



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

CIVIL SUIT NO. 1006 OF 2012

AFRICA INLAND CHURCH

TRUSTEES.....PLAINTIFF

VERSUS

KIMUTEI CHERONO..... 1ST DEFENDANT

ANDREW KIBIEGO CHEMUTEI..... 2ND DEFENDANT

JUDGEMENT

(Suit by plaintiff seeking eviction and permanent injunction against defendants; plaintiff holding a leasehold from the Government; defendants filing counterclaim for 25 acres of the suit land and seeking cancellation of title of the plaintiff on the basis that it was acquired by fraud; defendant alleging that he sold the land to plaintiff; no proof of sale; no proof of fraud tendered; suit by plaintiff succeeds; counterclaim dismissed with costs)

A. BACKGROUND AND PLEADINGS

1. This suit was commenced by way of a plaint filed on 6 December 2012. In the plaint, it is pleaded that the plaintiff is the registered proprietor of the land parcel L.R No. 23748 measuring 22.09 Hectares situated in Cheptebo, in Keiyo. It is pleaded that the land has been assigned for use by AIC Cheptebo Rural Centre, a project of the plaintiff. Their case is that the defendants invaded the land sometimes in March 2011 and fenced part of it alleging that 8 acres belongs to them and a criminal case for forcible detainer was instituted against them. In the suit they want a declaration that the suit land belongs to the plaintiff, an order of eviction, a permanent injunction, damages and costs.

2. The defendants filed defence and counterclaim. The 1st defendant is father to the 2nd defendant. They denied that the plaintiff is the registered proprietor of the suit land. They pleaded that 25 acres of the suit land belongs to them as ancestral land. They averred that they had allowed a Mr. Rettie to settle on the same with an understanding that he would purchase it which he never did. They pleaded that the rest was sold to the plaintiff by their brother one Thomas Cheron. In the counterclaim, they have stated that save for a small portion of land measuring 40X50 meters which they sold to Mr. Rettie, the rest of the land has never been surveyed with their involvement and consent. They have expressed surprise that the title deed to the land shows that it was granted by the County Council of Keiyo when the same did not belong to the County Council in the first place. They have pleaded that the plaintiff's title was acquired by way of fraud which particulars are as follows :-

(a) Appropriating unto itself a portion of the suit land measuring 25 acres that belongs to the defendants without paying for it.

(b) Engaging in secret survey of the suit land without involving the defendants who have lived in the area within which the suit land is located since time immemorial.

(c) Purporting to have assigned the suit land to A.I.C Cheptebo Rural Development Center when the said C.B.O claims ownership.

(d) Purporting to acquire a registration of title deed under the Registration of Titles Act when the general area is unadjudicated.

(e) Purporting to request for Grant of land that Mr. Rettie had earlier dealt in with individual owners.

3. The defendants have in their counterclaim asked for the following orders :-

(i) an order holding that the defendants are entitled to about 25 acres located on the eastern side of LR No. 23748 by virtue of being ancestral land.

(ii) A declaratory order holding that the suit land falls under an un-adjudicated area.

(iii) A declaratory order holding that the land within which the suit land herein falls is communally held with each family having defined boundaries.

(iv) A declaratory order holding that the survey process of L.R No. 23748 was irregular because it failed to address the proprietary interest of the defendants who have lived thereon since time immemorial.

(v) A declaratory order holding that the creation of L.R No. 23748 measuring 22.09 Has was unlawful and as such the issuance of title deed for L.R No. 23748 is unlawful.

(vi) An order of revocation of title deed for L.R No. 23748.

(vii) The registration of the suit land be held in abeyance awaiting adjudication of land falling under Rokocho location.

(viii) In the alternative, the defendants' 25 acres comprised in L.R No. 23748 located on the eastern side of the suit land, with a seasonal river marking the common boundary between their land and the remainder be excised and registered in their names.

(ix) In the alternative, payment of the market value of the defendants' portion of land measuring 25 acres that the plaintiff unlawfully subsumed.

(x) Any other relief that the honourable court may deem just to grant.

