



Tanui & 2 others (Suing as the officials of Kapkiagut Clan Land Cheptebo Group on behalf of members of Kapkiagut Clan) v African Inland Church Trustees Registered & 3 others (Environment & Land Case 73 of 2022) [2024] KEELC 1792 (KLR) (25 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1792 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 73 OF 2022
L WAITHAKA, J
MARCH 25, 2024**

BETWEEN

**WILSON TANUI 1ST PLAINTIFF
AMOS KIPLAGAT 2ND PLAINTIFF
RICHARD KOMEN 3RD PLAINTIFF
SUING AS THE OFFICIALS OF KAPKIAGUT CLAN LAND CHEPTEBO
GROUP ON BEHALF OF MEMBERS OF KAPKIAGUT CLAN**

AND

**AFRICAN INLAND CHURCH TUSTEES REGISTERED 1ST DEFENDANT
COUNTY GOVERNMENT OF ELGEYO MARAKWET 2ND DEFENDANT
CHIEF LAND REGISTRAR 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

JUDGMENT

1. By a plaint dated 14th December, 2020 the plaintiffs instituted this suit seeking judgment against the defendants for:-
 - a. A order for cancellation of the title in respect of land grant No. I.R.N 5935 land reference No.23748 by deleting the name of the 1st defendant and replacing it with the names of the plaintiffs to hold the same in trust for members of Kapkiagut clan;
 - b. An order that the 3rd defendant rectifies the land grant No. IR No.5935 land reference No.23748 by deleting the name of the 1st defendant and replacing it with the names of the plaintiffs to hold the same in trust for members of Kapkiagut clan;



- c. Costs of the suit together with interest thereon at such rates and for such period as this court may deem fit to order;
 - d. Any such and further relief as this court may deem appropriate.
2. The suit is premised on the grounds that sometime in the year 2019, the plaintiffs discovered that the 1st, 2nd and 3rd defendants caused land belonging to the plaintiffs and the Kapkiagut clan to be excised and a certificate of title under Registration of Titles Act (Cap 281) repealed to be issued to the 1st defendant being grant number I.R.N.5953 land reference No. 23748 (hereinafter referred to as the suit land).
 3. Although the plaintiffs have not pleaded or alleged that the suit land was fraudulently acquired or registered in the name of 1st defendant, they have provided particulars of fraud as follows:-
 - i. Alienation of the plaintiffs land before adjudication process;
 - ii. Issuance of a leasehold interest to the 1st defendant in violation of *the Constitution* and Statute;
 - iii. Failing to consult the plaintiffs who are the real owners of the land;
 - iv. Acting without jurisdiction.
 4. Terming the registration of the suit land in favour of the 1st defendant a nullity, the plaintiffs seek the reliefs listed herein above.
 5. The 1st defendant filed a statement of defence dated 8th March 2021 denying the allegations levelled against it. The 1st defendant avers that the suit land was donated by the community of Rokocho in 1986 for purpose of setting up a community project; that it has been in occupation of the suit land since 1986; that the plaintiffs were well aware of its ownership and occupation of the suit land and that it followed due process and obtained title to the suit land on 2nd February, 2001. It further pleads that there was a similar suit filed by it against the plaintiffs who are relatives of the same clan in 2012 to wit Eldoret E & LC Case No.1006 of 2012 hence the instant suit is res judicata the former; that the suit is poorly pleaded, ambiguous, unclear and defective hence ought to be dismissed with costs.
 6. The plaintiffs filed a reply to the 1st defendant's statement of defence, dated 2nd March 2022, reiterating the averments/contentions in the plaint.
 7. In the reply to defence, the plaintiffs have averred that the suit land was not donated to the 1st defendant by Kapkiagut clan; that the 1st defendant acquired the suit land through irregular and illegal means; that neither the plaintiffs nor the members of Kapkiagut clan were party to Eldoret E & LC Case No.1006 of 2012; that the defendants in the Eldoret case were not members of Kapkiagut clan and that the dispute between the parties in the instant suit has never been tried and determined by any other court hence its not res judicata.
 8. Terming the 1st defendant's statement of defence a mere denial and bad in law the plaintiffs urge the court to dismiss it and enter judgment in their favour as sought for in the plaint.

