REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 245 Of 2012

Formerly Hcc 46 Of 2006

Kipsang

Chepkwony.....Plaintiff

Vs

.David Kiptoo Cheluget ….....1st Defendant

.Abraham Kirwa Cheluget.....2nd Defendant

(Suit by plaintiff seeking orders that transfer of suit from 1st defendant to 2nd defendant by way of gift was fraudulent; plaintiff having been awarded part of the suit land by the Land Disputes Tribunal; award of tribunal having been entered as judgment of the court; judgment of the court not having been set aside; whether transfer of suit land from 1st defendant to 2nd defendant was fraudulent and aimed at defeating the judgment; land control act; whether consent of the land control board is required for an order or judgment of the court; plaintiff's suit succeeds)

JUDGEMENT

PART A : INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of plaint filed on 31st March 2006 through the law firm of M/s Anassi Momanyi & Company Advocates. In his plaint the plaintiff pleaded that sometimes in the year 1997, he filed a suit against the 1st defendant before the Land Disputes Tribunal of Mosop Division (the tribunal) claiming 18.5 acres of land from the 1st defendant. He pleaded that upon hearing the case, the tribunal awarded the plaintiff 18.5 acres out of land reference No. Nandi/Kipkarren Salient/119. The award of the tribunal was forwarded to the Kapsabet Principal Magistrate's Court, and filed as Kapsabet Land Disputes Tribunal Case No. 36 of 1997 (LDT No.36/97), which award was adopted as a judgement of the court on 24th June 1999.

2. The plaintiff has further pleaded that on or about 18th August 1999, the 1st defendant transferred the land parcel Nandi/Kipkarren Salient/119 to the 2nd defendant as a gift without receiving any consideration. The 2nd defendant is son to the 1st defendant. The plaintiff averred that the said transfer was fraudulent, and that it was effected so as to defeat the course of justice, particularly, the enforcement of the decree in Kapsabet LDT Case No.36/97.

3. The plaintiff has further averred that the 1st defendant attempted to challenge the decision of the tribunal in vain, through a judicial review application filed as Eldoret High Court Miscellaneous Civil Application No. 206 of 1997, which was struck out, and through an appeal filed in the High Court at

Kakamega, as Kakamega High Court Civil Appeal No. 34 of 2000 (later transferred to the Eldoret High Court as Eldoret High Court Civil Appeal No.151 of 2000), which was dismissed.

4. The plaintiff in his plaint sought the following orders :-

(a) Rectification of the register by cancellation of the transfer of land the land parcel No. Nandi/Kipkarren Salient/119 from the 1st to the 2nd defendant.

(b) A declaration that the transfer of land reference No. Nandi/Kipkarren Salient/119 from the 1st defendant to the 2nd defendant was fraudulent.

(c) Costs of the suit.

5. The summonses were duly served and the two defendants filed a joint statement of defence on 14th June 2006 through the law firm of M/s Birech, Ruto & Company Advocates. In the defence, the 2nd defendant has averred that he was not aware that there was a judgment over the land parcel Nandi/Kipkarren Salient/119 at the time that the land was transferred to him.

6. The defendants jointly denied that the said transfer was calculated to defeat justice, and pleaded that the tribunal acted *ultra vires* its powers, as it had no jurisdiction to handle the dispute referred by the plaintiff. They have pleaded that it is trite law, that a decision made without authority, is void *ab initio*, and cannot be acted upon.

7. They further pleaded that the plaintiff cannot ask for cancellation of the transfer from the 1st defendant to the 2nd defendant as that would be offending the provisions of Section 34 of the Civil Procedure Act. They averred that the plaintiff's suit is time barred as it is based on a fraud allegedly committed on 18th August 1999. They further stated that the award of the tribunal was so uncertain that no reasonable court can act on it. They were of the view that the plaintiff filed this suit after receiving an application filed by the 2nd defendant in LDT No. 36/97 to have the orders made on 24 February 2000 and issued on 28 February 2000 set aside. It was pleaded that the plaint was bad in law, as it did not set down the particulars of negligence (probably meant the particulars of fraud). The defendants asked that the suit be dismissed with costs.

8. The plaintiff filed an amended plaint on 28th June 2006, the only amendment being to plead particulars of fraud. The plaintiff particularized the fraud of the defendants as follows :-

(i) Transferring the land so as to defeat the execution of the judgement in Kapsabet Principal Magistrate Land Dispute Tribunal Case No. 36 of 1997.