(xi) Costs.

4. The plaintiff filed a Reply to Defence and Defence to Counterclaim in which it refuted all the claims of the defendants. They inter alia averred that the defendants cannot complain as it was through their consent that the AIC through Mr. Bill Rettie came to possess the land. They denied the particulars of fraud and averred inter alia that a survey cannot be done secretly, that adjudication can be done under special request, and the defendant's claim after 20 years is an afterthought. They have contended that the defendants have no cause of action and are attempting to reverse a legitimate process.

5. Pleadings having closed, the matter proceeded for hearing.

B. EVIDENCE OF THE PARTIES.

(i) Plaintiff's Evidence.

6. PW-1 was Barnaba Kiptoo. He is a pastor with Africa Inland Church (AIC), Emgwen AIC and the Chairman of AIC Cheptebo Rural Development Center which is a project of the AIC Church. Cheptebo Rural Development (CRD) was registered as a Community Based Organization (CBO) on 31 October 2012. It however started in the year 1986 and is based on the suit land. He testified that the suit land belongs to the plaintiff and he produced the title deed and search. He testified that since the year 1986 they have been on the land doing various projects. They have a demonstration farm, a conference center and a tree nursery, which are projects aimed at assisting the community. He became chairman of the project in the year 2011 and at the time he was taking over, he was never informed of any problem with the land. He testified that the defendants are neighbours with the church. On 24 February 2011, they came into a board meeting being held by the CRD and claimed the whole land. They could not agree as the church informed them that they have title. After the meeting the defendants wrote a demand letter dated 16 March 2011. In the letter, they claimed 25 acres of the land. On 6 March 2011, the defendants erected a fence. The plaintiff reported the matter to the Police and the defendants were arrested and charged with the offence of Forcible Detainer in Iten Criminal Case No. 424 of 2011. The criminal case was still pending at the time the witness testified. PW-1 stated that in addition to the fence, the defendants also put up a dwelling house and a structure to keep goats and also fell some trees. The Forest Department were called to assess the damage and their report was produced as an exhibit.

7. In cross-examination, PW-1 stated that he became Chairman of the CRD in 2011 but before that, he was a member of the CRD Board since the year 2004. He stated that the CBO was registered on 6 October 2010 and the Certificate was issued on 31 October 2012. According to PW-1 the church requested the community for the land and the community donated the land to the plaintiff. The Assistant Chief present was Thomas Cheron, who is also a brother to the 1st defendant. He denied that the land was purchased from the defendants or Thomas Cheron but was donated by the community. He testified that on the land there is a dispensary run by the Ministry of Health. He was not aware that the subject land is the defendants' ancestral land. In re-examination, he testified that the dispensary is run by the Government with the authority of the plaintiff. He also stated that the defendants own the neighbouring land.

8. PW-2 was David Kipruto Bett. He works with AIC in Keiyo Region and is a member of the CRD board. He was the first chairman of the project in the year 1986. He testified that between 1980-1981, he was studying in the United Kingdom. While a student he came into contact with an organization named Tear Fund. He requested Tear Fund whether they could assist in projects from the area that he came from and they agreed. He contacted one Dr. Elijah Korich, who at that time was Chairman of the District Development Council of AIC in Keiyo, who in turn talked to the Chief of the area. The Chief convinced the community to give out land. He was later informed that the community had agreed to donate 55 acres of land. He passed this information to Tear Fund who advised him to see their contact in Kenya. He did see their contact in Kenya who showed him a demonstration farm in Bungoma that he could copy for his community. That is how the project was initiated. He stated that the committee was formed in the year 1981 and they worked closely with the Assistant Chief, Mr. Thomas Cheron. The project was later adopted by the AIC as their project. A baraza was called by the Assistant Chief in 1981 and the intended project explained. The community assented to the project. The first manager of the project sent by AIC was Bill Rettie who was seconded by the African Inland Mission. He first came in the year 1984 to assess the project which formally started in 1986. On 2 April 1986, Thomas Cheron wrote a letter to the Bishop AIC, to confirm that land measuring about 50 acres had been made available.