Evidence

Plaintiff's Case

9. When the suit came up for hearing, Richard Komen (P.W.1) informed the court that Kapkiagut clan is a registered body (He produced certificate of registration as Pexbt 1); that parts of lower and upper Cheptebo have been adjudicated; that Kapkiagut clan occupies both upper and lower Cheptebo; that there is an area which is not adjudicated; that the clan has never donated or sold the suit land to



- the 1st defendant; that it is not clear how the 1st defendant was issued with a title deed before land adjudication process was completed; that on 11th November 1998, a meeting was held between the local administration, Rokocho & Cheptebo clans to resolve a boundary dispute and that more meetings were held culminating in an agreement on 21st March, 2002 where the boundaries between Rokocho and Cheptebo were demarcated.
10. further informed the court that their land is unregistered community land; that the process of adjudication is not complete and that it is not legally possible for the 1st defendant to have acquired its title in 2001 before land adjudication process was completed.
 11. According to P.W.1, for the 1st defendant to have acquired its title in 2001 before land adjudication process was completed, it must have by passed the process and obtained its title illegally.
 12. Concerning the judgment in the Eldoret ELC Case No.1006 of 2012 which was delivered on 11th November 2014, I paragraph 12 thereof where P.W.4, Phillip Kiprono states that he resides in Rokocho and is the Assistant chief, Rokocho sub location, P.W.1 stated that that Phillip is not a member of Kapkiagut clan; that if Phillip was referring to a clan called Rokocho giving land to the 1st defendant; that clan is not their clan and that Phillip had no authority to surrender land to the church.
 13. further informed the court that the clan has an elaborate procedure which it uses if it wishes to donate/sell land. In that regard, he informed the court that a meeting is usually called by the clan office bearers and members invited; that the proposal is put to members who then pass a resolution whether to donate or sell land.
 14. It is the testimony of P.W.1 that they do not have any record or document showing a resolution passed to donate land to the 1st defendant.
 15. the register of members as Pexbt 4. He stated that the register shows that the defendants in Eldoret ELC No. 1006 of 2012 are not members of Kapkiagut clan.
 16. He urged the court to grant them (plaintiffs) the orders sought in the plaint.
 17. In cross examination, he stated that he is the treasurer of the Kapkiagut clan; that he has not produced any document/certificate showing that he is an official of the clan; that he has no authority of the clan members to file this case; that the land in dispute is occupied by the African Inland Church (AIC); that they are claiming the entire parcel measuring 55 to 60 acres; that the clan only occupies a small portion measuring about 5 acres; that in the proceedings before the land adjudication officer (MFI 2), the Land Adjudication Officer (LAO) was dealing with lower Cheptebo area land; that parcel number 23748 is not mentioned anywhere in the proceedings of the LAO; that he has not filed any document/register showing the parcels of land adjudicated in lower and upper cheptebo; that they registered their clan and obtained a certificate of registration, Pexbt 1; that their clan is distinct from the clan referred to in the Eldoret case judgment.
 18. He acknowledged that the church was issued with a title deed in 2001; that their clan was already in existence when the title deed was issued and that he has not produced any document supporting his contention that his clan was in occupation of the suit property.
 19. Regarding the minutes of 6th December 2022, he admitted that the minutes are for a meeting convened specifically for filing the instant case.
 20. He asserted that the title deed obtained by the church was obtained illegally and in a fraudulent manner; that notwithstanding, he acknowledged that they did not file any complaint with the Directorate of Criminal Investigations (DCI).