(ii) Transferring the land during the pendency of the suit.

(iii) Transferring the land after a decree had been issued.

(iv) Transferring the land after the decision of the tribunal.

(v) Transferring the land secretly.

(vi) Unjustly effecting the transfer.

(vii) The actions were actuated by malice.

9. The defendants filed a joint statement of amended defence on 11th July 2006 and denied the particulars of fraud. They also averred that they will raise a preliminary objection as the amended plaint was not accompanied by a verifying affidavit.

10. The plaintiff filed a Reply to the Amended Defence on 26th July 2006. The plaintiff joined issue with

the defendants and specifically denied the assertions that the suit offends the provisions of Section 34 of the Civil Procedure Act; denied that a verifying affidavit is required to accompany an amended plaint; denied that the suit is time barred under the Limitation of Actions Act; denied that the award of the tribunal was uncertain and incapable of being acted upon by a reasonable court; and denied that the suit is bad in law.

11. The pleadings having closed the matter was set down for hearing on 20th June 2007. On that day, Mr. Birech for the two defendants, raised the preliminary objection that the amended plaint was incompetent for want of a verifying affidavit and further that the suit offends the provisions of Section 34 of the Civil Procedure Act. The gist of the second objection was that the plaintiff ought to have executed the decree issued in Kapsabet LDT No.36/97 instead of filing the present suit.

12. The objection was heard and determined by Bauni J, who dismissed it vide a ruling delivered on 3rd October 2007. No appeal was filed arising from that ruling.

13. On 21st July 2010, the 2nd defendant changed advocates and appointed the firm of M/s Arap Mitei & Company Advocates to act for him in place of M/s Birech, Ruto & Company who continued being on record for the 1st defendant. The suit was eventually heard on various dates between 11th April 2013 and 29th July 2013. The parties testified in support of their cases with the plaintiff calling one witness.

PART B : THE PLAINTIFF'S EVIDENCE

14. The plaintiff in his evidence stated that he knew the 1st and 2nd defendants as father and son. He stated that the land parcel Nandi/Kipkarren Salient/119 (the suit land) was previously registered in the name of the 1st defendant, but was later transferred to the 2nd defendant. He recalled having filed a dispute before the Land Disputes Tribunal where he sued the 1st defendant. He stated that the case before the tribunal was determined in his favour, and the 1st defendant ordered to transfer 18.5 acres of the suit land. He produced the proceedings of the tribunal and the proceedings in Kapsabet LDT Case No.36/97 as exhibits. He also produced as exhibits the rulings in Eldoret High Court Miscellaneous Civil Case No. 206 of 1997; the ruling in Eldoret High Court Civil Appeal No. 151 of 2000 (initially Kakamega HCCA No. 34 of 2000) ; a copy of the green card to the suit land; the transfer instrument , transferring the suit land from the 1st defendant to the 2nd defendant; a copy of the application for consent to transfer ; the consent to transfer, issued by the land control board, allowing the transfer from the 1st defendant to the 2nd defendant; and the official search of the suit land. He prayed for the orders sought in the plaint.

15. Cross-examined by Mr. Birech, for the 1st defendant, the plaintiff agreed that he currently resides in Cheptil area on land parcel Nandi/Cheptil/85. He stated that he bought 18.5 acres of the land parcel Nandi/Cheptil/85 (Cheptil land) from the 1st defendant for a consideration of Kshs. 5,100/= through agreement. He confirmed that the two had never had an agreement over the land parcel Nandi/Kipkarren Salient/119 which is the suit land. He stated that in the tribunal he asked for 18.5 acres of the suit land, and not 18.5 acres of the Cheptil land, because the same had been sold by the brothers of the 1st defendant. He stated that he occupies 6 acres of the Cheptil land. As to the transfer to the 2nd defendant, the plaintiff stated that he was not aware whether it was before or after the decision of the Kapsabet court.

16. Cross-examined by Mr. Mitei for the 2nd defendant, the plaintiff stated that he has never had an agreement with the 2nd defendant over the suit land. He agreed that the suit land is in Kipkarren Division, whereas the land in Cheptil is in Kabiyet Division, which are two separate Divisions and are far apart. He agreed that he referred his dispute to Kabiyet Land Disputes Tribunal but stated that he was not specific as to the land that he wanted. He accepted that he bought the land in Cheptil in 1965 and filed his case before the tribunal in 1997 which is 32 years after.