9. In 1995, he was informed by Bill Rettie, that the family of Kimutei Cheron, the 1st defendant, was offering to sell to the Church a small portion of land from their parcel which neighbours that of the Church. An agreement dated 12 September 1995 was drawn, and the same was produced as an exhibit. They later processed title to the land. They engaged the District Surveyor who surveyed the land and in 1996, they got an allotment letter. Formal title was eventually issued in the year 2001. The portion bought from the defendants was included in the title. It is later in 2011 that the defendants came to claim the land. He testified that the defendants have all along been neighbours and there has never been any problem between them. He testified that the land was donated by the community although he could not tell the

exact number of families that donated it.

10. In cross-examination, PW-2 inter alia agreed that as 1986, the land had not been surveyed. He was not however aware that only AIC has title in the area. He stated that Thomas Cherono is now deceased. He was not aware whether Thomas Cherono and the 1st defendant lived adjacent to each other. He was not aware of a seasonal stream nor fence posts demarcating a boundary within the land. He could not tell how the land was prior to the year 1986. He was not aware which people among the community donated the land. He denied any agreement between AIC and the defendants to purchase 25 acres of land from the defendants.

11. PW-3 was Joseph Kimeli Kiplalang. He has been the manager of the CRD project since the year 2003. He is the 4th manager of the project. He started off working as a community worker in the year 1999 and previously he was working for World Vision in the same area. He testified that the project commenced in the year 1986. It was approved by the Government through its District Development Committee and a letter from the then District Commissioner, dated 11 May 1987, was produced. He stated that when the project was handed over to him in the year 2003, there was a big ceremony attended by people from the community. The defendants were present and did not raise any issue. In the year 2006, he received a demand letter from advocate M.K Chebii, acting on behalf of the family of Kapcherono, stating that they had leased 55 acres to the Church. He stated that there was no record whatsoever that the land had been leased. They replied to the letter and nothing ensued. They continued with occupation until 6 March 2011, when the defendants entered the land and erected a fence. Cross-examined, he inter alia stated that he believed that the letter from advocate M.K Chebii was being written on behalf of both Thomas Cherono and Kimutei Cherono, the 1st defendant. According to him, the two families were claiming the land, but when they showed them their documents of title, the family of Thomas Cherono retreated.

12. PW-4 was Philip Kiprono Kiplagat. He is the Assistant Chief of Rogocho sub-location. He is also a Board member of the CRD. He testified that he was born and resides in Rogocho. He was appointed Assistant Chief in the year 2003 and stated that he understands the dispute well. He took over office from Thomas Cherono. He testified that when he was appointed Assistant Chief, the defendants had no problem with the land. He testified that AIC have been on the land since the year 1986. In cross-examination, the witness stated that he has not seen minutes where the community donated the subject land.

13. With the above evidence, the plaintiff closed its case.

(ii) Evidence of the Defence.

14. The second defendant testified as DW-1. He is son to the 1st defendant. He testified that they have had a land dispute dating back 15 years with the CRD. He was aware of an agreement made between them and Bill Rettie for the sale of a portion of 50 X 40 meters of land in 1995 for a consideration of Kshs. 50,000/= which was paid.

15. Before that, between 1987 and 1989, Bill Rettie accompanied by Thomas Cherono and a Pastor Bett, had come to his father asking for 25 acres of land. They wanted additional land since they said that the land that they have been given by Thomas Cherono was not enough for the projects that they had in mind. He testified that Thomas Cherono had given them 30 acres of his land for free. Their portion, and that of Thomas Cherono, were separated by a seasonal stream and some posts. He stated that his father was willing to give out land but not for free. He testified that at some point in the year 2006, CRD agreed to pay Kshs. 50,000/= per acre in a meeting held in Iten AIC, Keiyo District Headquarters but the money was never paid. They held another meeting in 2011 at the project site, but this time, CRD said they will not pay any money. It is then that they instructed their advocate to write the letter of 16 March 2011 where they claimed 25 acres of the land.