21. Regarding the minutes of 11th November 1998, he stated that the meeting was between local administration Kapkyakoi and Kamelgoi clan. He acknowledged that the minutes do not show that Kapkiagut clan were part of the meeting.
22. Concerning the title deed produced in court, he stated that they conducted a search at the lands office and confirmed that the suit land is registered in the name AIC.
23. With regard to the register produced as Pexbt 4, he stated that it contains all the family members of Kapkiagut clan but does not contain the names of the old members.
24. In response to the letter shown to him, dated 2nd April 1986 by the Assistant Chief Rokocho sub location, he stated that AIC church owns about 50 acres in Rokocho sub location. He acknowledged that they have not filed any document to counter that letter. He further stated that the AIC Church Cheptebo occupied the suit land in 1980's; that their fathers/forefathers never filed any case against the church but over the years several meetings have been held with various government offices regarding the clan dispute with the church.
25. On further cross examination by MS Odeyo, he stated that they have upper Cheptebo and lower Cheptebo; that their clan occupies both lower and upper Cheptebo; that AIC church occupies land in lower Cheptebo; that adjudication for lower Cheptebo was concluded; that during the adjudication process they filed a complaint before the LAO but they have not presented evidence.
26. Regarding the judgment of 2014, he stated that Rokocho clan is their neighbour but they are not part of their clan; that they were not aware of the case; that they only learnt that the church had been issued with a title deed in 2019; that they filed a Petition before the National Land Commission (not filed in court); and that their entire parcel is massive because it is in both lower and upper Cheptebo.
27. In re-examination, he stated that adjudication for lower Cheptebo area has not been concluded; that the area occupied by the church has never been adjudicated.
28. Regarding the letter dated 2nd April 1986, he reiterated that Thomas Kipsang Cheron, Assistant Chief, Rokocho sub location, is not the chief of their area. He maintained that the assistant chief was not referring to their clan in the letter under reference.
29. Wilson Tanui, Chairperson of Kapkiagut clan Community Based Organization (CBO). He informed the court that he was elected on 6th December 2020 (Pexbt 5); that the clan has never given out or sold land to the 1st defendant; that there are no minutes showing that adjudication for lower cheptebo was concluded in 2019; that the AIC church was not involved in the adjudication; that in 2019, they discovered that the 1st defendant had excised part of their land and obtained a title deed; that Rokocho clan is not part of their sub location but are neighbours and that they have never had a sitting with the defendant to try and resolve the dispute.
30. Regarding Eldoret ELC Case No. 1006 of 2012, he stated that the defendants in that case are not members of their clan; that the defendants in that case belong to Rokocho clan; that the Assistant Chief Cheron referred to in the judgment was an Assistant Chief of Rokocho clan which is a neighbouring clan and he had no mandate to represent them.
31. He urged the court to find them the rightful owners of the suit property and to nullify the 1st defendant's title.
32. In cross examination, he stated that they are in court for parcel No.23748; that the land is currently occupied by Kapkiagut clan on the right side and AIC in the middle and that on the lower side the clan has more land which is in Cheptebo sub location.



33. Regarding Pexbt 5, he stated that they signed the minutes.
34. He further stated that during the adjudication process they complained and held meetings about the 1st defendant but he had not brought any document to show that fact.
35. He acknowledged that the 1st defendant was in occupation of the land in dispute during land adjudication and that the area occupied by the 1st defendant is not adjudicated.
36. Regarding the minutes dated 16th July 2014, he stated that the electricity to be supplied to the 1st defendant was for the parcel of land in dispute; that Kapkaigut clan was represented in the meeting; that the boundary dispute was between the two clans not the 1st defendant; that members of Kapkaigut clan have occupied part of the 55 acres registered in the name of the 1st defendant; and that the land occupied by some of their members measures about 14 acres.
37. He admitted that they have no documents showing that adjudication has been completed and they have title deeds for lower Cheptebo sub location.
38. Concerning the Eldoret case (Eldoret ELC Case 1006 of 2012), he admitted that it was in respect to the suit land but stated that the land referred in the case 1006 of 2012 was in Rokocho sub location. He stated that if the court was to visit the ground and find it is the same land then they would not have a claim.
39. In further cross examination by Ms Jepkemei, he stated that their clan has always occupied the suit land; that the 1st defendant occupied the land in 2001; that he was elected interim chairperson of the clan in a meeting held on 6th December 2020; that he was later confirmed as chairperson but has no document to that effect.
40. Like P.W.1, he admitted that they have not reported the alleged illegal/fraudulent manner in which the 1st defendant obtained the title to the DCI.
41. He clarified that the boundary dispute referred to in paragraph 7 of his witness statement was between Rokocho and Cheptebo. He asserted that the 1st defendant was not part of the dispute.
42. He acknowledged that the 1st defendant holds a leasehold title for 55 acres and conceded that no law bars them from holding title.
43. Regarding the minutes dated 16th July 2014, in the defendant's list of documents, he stated that AIC church is not a community project.
44. He acknowledged that over the years, they have had a boundary dispute with other clans but not the church.
45. He stated that at the time the 1st defendant occupied their land, they purported to have been given the land by two gentlemen who are not members of their clan. The two gentlemen are from Kamongoi clan who occupy a different parcel of land from theirs.
46. He admitted that the lease issued to the 1st defendant was to be used for public utilities including religious purposes.
47. Regarding the photographs filed by the defendants on 25th April 2022, DMFI 2, he acknowledged that the structures shown therein are for the 1st defendant.
48. He stated that there is a church and an agricultural training centre on the ground. There is also a health centre and a conference centre.