17. After re-examination, Mr. Momanyi for the plaintiff closed his case but before the start of the defence case, he applied to re-open the case to produce some additional evidence, being the decree in a suit Eldoret High Court Civil Case No.48 of 1991. This was objected to by both Mr. Birech and Mr. Mitei for the 1st and 2nd defendants, but I overruled the objection, as I thought that it would be in the interests of justice to have the plaintiff ventilate his case fully. I also saw no prejudice which would be suffered by

the defendants as they had not yet started their defence case.

18. The plaintiff was thus recalled and he produced a certified copy of the decree in Eldoret HCCC No. 48 of 1991 as a further exhibit. The suit Eldoret HCCC No. 48 of 1991 concerned the land parcels Nandi/Cheptil/85 and Nandi/Kipkarren/119, the latter being the same subject matter in this suit. The plaintiffs in that suit were Joshua Kipleting Too and Kibiego Kogo. The defendant was David Kiptoo Cheluget, the 1st defendant herein. In that suit, the plaintiffs claimed that David, held the two parcels of land land in trust for them, and they sought orders for the said parcels of land to be sub-divided amongst themselves as brothers.

19. The court decreed that David held the land parcel Nandi/Cheptil/85 in trust for the plaintiffs and ordered the land to be sub-divided into three equal parts, each party to receive 6 acres. No order seems to have been made concerning the land parcel Nandi/Kipkarren/119 which is the suit land herein and it seems as if the same was left entirely in the hands of the 1st defendant.

20. PW-2 was Joshua Kipleting Too. He is a brother to David (the 1st defendant). He testified that David is the first born in their family, followed by Kibiego, then himself. He confirmed that he and Kibiego filed the suit Eldoret HCCC No. 48 of 1991 so as to have the land parcel Nandi/Cheptil/85 sub-divided amongst the three brothers. He stated that David, had sold the whole land to the plaintiff herein. He confirmed that the decree in Eldoret HCCC No. 48 of 1991 was implemented and the land parcel Nandi/Cheptil/85, sub-divided into three portions of 6 acres, namely Nandi/Cheptil/428, 429, and 430. The land left for David is parcel No. 430. The witness stated that the plaintiff now resides in the 6 acres owned by David i.e the parcel No. Nandi/Cheptil/430.

21. Cross-examined by Mr. Birech, PW-2 stated that before they filed the suit Eldoret HCCC No. 48 of 1991, the plaintiff occupied the whole of the land parcel Nandi/Cheptil/85 and had even built a house. After the sub-division, the house fell in the portion of PW-2. The plaintiff pulled down the house and moved into the portion assigned to the 1st defendant.

25. With that evidence, the plaintiff closed his case.

PART C : THE EVIDENCE OF THE DEFENDANTS

26. DW-1 was the 1st defendant. He testified in chief, that he previously owned the land parcel Nandi/Cheptil/85 measuring 18.5 acres and resided there. He later bought the land parcel Nandi/Kipkarren Salient/119 and moved into it, in the year 1965. In the year 1967, he sold the Cheptil land to the plaintiff. He stated that he received a deposit of Kshs. 5,000/= which covered the coffee planted on the land but stated that they had not agreed on the full purchase price. He never formally transferred the land to the plaintiff. He stated that the agreement he had with the plaintiff was for the Cheptil land and not the Kipkarren land. He agreed that he transferred the Kipkarren land to the 2nd defendant who is his son. He transferred it to him, because the 2nd defendant is his son, and he moved to another land in Tuiyo. He confirmed that he was sued before the tribunal and that the tribunal decided that the suit land (Kipkarren) be given to the plaintiff. He stated that he does not agree with this decision. His position was that if the plaintiff has any claim, the same should be restricted to the Cheptil land and not the suit land. The agreement that he had, was for the Cheptil land, and not the Kipkarren land.