16. He stated that before they were charged for the criminal offence, he was not aware that AIC had title to the land. He testified that formal survey and adjudication is yet to be done for the area and people in that area have no titles. He stated that they were not aware of any survey being done and that no notice

was ever given. In his view the survey of the land was done irregularly. He denied that the land was donated by families of Rogocho area and that it is only Thomas Cherono who gave out 30 acres of his land. He stated that the land was never one of the Keiyo County Council and the County Council could not donate the land. He stated that he was born on the land and that where the pastor's house is currently situated is where they used to live in the year 1996.

17. He testified that when they dealt with Bill Rettie, Rettie never stated that he was acting on behalf of AIC Trustees. He stated that money to buy the 50 X40 meters piece that they sold came from World Vision. He testified that on the land is a public dispensary and in his view, the same does not belong to AIC Trustees. He stated that they have never instructed the law firm of M/s M.K. Chebii to act for them and that probably M.K Chebii was acting for the family of Thomas Cherono.

18. In cross-examination, DW-1 stated that he was not present when Thomas Cherono gave out his land. He only came to know that Thomas Cherono had given out his land when they came asking for the additional 25 acres. He did not have the minutes in which AIC promised to pay Kshs. 50,000/= per acre in the year 2006. He conceded that no agreement was ever entered to show this. He stated that they agreed with Bill Rettie that they would pay Kshs. 5,000/= per acre for the land but no time frame for payment was given. He was not aware what relationship Bill Rettie had with the church. He asserted that the agreement of 1995 was between them and the Community of Rogocho and not with AIC and that the money was provided by World Vision. He stated that on this portion a conference center was built with money from an NGO called SARDEP and manpower from the community. He stated that the first time they claimed their 25 acres was in 1996 when they visited Bill Rettie in his office.

19. The first defendant testified as DW-2. He stated that there has been no adjudication within the Rogocho area and people have traditional boundaries. He testified that Thomas Cherono (now deceased) was his younger brother. He testified that around 1986, Thomas Cherono accompanied by some visitors, one of whom was Bill Rettie, came to his home and informed him that he has donated 30 acres of his land to the church but that the same was not enough. He accepted to give out his land but at a price of Kshs. 5,000/= per acre. They accepted the price but no agreement was written. The church then took possession of the land. Apart from the 25 acres, he also sold to the church a small portion of 50 X 40 meters for which they wrote an agreement. He stated that when he sold this small portion, they had not yet resolved the issue of the 25 acres. He stated that he first saw the title of the plaintiff when he was charged in the criminal case. He asked that the plaintiff's title be revoked because he has never been paid. He stated that he was not aware of any adjudication and that he would have objected if he knew of this. He stated that he has continuously been living on portions of the land.

20. In cross-examination, DW-2 asserted that he showed the church 25 acres and allowed them use of it. He agreed that the later portion sold of 50 X 40 meters was outside the 25 acres but that this sale was to the Rogocho community, not the same people that he sold the 25 acres to.

21. DW-3 was Collins Kimutai Choge. He is a nephew to the 1st defendant and son to Thomas Cherono. He testified that Thomas Cherono died in the year 2008. On his part, he was born in the year 1979. He stated that his father informed them that he has given out 30 acres to the church. He testified that 25 acres of the land belong to the 1st defendant. He stated that adjudication has not been done in the area. In cross-examination, it was put to the witness that he was only 7 years old in the year 1986 and he stated that he was giving evidence from what he was informed by the 1st defendant and his father.

22. DW-4 was Joseph Kitilit. He is a resident of Rogocho. He stated that he was a friend to Thomas Cherono. In 1995, Thomas informed him that he has given out 30 acres to the Church. He stated that he later heard that the 1st defendant was complaining that he has not been paid for his land. He stated that adjudication has not yet been done in the area.

23. DW-5 was Ernest Chesire Kotonjo a resident of Rogocho. He is first cousin to the 1st defendant. He stated that the area has not yet been adjudicated. He stated that Thomas Cherono gave out 30 acres to Bill Rettie but that the 1st defendant agreed to sell his 25 acres at Kshs. 5,000/= per acre. He testified that for the 50 X 40 meter piece, the same was paid for by the community, and that Bill Rettie signed because the

money was handed to him by the community, which was given the money by World Vision.