49. In re examination, he stated that there is a health centre on the disputed land which belongs to the Government of Kenya.
50. He maintained that the disputed parcel was not adjudicated.
51. He further stated that during the boundary dispute with their neighbouring clan, the issue of AIC was not addressed because they wanted to resolve the boundary dispute first.
52. Amos Kiplagat stated he was the Secretary Kapkaigut clan. He informed the court that the suit land has always belonged to their clan, Kapkaigut since the time of their forefathers; that as the secretary of the clan and custodian of the clan's records, he has never come across any record showing that the clan gave/sold land to any person; that their land is not government land and that if the government gave it out, it did not do it in the correct manner.
53. He further stated that by the time the 1st defendant was issued with title deed, land adjudication had not been done.
54. He could not tell how the 1st defendant entered the suit land; that they just found the 1st defendant had built a church.
55. Concerning the parties in the Eldoret case, Elc 1006 of 2012, he stated that the defendants in that case are not members of their clan. He termed the defendants in that case as members of a neighbouring clan.
56. He urged the court to cancel the title issued to the 1st defendant on the ground that it was issued fraudulently.
57. On cross examination, he reiterated that the land belongs to their clan; that their clan occupies over 10 acres of the land in dispute; that the 1st defendant entered the suit land after 2000; that he was elected secretary of the clan in 2020; that the 1st defendant was in occupation of the suit land that time and that their elders have had disputes with the 1st defendant even before they moved to court. In that regard, he referred to the minutes of a meeting held on 16th July 2004 where they agreed that the 1st defendant be allowed to install electricity (their clan was represented). He stated that they were not able to resolve the dispute.
58. Francis Kandie Kigen, informed the court that he has always known that the suit land belongs to Kapkiagut clan because they were warned by their parents that they should not encroach on land belonging to Kapkiagut clan by grazing or cultivating; that adjudication in Cheptebo started but was halted because there was a dispute between two clans; that in 2002, there was a meeting that resolved the dispute and the boundary between Rokocho and Cheptebo was demarcated and that the land in dispute was left with Kapkaigut clan in Cheptebo sublocation.
59. He further stated that he knows Thomas Cheronon, that he (Thomas Cheronon) is from Rokocho clan; that he (Thomas Cheronon) was the 1st Assistant Chief Rokocho sub location; that Rokocho and Cheptebo were initially one and that the two were split in 1981 to form Rokocho and Cheptebo sub locations.
60. He stated that he also knows Joseph Kimeli as the chairman of AIC Project Cheptebo.
61. told the court that if members of Rokocho clan gave out the suit land, then they gave land that did not belong to them.



62. In cross examination, he stated that there was a boundary dispute between Kapkiagut and Kamelgoi in 1998; that the AIC church was in possession of the suit land in 1992 and that Cheptebo adjudication was not completed because of the boundary dispute between the two clans.
63. He informed the court that adjudication commenced in 1986; that in 1981, there was only Cheptebo sub location; and that in that year it was split into two to form Cheptebo Sub location and Rokocho sub location.
64. Concerning DMFI 3, he stated that the Chief Rokocho used his authority to give AIC church land that belonged to Kapkaigut clan.
65. It is the testimony of P.W.4 that there were alot of complaints.
66. He did not produce any document showing the suit land belonged to Kapkaigut clan or any report made by various government institutions that the chief gave out their land or that the 1st defendant obtained the land through fraud.
67. He further informed the court that Joseph Kimeli Kiplalang is from Kamelgoi clan.
68. He acknowledged that the 1st defendant has put up a lot of development on the suit land some of which benefit the community but maintained that the developments have been done on land belonging to Kapkiagut clan.
69. He informed the court that the clan and its generations to come will highly be prejudiced if the 1st defendant does not give back the land to them because right now, the clan does not have enough land.
70. He stated that he was not aware of Pexbt 1 and that some members of Kapkaigut clan approved the electricity project for the 1st defendant.
71. In re examination, he stated that there are members of Kapkaigut clan whose families live on part of the suit land i.e 2 families.