27. In cross-examination, the 1st defendant stated that he never testified before the tribunal. He stated that at the tribunal, the plaintiff wanted the land in Cheptil. He agreed that vide the decree in Eldoret HCCC No. 48 of 1991, the court ordered the land in Cheptil sub-divided into three portions and that this was implemented. He stated that it was after the implementation of the decree that the plaintiff sued before the tribunal. He was aware that the tribunal decided that the plaintiff be given 18.5 acres of the Kipkarren land. He was aggrieved by this decision and filed the appeal in Kakamega. He agreed that the decision of the tribunal has never been overturned by the court. He agreed that he transferred the suit land to the 2nd defendant in the year 1999 as a gift. He also agreed that he has a close relationship with the 2nd defendant and indeed the 2nd defendant accompanied him to Kakamega, to see an advocate, to file the appeal on the decision of the tribunal. He denied that he transferred the suit land to the 2nd defendant so as to defeat the

decision of the tribunal.

28. Cross-examined by Mr. Mitei for the 2nd defendant, the 1st defendant stated that there was nothing that prevented him from transferring the suit land to the 2nd defendant. He averred that when he transferred the land, he was not aware of the decision of the tribunal and that the order came after the transfer. He further stated that the 2nd defendant was living on the suit land when he transferred it to him.

29. The 2nd defendant testified in Chief, that he lives on the suit land and that the same was transferred to him by his father, the 1st defendant, on 18th August 1999. He produced the official search of the land as an exhibit, to demonstrate that he is the proprietor. He stated that he has been living on the suit land since the year 1982. He considers that as his home and has even built a permanent house. He averred that his father transferred the land to him as he wanted to take an AFC loan. He testified that before the transfer, he was not aware of any case touching on the land in Cheptil. Neither was he aware of the decision of the tribunal nor the decree from the Kapsabet court. He agreed driving his father to Kakamega, but stated that he did not know why his father wanted to see an advocate. As far as he was concerned, there was no caution, nor court order stopping any dealings on the land. He asserted that the suit land is now his, and he is not ready to give it away. He asked that the decision of the tribunal be set aside as the tribunal had no jurisdiction over the suit land which was in another Division.

30. Cross-examined by Mr. Momanyi, the 2nd defendant agreed that the application for consent to transfer was dated 17th August 1999. The transfer was effected on 18th August 1999. He agreed that the land was transferred to him as a gift. He repeated that the land was transferred to him as a gift to enable him get an AFC loan but had nothing to show that a loan was indeed taken. He also repeated that he had no idea why his father asked him to drive him to Kakamega to see an advocate. He however agreed that he enjoyed a good relationship with his father. He confirmed that they, (as defendants), have not filed any counterclaim.

31. With that evidence, the defendants closed their respective cases. The hearing of the matter having closed, I invited counsels to make submissions.

PART D : SUBMISSIONS OF COUNSELS

32. Mr. Momanyi submitted that the decision of the tribunal which awarded the plaintiff the 18.5 acres of the suit land was made on 13th May 1997. He pointed out that the award was adopted as a judgment and decree of the court on 24th June 1999, and that the transfer to the 2nd defendant, was made on 18th August 1999. He submitted that the transfer was aimed at defeating the award of the tribunal, and the subsequent decree, and was therefore fraudulent. He further pointed out that the 1st defendant's attempts to nullify the award and decree came to nought. He averred that the transfer was effected when the 1st defendant's application for certiorari had been dismissed. He asserted that the 2nd defendant must have been aware of the decision of the tribunal and the subsequent decree, despite feigning ignorance, and was thus privy to the fraud. He relied on three authorities being, ***Suleiman vs Azzan (1958) EA 553***, ***Cohen vs Syed Ali & Others (1956) EALR 161***, and ***Chauhan vs Omagwa (1985) KLR 656.***

33. Mr. Birech on his part, submitted that the crux of the case hinges on the original agreement between the plaintiff and the 1st defendant which involved the land parcel Nandi/Cheptil/85. He pointed out that the land in Cheptil was never formally transferred to the plaintiff, and stated that the formalities requisite to complete that agreement, i.e the consent of the land control board was never obtained. It was his view, that it was open to the plaintiff to file suit for adverse possession, but never did so. He stated that owing to the suit, filed by the brothers of the 1st defendant, the land in Cheptil has now been sub-divided into three portions and the plaintiff occupies 6 acres of it. He submitted that the plaintiff could not claim, before the tribunal, 18 acres of the suit land, (Kipkarren), since what he had was an agreement for 18.5 acres for the Cheptil land. He pointed out that there was absolutely no contractual relationship between the plaintiff and the 1st defendant concerning the suit land. In his view the tribunal could not make an agreement for the suit land which never existed.