24. In cross-examination, it emerged that DW-5 has been a councilor and mayor. It also emerged that at some point, he was a member of the CRD committee. He stated that the 1st defendant started raising the issue in the year 1991 or 1992.

25. With that evidence, the defendants closed their case.

C. SUBMISSIONS OF COUNSEL

26. Mr. Kipnyekwei for the defendants, submitted that the witnesses of the plaintiff were incompetent to testify as none of the witnesses is a Trustee or employee of the Trustees. He submitted that none had a power of attorney to act on behalf of the Trustees and none tendered a letter authorizing them to testify. He submitted that the suit was filed by an entity without locus standi. He further submitted that there was no evidence that the suit land was initially communal land, and that the agreement of 1995, is a demonstration that the land is individually owned even though not demarcated. He stated that no minutes were tendered to demonstrate that in 1986 the community donated any land to the plaintiff and that it was Thomas Cheron who donated his own land of 30 acres. He submitted that the church took the 25 acres of the defendants on the understanding that they would pay Kshs. 5,000/= for it which was never paid. He also submitted that the defendants have all along been in occupation of the land. It was his view that title was irregularly acquired as the area where the land falls has neither been adjudicated nor surveyed. He averred that no witness from the Ministry of Lands was called by the plaintiff to explain why only one title deed has been issued in the area and why an title was issued under the Registration of Titles Act on an area falling under the Registered Land Act. He submitted that the defendants have proved their counterclaim. He tendered no authorities in support of his position.

27. Ms. E.C Rotich for the plaintiff, submitted inter alia that the title of the plaintiff was legitimate. She submitted that the certificate of title is adequate proof of ownership. She submitted that the defendants had not tendered any evidence to show that the title was acquired fraudulently. She relied on the case of **Charles Gathuma Munge vs Peter Icharia Munge & Another (Nairobi ELC No. 1189 of 2007 (2014) eKLR** to argue that fraud needs to be proved at a level above the balance of probability. She submitted that there was nothing in writing to show that the defendants sold land to the plaintiff yet writing is a mandatory requirement. She submitted that without a written agreement, one cannot enforce a contract for sale of land. She relied on the case of **Francis Pius Omweri & Another vs Alice Chesire, (Eldoret ELC Case No. 280 of 2012) (2013) eKLR**. She submitted that it was immaterial whether the defendants were present when survey was done.

28. It is with the above background that I need to decide the matter.

D. DECISION

29. The counsels did not agree on the issues but I think that in the discourse that follows, I will have addressed all matters relevant to this suit.

30. Let me start by a preliminary issue raised by the defendants that the plaintiff lacks locus and that their witnesses were incompetent. I don't see any substance in that line of defence or the submission. The suit land is owned by the African Inland Church of Kenya Trustees, who are incorporated under the Trustees (Perpetual Succession) Act (CAP 164) Laws of Kenya. It is AIC Trustees who are the plaintiffs in this case. I do not know where the submission that the plaintiff has no locus is coming from. A party is free to call any witness to support his case. I know of no law which prescribes that such witness must come with a letter showing that they have been authorized to testify or that they must hold a power of attorney to testify. None was indeed availed to me by counsel for the defendant. That line of defence is completely misplaced.

31. The substance of the matter revolves around the title held by the plaintiff. The plaintiff asserts that it is a good title whereas the defendants claim that the title is bad and ought to be nullified. It is their

contention that the plaintiff could not have got good title because the area is not adjudicated.

32. The plaintiff described how it got its title. It stated that an idea for a community project was mooted and they looked around for some land. It was their evidence that the suit land was donated by the community of Rogocho in the year 1986. They then set up the community project. An additional land of 50 X 40 meters was sold to them in the year 1995 by the defendants and they added this to what had been donated and later acquired title. On the other hand, the defendants case is that 30 acres of the suit land was donated by Thomas Cheronno and 25 acres was sold by the 1st defendant but that the plaintiff has not paid for it. They have not refuted the sale of the latter portion of 50 X 40 meters. They have of course claimed that the title of the plaintiff was acquired irregularly.