Defendant's Case

72. D.W.1 Rev. David Kiptoo Bett, relied on his witness statement recorded and signed on 22nd February 2022 and the documents contained in his list of documents filed on 25th April, 2022 after they were adopted in evidence.
73. In cross examination by Ms. Koech, he stated that the projects in the suit property started in 1981; that the suit land was donated to them by the community. The Assistant Chief Rokocho sub location, Thomas Cheron, called a baraza for the community in 1986 to inform them that AIC wanted to start a project in the community; that they had earlier approached the chairman of the community and informed him about their intentions. The chairman of the community informed the assistant chief who called the baraza after the community agreed; that several donors insisted they needed to inject their money in land that had a title deed in the name of the church.
74. They were issued with a title deed in 1997 (Dexbt 11). The 1st defendant has erected a lot of buildings there at including a church, community health centre, farming activities among others. He stated that the developments are consistent with the use contained in their title deed.
75. In cross examination, by Mr. Bett, he stated that the land was donated by the community. In 1986, the land had not been adjudicated. The suit property is situated in Rokocho sub location as at 1986 (Pexbt 1).



76. Regarding Pexbt 10 (judgment), he stated that he is aware of the suit between the 1st defendant and Kimutai Cherono and Andrew Kibiengo Chemutai. The defendants in that case had encroached on their land; that he was a witness in the case as attested by the judgment, paragraphs 8-10.
77. He further stated that their land (1st defendant's land) is in Rokocho sub location. Despite Pexbt 7 being headed AIC Cheptebo Rural Development Centre, he maintained that the land is located in Rokocho.
78. He stated that he could not comment on Dexbt 5 because he had left office by the time it was made. He could not tell where the boundary between Cheptebo and Rokocho is.
79. In re examination, he stated that Pexbt 1 was confirming that AIC church had land in Rokocho sub location; that although the area had not been surveyed, Pexbt 10 had brought individuals to court who had encroached part of their land. The court found that the land belonged to the 1st defendant. He maintained that the suit land is in Rokocho sub location. Before being issued with a title deed, the church had earlier been issued with an allotment letter which is in the church's possession (allotment letter not produced in court).
80. D.W.2 Joseph Kimeli Kiplalang, relied on his statement recorded and signed on 21st February 2022 after it was adopted as his evidence in chief.
81. In cross examination by Ms. Koech, he stated that he lives in Rokocho sub location; that in 2003 there was a big function attended by members of the community; that there is no dispute and no one indicated that there was a dispute between the 1st defendant and the community. He was handed over the project in 2003 peacefully.
82. He stated that the land is located in Rokocho sub location; that in 2004, they intended to put electricity in their project; that Kapkiagut clan objected but electricity was installed after the local administration intervened and brought the community together including some elders from Kapkaigut clan who endorsed the project. They obtained their title deed using the correct procedure; that there was no illegality or fraud.
83. In cross examination by Mr. Bett, he stated that he lives in Rokocho; that the project was handed over to him in 2003 and that there was a big ceremony. He maintained that the land was given by the community through the assistant chief.
84. He maintained that the suit land is in rokocho and not Cheptebo sub location; that Kamalgai clan lives in Rokocho while Kapkaigut clan lives in Cheptebo. The persons they sued as defendants in ELC 1006 of 2012 were members of Kamelgoi clan who had encroached on their land.
85. In re examination, he maintained that the land is in Rokocho and stated that he started working for the 1st defendant in the Cheptebo project in 2003; that among the documents handed over to him was a title deed.
86. Concerning the problem they encountered in 2004, he stated that Kapkaigut clan had objected to the 1st defendant getting electricity. The problem was solved by the community through the District Commissioner of the area.
87. Concerning the history of the suit land, he stated that he is not privy to it because he was not working for the 1st defendant when the suit property was acquired.
88. D.W.3 Philip Kiprono Kiplagat, Assistant Chief Rokocho sub location, stated that he was appointed into the position on 14th July 2003. Concerning Dexbt 1, he stated that the suit land was donated to