34. Mr. Birech further pointed out that the tribunal could not make an award on registered land and he

submitted that the award is therefore null and void for want of jurisdiction. He submitted that where a decision is null and void *ab initio*, no court of law can act on the same. As to the award itself, Mr. Birech submitted that it was read out in court on 24th June 1999 in the absence of the 1st defendant, and that the same was confirmed on 24th February 2000. He submitted that the transfer of the land to the 2nd defendant was made on 18th August 1997 way back before the award was made an order of the court. He further submitted that this suit was filed on 31st March 2006. He stated that pursuant to Section 4 (2) of the Limitation of Actions Act, CAP 22, tort actions have a limitation period of 3 years. He asserted that this suit is therefore time barred.

35. Mr. Birech reiterated his preliminary objection, and submitted that this suit offends the provisions of Section 34 (1) of the Civil Procedure Act. He also submitted that once the Kapsabet court issued a decree in favour of the award of the tribunal, that judgment became a dealing in land which required the consent of the land control board. He stated that no application for consent was made and thus the award and decree are now unenforceable and have become void. He trashed the authorities tendered by Mr. Momanyi as being irrelevant. On his part, he relied on the cases of ***Mathenge & Another vs Kimotho (1994) KLR 461*** and ***Omulo vs Small Enterprises Ltd (2005) 1 KLR 668***.

36. Mr. Mitei, for the 2nd defendant, submitted that the tribunal had no jurisdiction over the matter. He asserted that the said decision is a nullity in law and that it is immaterial whether it has been quashed or challenged. He further submitted that the allegations that the land was transferred to the 2nd defendant fraudulently have not been proved. He pointed out that the 2nd defendant testified that he was unaware of any dispute before the tribunal or the decree of the Kapsabet court adopting the award. He stated that the transfer to the 2nd defendant was made in good faith and that the suit land had no encumbrances to stop the transfer. He stated that the court decree was registered against the suit land way after the land had been transferred to the 2nd defendant. He averred that the plaintiff's right can only be on the land in Cheptil, as there has never been any agreement for the sale of the suit land to the plaintiff. He stated that the plaintiff has slept on his rights since 1965 and that there was no basis to allow him claim the suit land. He relied on the ***Halsbury's Laws of England, 3rd Edition, Volume 9***, page 351 and the case of ***Muhia vs Mutura (1999) 1 EA 209***. He also relied on the Limitation of Actions Act and asked that the suit be dismissed with costs.

37. I allowed Mr. Momanyi to file submissions in response to the submissions of the defendants. *Inter alia* in his reply, Mr. Momanyi submitted that there is no counterclaim seeking to have the proceedings of the tribunal set aside or be declared to have been null and void. As to time, he stated that time started running from 1997, when the decree was issued, and not 1965 when the plaintiff and 1st defendant entered into an agreement. He pointed out that the 2nd defendant has never challenged the decision of the tribunal and the subsequent decree. He asserted that the transfer was made in the year 1999, and not the year 1997, as submitted by Mr. Birech. As to Limitation, his view was that this is an action founded on a judgment, and the limitation period is 12 years, which had not lapsed when the suit was filed. He also contended that the provisions of Section 34 of the Civil Procedure Act were not applicable as the 2nd defendant was not a party to the Kapsabet case.

PART E : DECISION

38. It is with the above pleadings, evidence, and submissions that I have to make a decision in this matter.

39. The counsels could not agree on issues and each drew separate issues. In my view, the following issues will adequately cover the matter herein. I have adopted these issues to marry the issues filed by all parties.

(1) Whether or not the tribunal had jurisdiction to hear the dispute between the plaintiff and 1st defendant.

(2) Whether or not the award was adopted as an order of court.

(3) Whether the award and decree have been challenged by the defendants in these or other proceedings.

(4) Whether the award and decree remain in force and must be executed.

(5) Whether or not the transfer to the 2nd defendant was fraudulent and aimed at defeating the decree.

(6) Whether or not the transfer to the 2nd defendant ought to be protected or disturbed.

(7) Whether or not the suit herein is time barred.

(8) Whether or not the plaintiff is entitled to the prayers sought.