33. I have looked at the title held by the plaintiff. It is a leasehold title issued under the Registration of Titles Act, CAP 281 (now repealed). It is a leasehold for a term of 99 years from 1 November 1997 at an annual rent of Kshs. 72/=. The land is to be used for "*a health clinic, agricultural training center and religious purposes.*" Annexed to the Certificate of Lease, is a deed plan No. 229268 dated 13 June 2000. The title was formally issued on 2 February 2001. I honestly do not see anything wrong with the title as issued. It appears to me that the land in issue was previously Government land and the Government decided to issue a lease to the plaintiff for a specific purpose. The purpose is indeed not one for personal gain but for assisting the community.

34. I have no documentary evidence that the land was previously that owned by Thomas Cheronno and the 1st defendant. I have seen the letter dated 2 April 1986 written by Thomas Cheronno, who was then Assistant Chief of Rogocho Sub-Location. The letter is addressed to the Bishop of AIC, and informs the Bishop that though the area is undemarcated, AIC owns "*about 50 acres or more (in the sub-location) purposely for rural development project (sic).*" Nowhere in the letter does it state that Thomas Cheronno had donated 30 acres of land to AIC and nowhere in the letter are the defendants mentioned. Neither do I have any document to demonstrate that the 1st defendant agreed to sell any land measuring 25 acres to the plaintiff. It was said that there was an agreement between the 1st defendant and Bill Rettie for the sale of 25 acres for a consideration of Kshs. 5,000/= per acre but no document was tendered to back up this allegation. It is trite law that agreements for the sale of land must be documented for them to be enforceable. This is by dint of Section 3 (3) of the Law of Contract Act, CAP 23, Laws of Kenya which provides as follows :-

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.

35. The defendants contend that they sold the land to the plaintiff but in the absence of a written document, they cannot enforce the purported agreement.

36. I have also seen the agreement of 12 September 1995 where the defendants sold a portion of 50 X 40 meters to the plaintiff. Although the defendants attempted to allege that the land was purchased by the community, this is not what is contained in the document. The agreement states that Kimutei Cheronno (1st defendant), has sold a portion of his land "*to Africa Inland Church to be adjoined to the area already owned and occupied by AIC Cheptebo Rural Development Project. The said land extends for a distance*

of 40 metres from the south west corner of the existing AIC Cheptebo Rural Development Project boundary (TB11971) eastwards along the northern side of the Tambach-Iten road; from the said road the land extends northwards for a distance of 50 metres. The total area is 2000 square metres."

37. The agreement is signed by the 1st defendant and the 2nd defendant as representing the family of Kimutei Cheron. It is also signed by T. Cheron (presumably Thomas Cheron), Pastor D. Bett (presumably PW-2), W.J Rettie (presumably Bill Rettie) Chairman, AIC Cheptebo Rural Development Project and an independent witness who is not named.

38. It will be noted in the agreement, that the 1st defendant was acknowledging that the land being sold adjoins an area *"owned and occupied by AIC Cheptebo Rural Development Project."* The inference is that as at 1995, the defendants already recognized that AIC owned the land adjacent to what the defendants were selling at that time, which is a portion of 50 X 40 meters. The defendants have of course alleged that Bill Rettie was a representative of the community in the said agreement but it will be seen from the document itself that Bill Rettie was a representative of AIC.

39. If really 25 acres of the suit land was sold in the year 1986 as claimed by the defendants, I would have expected them to commence proceedings shortly thereafter, and indeed, before they sold their portion of 50 X 40 meters to the plaintiff. It has not plausibly been explained why in the agreement of 1995, the defendants acknowledge that the plaintiff owns the adjacent land, if at all there was still an unresolved issue surrounding it. Neither is there any record of any complaint by the defendants throughout the 1980s and 1990s.