- AIC church located in Kibargoi location, Rokocho sub location. That there are public utilities built in the suit land, built and run by the community as a community based organization. Its committee is elected every 4 years.
89. In cross examination by Mr. Bett, he stated that the suit land is located in Rokocho sub location; that he is a member of Kamongoi clan and took over the office of assistant chief Rokocho when the former Chief passed on.
 90. Regarding Dexbt 10 (judgment), he stated that the defendants in that case were members of Kamugoi clan; that he was a witness in the case; that although the judgment says he stated he had never seen minutes for a meeting donating the community land, he did not say that in court. He acknowledged that there are no minutes before the court showing the community donated their land to the church.
 91. He could not tell whether adjudication was done for the suit land. He stated that he was not aware that the church had obtained title to the suit land long before adjudication but stated he is aware there are two clans, Kapchebut and Kamelgoi clan.
 92. In re examination, he asserted that he was appointed in 2003; that the project has been in existence since 1986; that the land was donated to the AIC church by the Rokocho community. Concerning what is captured in Dexbt 10 as his evidence, he stated that he had not seen any minutes for the meeting between the community and church donating the land. He further stated that the dispute between Kamelgoi clan and Kapchebut was resolved at the District Commissioner's office (Dexbt 6). He asserted that the suit land is in Rokocho sub location, Bargei location.
 93. D.W.4 Reuben Kimutahi Tanui, a Government Surveyor deployed to Elgeyo Marakwet county, pursuant to summons issued by the court requiring him to attend court and produce maps showing where AIC Cheptebo is located, he attended court and produced two maps. The 1st map shows that the church is located in Rokocho sub location. The second map, which is a sketch map, shows that the church lies between Cheptebo and Rokocho adjudications. He stated that the area where the church lies may not have been adjudicated but registration was completed before the 2 areas, Rokocho and Cheptebo were adjudicated. He further stated that there are instances where the Government maps out an area and registers it without adjudication. He opined that that is what may have happened in this case. He produced the maps as Dexbt 1 and 2.
 94. In cross examination by Ms. Koech, he stated that Cheptebo is located in Rokocho sub location; that AIC Cheptebo does not fall in any adjudication section and that it is in between the two sections. Further, that the registration of AIC church went through the normal registration process but was not adjudicated.
 95. In cross examination by Mr. Bett, he stated that Dexbt 1 is a map of the District Commissioner's Office administration division drawn in 1983; that the marking "AIC Cheptebo" were done by him; that according to the deed plan, attached to the title for LR 23748, the parcel of land is located in Cheptebo township.
 96. In re examination by Ms. Jepkemei, he stated that as an expert, he is unable to tell from Dexbt 1 whether AIC Cheptebo project is in Rokocho sub location. The maps he produced were drawn when the Ministry of Lands was under the Provincial/District Administration. That's why the maps read "administrative".
 97. After hearing closed, parties filed submissions which I have read and considered.



Submissions

Plaintiffs Submissions

98. In their submissions, the plaintiffs have given an overview of the parties pleaded cases and identified issues for the court's determination as follows;
- i. Whether the plaintiffs are the owners of the suit land, LR No. 23748 grant No.5935?
 - ii. Whether due process was followed to obtain the title held by the 1st defendant;
 - iii. Whether the suit is res judicata;
 - iv. What is the order as to costs?
99. On whether the plaintiffs are the owners of the suit land, the plaintiffs have asserted their claim that the suit land is their ancestral land; that the suit land remains unadjudicated and that the clan cultivated it in undivided shares. Based on the provisions of Article 63 of *the Constitution* of Kenya 2010, and Section 2 of the *Community Land Act* which inter alia defines the term "Community" as a clearly defined group of users of land identified on the basis of ethnicity, culture or similar community of interest as provided under Article 63(1) of *the Constitution*, which holds a set of clearly defined rights and obligations over land and land-based resources, it is submitted that the plaintiffs have proved that they are a community as contemplated by Section 2 of the *Community land Act*, 2012 and that they have proved that the suit property was their ancestral land.
100. On whether due process was followed in obtaining the title held by the 1st defendant, based on their contention that the suit land is unadjudicated, the plaintiffs submit that the title held by the 1st defendant should be cancelled because it is tainted with procedural illegality namely failure to adhere to the applicable law and procedure in acquisition of the title. In particular, it is submitted the title held by the 1st plaintiff was acquired without with the *Land Adjudication Act*, Cap 284 Laws of Kenya and the *Community Land Act*, 2012.
101. In support of their case, the plaintiffs have made reference to the following cases:-Daniel Musili Nyeki & 49 others v. Cabinet Secretary of Lands & Settlement & another; Bernard Malonza Musya & 30 others (Interested Parties) (2021) e KLR; Stephen Kipkosgei Samoei & 61 Others V. William Chepkinyeng & 21 Others (2013)e KLR and Republic V. Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage & 15 Others Mombasa HCMCA No.617 of 2003 (2006) 1 KLR (E & L) 563.
102. As to whether the instant suit is res judicata Eldoret ELC Suit No.1006 of 2012, it is submitted that the 1st defendant did not prove that the defendants in the former case were members of Kapkiagut clan or that Kapkiagut clan was aware of the suit to warrant the instant suit being not res judicata the former.
103. On costs, it is submitted that costs follow the events and the court is urged to allow the plaintiffs' suit with costs.