40. I will not make any separate heading for each issue but I trust that at the end of this decision, I will have canvassed all issues as disclosed above.

41. The facts of this matter are in most material respects not in dispute. Much of it has been set out above but I will recap the same.

42. Around the year 1965, the 1st defendant entered into an agreement with the plaintiff for the sale of the land parcel Nandi/Cheptil/85 measuring 18.5 acres for consideration. Although the 1st defendant in his evidence stated that the plaintiff never paid the full consideration, I think the issue is immaterial. The fact remains that there was a sale of the land parcel Nandi/Cheptil/85 and given the subsequent events, the 1st defendant must have been satisfied that the plaintiff has paid the consideration in full; no complaint over it was ever brought forward and the 1st defendant never moved to nullify the sale.

43. The land was however never transferred to the plaintiff and in the year 1991, two brothers of the 1st defendant filed the suit Eldoret HCCC No. 48 of 1991 claiming equal portions of the Cheptil land. The court in a decree issued on 30th January 1997 ordered the land to be sub-divided into three equal portions of 6 acres each. This decree was effected and the plaintiff moved into the 6 acre portion of the 1st defendant, which he still resides in to date.

44. In April of 1997, the plaintiff filed a dispute before the Kabiyet Division Land Disputes Tribunal against the 1st defendant. In the tribunal, he stated that he had bought the Cheptil land but owing to the decision in Eldoret HCCC No. 48 of 1991, he was now landless. He thus wanted to be given alternative land of equal measure by the 1st defendant. The tribunal in its decision, awarded the plaintiff 18.5 acres of the land parcel Nandi/Kipkarren Salient/119, which at that time, was registered in the name of the 1st defendant. The rationale behind the award of the tribunal, probably, was to compensate the plaintiff with land of equivalent size since he could no longer claim the land in Cheptil, owing to the court decree in Eldoret HCCC No. 48 of 1991. The award was rendered on 13th May 1997. It was filed in the Kapsabet Principal Magistrate's Court on 21st May 1997 as Kapsabet LDT Case No.36 of 1997.

45. Before the award was read to the parties, the 1st defendant filed the suit Eldoret High Court Miscellaneous Civil Case No. 206 of 1997. The same was a judicial review application seeking to quash the decision of the tribunal. That application was struck out with costs by Nambuye J (as she then was), on the 6th January 1999, apparently because there was a technical defect in the supporting affidavit.

46. The award of the tribunal was then read out on 24th June 1999. On that day, Mr. Murgor was present for the 1st defendant (who was defendant in those proceedings) and asked that the award be read out, despite the absence of his client. Parties were given 30 days to appeal. For some reason, the matter was then listed for "confirmation of the award". The award was then "confirmed" on 24th February 2000.

47. An appeal against the decision of the tribunal seems to have been filed by the 1st defendant, on 5th May 2000, initially as Kakamega HCCA No. 34 of 2000, which was transferred to Eldoret High Court, as Eldoret HCCA No. 151 of 2000. That appeal was dismissed by Dulu J, on 7th June 2005. The basis of the dismissal was that there was no direct avenue for appealing the decision of the Land Disputes Tribunal to the High Court, as the Land Disputes Tribunal Act (now repealed by the Environment and Land court Act, Act No. 19 of 2011), directed that appeals first be heard by the Provincial Appeals Committee before a second appeal could be filed in the High Court. No other proceedings were filed by the 1st defendant to

challenge the award.

48. On 18th August 1999, the 1st defendant transferred the suit land, as a gift, to the 2nd defendant who is his son. On 31st March 2006, the plaintiff filed this suit seeking to nullify the registration of the 2nd defendant as the registered proprietor of the suit land.

49. There is no doubt in my mind, that the tribunal did not have jurisdiction to hear the dispute between the plaintiff and the 1st defendant. The jurisdiction of the land disputes tribunal under Section 3 of the Land Disputes Tribunal Act, Act No. 18 of 1990, limited the jurisdiction of the land disputes tribunal to disputes relating to :-

a. *The division of , or the determination of boundaries to land, including land held in common.*
b. *A claim to occupy or work land; or*
c. *Trespass to land.*

50. The dispute filed before the tribunal was for an order to have the 1st defendant transfer to the plaintiff land, equivalent to 18.5 acres. The tribunal certainly did not have jurisdiction to entertain such a dispute. The dispute was not one seeking to determine boundaries to land; neither was it a dispute on a claim to occupy or work land, nor was it a dispute touching on trespass to land. All the same, the tribunal heard the matter and rendered an award granting the plaintiff 18.5 acres out of the suit land. It is an interesting award, because there was never any agreement between the plaintiff and the 1st defendant touching on the sale of this land. Their agreement was in respect of the land in Cheptil and not the suit land.

