana County dated 22/06/2020, 1DExh1, to put forward that the ministry of lands had not prior soft copy records of all surveys done before devolution. In fact, those records were destroyed by floods in 2019. It also confirmed that the Kapokor family had never surveyed the land since devolution. That there has never been any transfer or allotment of the said parcel of land. As such, the Plaintiffs' documents could not be authenticated. It is to be noted that the above referenced letter was written in reference to "court orders no. 22 seeking information from our office in the Naurenpuu case between Eloo family and Kapokor family..."
67. DW1 produced 1DExh3, letter dated 28/10/2018 from the area chief Lawrence Esuron. It was reported that a portion the suit land, approximately measuring 7.2743 acres was sold by the 1st Defendant to the 2nd Defendant. In his testimony, DW1 stated that the purpose of the letter was to survey the land because he had sold the land to the 3rd Defendant for a sum of Kshs. 2,000,000.00. In his view, this letter confirmed that he was the owner of the suit land.
68. On one hand, the Plaintiff claims ownership in the form of ancestral land and is thus family land. The 1st Defendant on the other hand claimed that as a result of settling on the suit land since 1989, the Plaintiffs were not only late in time but had not established ownership of the suit land to the required standard of proof.
69. Ultimately, parties advanced that the suit property was community land; though the 1st Defendant for the most part contended that he inherited the property from his father. Article 63 (2) of the Constitution states that community land consists of:
- a. Land lawfully registered in the name of group representatives under the provisions of any law;
 - b. Land lawfully transferred to a specific community by any process of law;
 - c. Any other land declared to be community land by an Act of Parliament; and
 - d. Land that is:
 - i. Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
 - ii. Ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
 - iii. Lawfully held as trust land by the county governments but not including any public land held in trust by the county government under Article 62 (2).
70. An appreciation of the facts connotes that the suit land is community land within the meaning of ancestral land in the context set out in Article 62 (2) (d) (ii). My interest and attention has been drawn to the Plaintiffs' asserting ownership rights to the suit property by relying on PExh1, a letter dated



- 14/12/2011 from the ministry of lands, housing and urban development. The letter was executed by the then Turkana District Surveyor Mark Mbadi Oyoo. The letter disclosed that the suit land was vested in the name of the Kapokor family.
71. In dispelling this piece of evidence, the Defendants called DW4, MARK Mbadi Oyoo, who dismissed that the signature and rubber stamp were not his. He went ahead to state that a family could not own a parcel of land and if so, all names of the families ought to have been recorded. He continued that the document ought to have been accompanied by a Letter of Allotment from the municipal council or a written request to the District Surveyor and a Part Development Plan (PDP) from the Directorate of Physical Planning. In addition, it ought to have been accompanied by a miscellaneous receipt from the treasury. He added that the document lacked coordinates; which were crucial as to ascertain acreage, bearing and distance.
72. The rules of the *Evidence Act* and in particular at Section 107, 108 and 109 suggest that he who alleges must prove. In this case, DW4, who remained working as a surveyor but at the time of his testimony, posted to the Nairobi office negated aspects of the document marked PExh1 as to defeat its purpose.
73. Being in that office, nothing would have impeded DW4 from availing to this Court sample documents in support of his evidence as to demonstrate that indeed the document marked PExh1 was not only incomplete but also illegal and unfounded. Nothing would have further stopped him from adducing the rubber stamp he purported to have used when serving as district surveyor at all material times to the suit. He only gave mere to persuade this court to find in the Defendants' favor. In addition, it is also testified that the signature on the document marked PExh1 was not his. What stopped the Defendants from having the said document as well as DW4's sample signature from being assessed for examination by an expert at their own behest? This would have at best conclusively found that his evidence was justifiable.
74. In this court's view, mere denials do not defeat the parol evidence rule which states as follows:
- “The parol evidence rule states that evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, the rule means that, where a contract has been reduced to writing, neither party can rely on extrinsic evidence of terms alleged to have been agreed, i.e. on evidence not contained in the document. Although the rule is generally stated as applying to parol evidence, it applies just as much to other forms of extrinsic evidence. Of course, if a contractual document incorporates another document by reference, evidence of the second document is admissible, but the rule prevents a party from relying on evidence that is extrinsic to both documents.”
75. Still on the parol evidence rule, I find that in the absence of any appeal or opposition to the minutes held on 02/05/2019, indeed the proceedings captured therein demonstrated that indeed the Kapokor family are the lawful owners, under the system of communal land ownership, of the suit land. In those proceedings, the 1st Defendant participated extensively and gave evidence. Those proceedings have remained unchallenged to date.
76. Consequently, I find that PExh1 was a valid document and subsisting to the extent that the same established that indeed the land was demarcated to the Kapokor family. It is solely based on that piece of evidence that I find that the Plaintiffs' family are indeed the owners of all that parcel of land namely Loima (Naurenpuu) measuring 286.0901 Ha as demarcated by the Turkana District Surveyor on 14/12/2011.



iv. Whether the 2nd and 3rd Defendants were *bona fide* purchasers for value without notice?