1st Defendant's Submissions

104. In the 1st defendant's submissions dated 22nd January 2022, an overview of the parties pleaded cases and the evidence adduced in respect thereof is given and the following identified as the issues for the court's determination:-
- i. Whether the certificate of lease held by the 1st defendant was legally obtained;



- ii. Whether the plaintiffs are entitled to the remedies sought; and
 - iii. Who should pay costs of the suit.
105. On whether the certificate of lease held by the 1st defendant was legally obtained, it is submitted that the 1st defendant followed due process in obtaining it. In that regard, it is submitted that the evidence adduced during hearing shows that the suit land was donated by the community in a public baraza; that after the donation the area assistant chief wrote a letter, dated 2nd April 1986 (Dexbt 1) confirming that AIC church owns the suit land and that on the basis of the foregoing facts, the 1st defendant went ahead and procured a title deed (Dexbt II) over the suit land.
106. Based on the provisions of Section 23 of the Registration of Titles Act (now repealed), under which the title held by the 1st defendant was issued, Section 26 of the *Land registration Act*, 2012 and the cases of *Teresia Wangari Mbugua v. Jane Njeri Nduati & another* (2020)e KLR; *In Re Estate of Raphael Ngugi (Deceased)* (2022)e KLR and *Munyu Maina vs. Hiram Gathiha Maina*, Civil Appeal No.239 of 2009 (unreported), where courts distilled the effect of registration as proprietor of land and issues touching on sanctity of title, it is submitted that the 1st defendant holds a good title to the suit land.
107. It is pointed out that the plaintiffs urged a case of fraud and illegality in the registration of the suit property in favour of the 1st defendant and based on the cases of *R.G. Patel V. Lalji Makani* (1957) E.A 314, quoted in the case of *Gladys Wanjiru Ngacha V. Treresia Chepsaat & 4 Others* (2013) e KLR and *Vijay Morjaria V. Nansingh Madhusingh Darbar & Another* (2000)e KLR, where the law regarding pleading a case of fraud/illegality and the standard of proof in respect of such cases is espoused and submitted that the plaintiffs failed to discharge the burden imposed of proving that the title held by the plaintiff was fraudulently obtained.
108. As to whether the plaintiffs are entitled to the orders sought, the 1st defendant submits that they are not as they failed to prove their pleaded case against the 1st defendant.
109. On who should bear the costs of the suit, it is submitted that the plaintiff having failed to prove their case against the defendants, it should be dismissed with costs to the defendants.

3rd and 4th Defendants Submissions.

110. The 3rd and 4th defendants, through their submissions, filed on 19th January, 2024 have similarly given an overview of the plaintiffs' pleaded case, their response, the evidence tendered in support of their pleaded case and identified the following as the issues for the court's determination:-
- i. What is the geographical location of the suit land, I.R.N 5935 L.R No.23748 AIC Cheptebo Development Centre?
 - ii. Whether the provisions of the *Land Adjudication Act*, Cap 284 Laws of Kenya were complied with in issuing title in respect of grant number I.R.N 5935 L.R No.23748 to the 1st defendant?
 - iii. Whether the title of grant number I.R.N 5935 L.R No.23748 was lawfully issued and registered to AIC Kenya Trustees Registered?
 - iv. Whether the plaintiffs' suit is incompetent, defective, misconceived, frivolous, vexatious and an abuse of court process?
 - v. Whether the plaintiffs are entitled to the orders and the reliefs sought?
111. Concerning the geographical location of the suit land, I.R.N 5935 L.R No.23748 AIC Cheptebo Development Centre, reference is made to the testimonies of the plaintiffs' witnesses, P.W.1 to P.W.4



and submitted that their testimonies raised a question of the geographical location of the suit property; that the question made the court to order the County Surveyor to avail documentation that could assist in determination of that issue and that in that, the County Surveyor availed two documents which show that administratively, the suit land is in Rokocho sub location but in terms of land adjudication is neither in Lower Cheptebo nor in Rokocho; it is in between the two.