51. The attempts of the 1st defendant to have this decision quashed did not succeed, as the judicial review application in Eldoret Misc. Civil Suit No. 206 of 1997 was dismissed. So too the appeal in Eldoret HCCCA No. 151 of 2000. The 1st defendant never filed any other suit to have the decision of the tribunal and the subsequent decree quashed or nullified. The award and the decree therefore still stand as issued, as they have never been declared null, nor have they ever been set aside.

52. The question that arises, is whether that award, and the subsequent judgment and decree are null and void *ab initio* and incapable of being acted upon, or, whether they remain in force, despite the obvious lack of jurisdiction.

53. The position of counsels for the defendants, is that the award is null and void *ab initio*, and that being the case, the same cannot be acted upon by this court. The position of the plaintiff, is that there is no counterclaim filed to nullify the award and decree, and therefore the same remains in force. No direct authority was referred to me by either of the counsels. Mr. Mitei referred me to the part of the Halsbury's Laws of England, which states that a judgment of the court made without jurisdiction is a nullity. I have no problem with accepting that position, but the point, I think, is whether the judgment, even if made without jurisdiction, still exists and must be respected until it is set aside, or whether it is to be ignored because it was apparently made without jurisdiction.

54. I must say that I have been put in a dilemma. On one hand, it is clear to me that the decision of the tribunal was out of jurisdiction. On the other hand, there exists a judgement and decree of the court, based on that award, which judgment has not been set aside. This is owing to the provisions of Section 7 of the Land Disputes Tribunal Act (now repealed) which provided as follows :-

7. *(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.*

(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

It will be seen from the above, that the award of the tribunal, is now not just an award, but an actual judgment and decree of the court, which still subsists.

55. I think as a matter of public policy, judgements, whether or not made out of jurisdiction, ought to be respected so long as they have not been set aside or nullified. To hold otherwise, will be to invite anarchy, as it will be left to an individual to make his own decision, on whether or not to respect a judgment, and opt not to respect the judgment, if in his view the same was made out of jurisdiction. In my opinion, unless that judgment, whether made with, or without jurisdiction, has been set aside or declared null, must be respected.

56. The judgment and decree of the Kapsabet court in LDT No. 36/97 has not been set aside and it is still in force. I do not have before me any pleadings by way of counterclaim or otherwise, seeking to set aside that judgment or seeking a declaration that the said judgment is a nullity. Parties are bound by their pleadings, and in this instance, if the defendants wanted that judgment nullified, they ought to have filed a counterclaim seeking to annul the judgment. If I am to declare that judgment null and void in the absence of pleadings, then I would be unfair to the plaintiff, because he has not been alerted of any such intention, nor given an opportunity to defend that judgment. I have little choice but to hold that the said judgment of the Kapsabet court stands and must be respected in the absence of any suit or pleadings to have the same set aside.

57. That I believe resolves any issues about the award and the subsequent decree of the Magistrate's Court, but before I close that point, let me say something about the argument of Mr. Birech, that this suit is incompetent as it does not comply with the provisions of Section 34 of the Civil Procedure Act. My short answer to this, is that, the issue has already been determined through the ruling of Bauni J, of 3rd October 2007. I do not have jurisdiction to sit as an appellate court to that ruling. If at all the defendants were aggrieved by that ruling, the avenue open was to appeal the same which was never done. I will not therefore dwell much on that point, as it has already been decided and it is therefore *res judicata*.

58. The other important question is whether the transfer to the 2nd defendant was done in good faith, and should be respected, or whether it was done solely to defeat the award and subsequent decree. The case of the defendants is that the transfer was made in good faith. The 1st defendant in his evidence, stated that he was not aware of the judgment before he made the transfer. The 2nd defendant also denied any knowledge of the award and decree before the transfer was effected to him. I am not convinced. It is obvious beyond peradventure, that the 1st defendant was aware of the award. That is why he filed the judicial review seeking to nullify that award. He could of course not file a judicial review application on an award that he was not aware of. It happened that the judicial review suit failed and the award was subsequently read out and adopted as a judgment of the court.