77. The 2nd and 3rd Defendants are a couple. It was their evidence that they purchased the suit land from the Defendant lawfully and are therefore entitled to the portion purchased by them. They maintained that the 1st Defendant was the lawful owner and that if he wasn't, then they had no claim over the parcel of land.
78. *Black's Law Dictionary 8th Edition* defines "*bona fide* purchaser" as: "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."
79. In Uganda, the Court of Appeal in the case of *Katende vs. Haridar & Company Limited* [2008] 2 E.A.173 held:
- "For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, (he) must prove that:
- a. he holds a certificate of title;
 - b. he purchased the property in good faith;
 - c. he had no knowledge of the fraud;
 - d. he purchased for valuable consideration;
 - e. the vendors had apparent valid title;
 - f. he purchased without notice of any fraud; and
 - g. he was not party to any fraud."
80. Have the 2nd and 3rd Defendants fulfilled those conjunctive parameters? I think not and this is why; Firstly, they failed to demonstrate or adduce evidence to persuade this court that they held a certificate of title. Secondly, they failed to adduce evidence to demonstrate that they paid the sum of Kshs. 2,000,000.00. Nothing in evidence alluded to those payments. Thirdly, I have already established that the Plaintiffs' family have ownership over the demarcated suit land and not the 1st Defendant who had no title to pass.
81. Furthermore, they did not exercise due diligence or sincerity in their actions. For instance, they did not conduct a search at the relevant offices to establish who the true owners of the suit land were. It was their belief that the word of the area chief was final and conclusive. How can a letter from an area chief be evidence of ownership of land? How on earth can it constitute a certificate of title or lease? It is absurd to argue so. Even in communal land ownership, an area chief cannot purport, as a single person, to found the ownership of anyone: that can only be proven in accordance with the law relating to community land. In my view, this action of the 2nd and 3rd Defendants in conjunction with the 1st Defendant regarding ownership of part of the suit land points to an element of fraud since they contingently knew that the 1st Defendant was not the proprietor so why bother to establish that. In addition, they did not furnish evidence that they wrote a letter to the Ministry of Lands for it to confirm who the true owner was.



82. The 3rd Defendant, in her witness statement, stated she met the 1st Defendant in July 2019 when she was shown the suit land. It was hereafter that she established that the 1st Defendant owned the suit land. She then proceeded to enter into an agreement with him. The purported agreement is that dated 17/08/2017 and marked as PExh2 and 1DExh and 2DExh1 respectively. It is mysterious that the 3rd Defendant executed an agreement in 2019 which was allegedly done in 2017 as testified by the 1st and 2nd Defendants. Was it a lackadaisical quintessence of poor drafting or were this the actual facts? Be that as it may, it is apparent that the 1st and 3rd Defendants were in a dichotomous examination of evidence. The lack of consonance leads me to conclude that they were not genuine as to the true state of facts in this matter.
83. Be that as it may, the same was not pleaded and prayed for in their Defence. They did not file a Counterclaim as to justify the award in that manner. In the end, it is my finding that the 2nd and 3rd Defendants were not *bona fide* purchasers for value without notice.
84. In light of the above, I enter judgment for the Plaintiffs as against the Defendants jointly in the following terms:
- a. A declaration be and is hereby made that the suit property namely Loima (Naurenpuu), measuring 286.0901 Ha, as demarcated by the Turkana District Surveyor on 14th December 2011, is the property of the Plaintiff's family namely the Kapokor family;
 - b. A declaration be and is hereby made that in light of (a) above, the purported sale of a portion of the said demarcated property, between the Defendants, is null and void;
 - c. A permanent injunction be and is hereby issued restraining the Defendants, their agents and/or servants from encroaching and/or dealing in any way with the demarcated plot in Loima (Naurenpuu) measuring 286.0901Ha as demarcated by the Turkana District Surveyor on 14th December 2011;
 - d. The Plaintiffs are awarded costs of the suit.
85. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ELECTRONIC MAIL THIS 16TH DAY OF FEBRUARY 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