112. It is pointed out that the County Surveyor informed the court that the suit land was not subjected to adjudication but was subjected to normal process of registration as it was curved out for a specific purpose under leasehold.
113. On whether the provisions of the *Land Adjudication Act*, Cap 284 Laws of Kenya were complied with in issuing title in respect of grant number I.R.N 5935 L.R No.23748 to the 1st defendant, it pointed out that the plaintiffs' suit is premised on the contention that the suit land was not subjected to land adjudication before it was registered in the name of the 1st defendant and submitted that no provision of law bars the 3rd defendant from issuing title before the completion of land adjudication.
114. As to whether the title of grant number I.R.N 5935 L.R No.23748 was lawfully issued and registered to AIC Kenya Trustees Registered, the 3rd and 4th defendant have answered that question in the affirmative.
115. The 3rd and 4th defendant urge this court to be guided by the decision of Munyao J, in Eldoret ELC Case No.1006 of 2012, where he declared the plaintiffs to be the lawful owners of the suit property.
116. The plaintiffs are said to have failed to prove that they are the lawful owners of the suit property.
117. Terming the plaintiffs' suit incompetent and lacking a reasonable cause of action against them, the 3rd and 4th defendant urges the court to dismiss it with costs to them.

Analysis and determination

118. From the pleadings, evidence and the submissions I find the main issues for the court's determination are:-
 - i. Whether the plaintiffs' are the true owners of the suit land;
 - ii. Whether the 1st defendant defendant obtained title to the suit land fraudulently?
 - iii. What orders should the court make?
119. On whether the plaintiffs are the true owners of the suit land, the totality of the evidence adduced in this case shows that there has been a boundary dispute between the Plaintiffs' clan Kapkiagut and Rokocho clan; that whilst the plaintiffs claim that the dispute between them and Rokocho clan was resolved in their favour, no evidence was adduced capable of proving that fact.
120. Whereas the plaintiffs claim to be the owners of the suit land, the evidence adduced in this suit shows that the 1st defendant has been in use, possession and control of a larger portion of the suit land (over 40 acres going by the plaintiffs' testimony to the effect that they are in occupation of between 5 to 15 acres of the suit land) for a long period of time (admittedly since early 1980's). The plaintiffs were unable to offer any evidence or explanation of the circumstances upon which the 1st defendant entered the suit land.
121. There was no evidence of any displacement and/or eviction of the plaintiff by the 1st defendant or the government to pave way for the occupation of the suit land by the 1st defendant.



122. The plaintiffs admitted that the dispute that existed concerning the suit land, if any, was between their clan and Rokocho clan. The dispute touched on the boundary between the two clans' land. There was no dispute between the plaintiffs and the church.
123. The 1st defendant led evidence to the effect that the suit land was donated by it by the Rokocho clan.
124. There being evidence that there was a dispute between the plaintiffs' clan Kapkiagut and Rokocho clan which allegedly donated the suit land to the 1st defendant, and there being evidence that the 1st defendant had been in use and possession of the suit land without any claim by the plaintiffs or their predecessors in entitlement to the suit land and further in the absence of any explanation by the plaintiffs concerning the circumstances upon which the 1st defendant gained entry into the suit land, which they claim to be theirs, the claim by the plaintiff can only be perceived or appreciated in the context of the boundary dispute between the plaintiffs' clan and Rokocho clan.
125. As pointed out herein above, whilst the plaintiffs claim that the boundary dispute was resolved in their favour, they did not adduce any evidence capable of proving that fact.
126. The evidence adduced by the County Surveyor, D.W.4, is to the effect that the suit land lies between Cheptebo and Rokocho.
127. Without any evidence capable of showing that the suit land originally belonged to the plaintiffs' clan and not Rokocho clan, which allegedly donated the land to the 1st defendant, I find and hold that the plaintiffs' have failed to prove that they are the true or beneficial owners of the suit land.
128. As to whether the 1st defendant obtained title to the suit land fraudulently, while it is not in dispute that the suit land fell in a land adjudication area and was not adjudicated at the time the 1st defendant obtained its certificate of lease, being of the view that obtaining of the certificate of lease before the area was adjudicated is not proof of fraud on the part of the 1st defendant or any of the other defendants, I return a negative verdict on that issue.
129. The upshot of the foregoing is that the plaintiffs have not made up a case for being granted the orders sought. Consequently, I dismiss their suit with costs to the defendants.
130. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 25TH DAY OF MARCH, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered electronically in the presence of:-

Mr. Bett for the Plaintiffs

Ms. Koech for the 1st Defendant

N/A for the 2- 4th Defendants

Court Asst.: Christine Towett