40. From the documentary evidence tabled, the defendants seem to have commenced their claim for the land in the year 2006. This is 20 years after the alleged sale. I have no evidence of any complaint prior to that. The claim in 2006 came through a letter written by M.K. Chebii & Company Advocates dated 10 February 2006. The letter is written on behalf of the Kapcherono family and inter alia states that the family leased out land and the same was to be returned after a reasonable time. The letter asked for the immediate surrender of the land and in the alternative proposals for compensation. Of course, I have no evidence of any lease and none of the defendants gave evidence of any lease.

41. It is later that the defendants started alleging that 25 acres of the land belongs to them. As I mentioned earlier, the suit land is a leasehold issued under the Registration of Titles Act. The defendants allege that this title was obtained fraudulently. It is trite law that he who asserts must prove. The onus of proving that the title was acquired illegally or fraudulently fell upon the defendants. The defendants did not call any person from the lands office, and neither did they call any expert, to demonstrate that the title of the plaintiff is a bad title that was acquired improperly.

42. Since the title was issued under the Registration of Titles Act, its provisions are relevant to this matter. Section 23 of the Registration of Titles Act, provided that :-

23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.

43. These provisions are not very different from the current law which is set out in the Land Registration Act. Section 26 provides as follows :-

26. (1) 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.

44. It will be seen from the foregoing, that title is only impeachable on the grounds of fraud or misrepresentation to which the title holder must be proved to be a party, or title may be challenged if it was acquired illegally, unprocedurally, or through a corrupt scheme. I am afraid that the defendants have not demonstrated any fraud or misrepresentation on the part of the plaintiff. Neither have they demonstrated that the title was procured illegally, unprocedurally or through a corrupt scheme. Much was said that the area is undemarcated and unsurveyed. No officer from the lands department was called to prove this. But even assuming that this is so, the title herein is a leasehold by the Government, issued for a specific purpose. It is not a freehold title, given under the Registered Land Act (CAP 300) which is the form of title ordinarily issued after a process of adjudication. I have not been shown any law that says that the Government cannot carve out an area of its own land and issue a title for a specific purpose, before the rest of the area is adjudicated. Neither can it be said that the plaintiff has not utilized the land as leased. I could see from plaintiff's exhibit 12, a newsletter, that the plaintiff has put up a demonstration farm, a conference center and a health center. There is no question that they have utilized the land to assist the community in accordance with the lease. I reiterate that I see nothing wrong in the title held by the plaintiff.

45. The upshot of the above is that I am unable to grant the prayers sought by the defendants. It follows that I have no reason not to allow the suit by the plaintiff. It is hereby allowed. Part of the claim of the plaintiff was for damages caused by the defendant's actions of occupation. I have seen from the report of the Kenya Forest Service produced as plaintiff's exhibit No. 7, that the defendants cut down trees within the suit land. The value of the actual damage caused is of kshs. 11,152.60/= but a sum of Kshs. 55,000/= is required to restore the land. I therefore award the sum of Kshs. 55,000/= which will be the actual amount expended to restore the site.

46. I therefore enter judgment for the plaintiff and issue the following final orders :-

(a) As against the defendants, the plaintiff is hereby declared to be the rightful proprietor of the leasehold title comprised in the land parcel L.R No. 23748 (I.R No. 5935) .

(b) The defendants are hereby ordered to immediately vacate the suit land, and if they fail to do so, the plaintiff is at liberty to apply for an order of eviction, and any eviction shall be at the cost of the defendants.

(c) A permanent injunction is hereby issued against the defendants and/or their servants/agents from entering, being upon, utilizing, or in any other way interfering with the plaintiff's occupation and possession of the land parcel L.R No. 23748 (I.R No. 5935).

(d) The defendants shall pay damages of Kshs. 55,000/= to the plaintiff.

(e) The counterclaim of the defendants is hereby dismissed.

(f) The defendants shall shoulder the costs of both suit and the counterclaim.

Judgment accordingly.

DATED AND DELIVERED AT ELDORET THIS 11TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mr. P.K. Komen holding brief for M/s E.C Rotich for the plaintiff.

Mr. J.K. Kipnyekwei present for the defendants.