59. Mr. Birech argued that the award was read in the absence of the 1st defendant. That may be so, but his counsel was present, and his counsel specifically stated that the award could be read in the absence of the 1st defendant. The 1st defendant cannot claim not to have been aware of the reading of the award, as his counsel must have been acting on instructions. There is absolutely no averment by the 1st defendant that Mr. Murgor, then acting for him, had no instructions in the matter and the only presumption, in the absence of evidence to the contrary, is that the 1st defendant became aware of the reading of the award on the day that it was read, which is on 24th June 1999.

60. The 2nd defendant on his part, stated that he was not even aware of any dispute existing between the plaintiff and the 1st defendant. He testified that when he drove his father to Kakamega, he did not know why his father wanted to see an advocate. He agreed however, that he had a good relationship with his father. When he gave evidence, the 2nd defendant testified that he is 56 years old. Around the year 2000 the 2nd defendant certainly was more than 40 years old. He is a son to the 1st defendant.

61. I find it difficult to believe that the 2nd defendant would not know of any dispute, that his father had, touching on the Cheptil land. I find it even more difficult to buy the statement, that the 2nd defendant never knew of the award and decree, before the suit land was transferred to him. He lived on the suit land, part of which had been awarded to the plaintiff. In the ordinary course of events, the 2nd defendant must have known, or must be expected to know, that part of the land that he occupies, and which may very well consist of his future inheritance, has been awarded to another person. I also find it highly improbable, that the 1st defendant would ask the 2nd defendant to drive him all the way to Kakamega, without the 2nd

defendant being informed why they were travelling to Kakamega to see an advocate. That is why I do not agree that the 2nd defendant did not know of the fact that the suit land had been awarded to the plaintiff before it was transferred to him. He knew of this position, and in my view, was actively involved in ensuring that the suit land was transferred to him. It does not take rocket science to discern the motivation for the transfer. The same was no doubt meant to defeat the award and decree. There would have been no other motivation given the timing of the transfer, and even without any direct evidence, I think the circumstances surrounding the transfer speak for themselves.

62. In the case of ***Suleiman v Azzan (1958) EA 553*** cited by Mr. Momanyi, the plaintiff sought to set aside as fraudulent a conveyance of land by the first defendant, the judgment debtor, to his son, the second defendant. The conveyance was made three days after judgment against the first defendant. The plaintiff claimed that the conveyance was intended to defeat his claim. Although there was no direct evidence of fraud, the court held *inter alia* that circumstantial evidence can suffice to establish fraud.

63. In our case, the circumstances and timing of the transfer from the 1st defendant to the 2nd defendant, point to an intention, by the 1st defendant, to defeat the tribunal award and the subsequent judgment of the subordinate court.

64. Section 143 of the Registered Land Act, Chapter 300, Laws of Kenya (now repealed by the Land Registration Act, 2012) which was the prevailing law when this suit was filed, allows the court to order the rectification of the register by making an order cancelling the registration, if such registration was obtained by fraud or mistake. The said provision was drafted as follows :-

S. 143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

65. It will be seen from the above provision, that the court can order the rectification, but such rectification is not to affect the title of a proprietor who is in possession and acquired the land for valuable consideration, unless such proprietor had knowledge of the fraud. It has been argued that the 2nd defendant was not aware of the proceedings that ordered the 1st defendant to surrender 18.5 acres of the suit land to the plaintiff. I have already held that I am skeptical of that argument given the surrounding circumstances. But even if the 2nd defendant was innocent, he is not protected by Section 143 (2) of the Registered Land Act. This provision only protects an innocent proprietor who is in possession and who *acquired the land for valuable consideration.* The 2nd defendant did not acquire the land for valuable consideration; he acquired it by way of gift and is therefore not one of the category of persons protected by Section 143 (2). His title can therefore be subjected to cancellation.

66. The interpretation of Section 143 of the Registered Land Act arose in the case of ***Chauhan vs Omagwa (1985) KLR 656,*** relied upon by Mr. Momanyi. In this case, the plaintiff had purchased land from a seller and moved into possession. The same land was again sold to a second person who obtained registration as proprietor. The first buyer sued for rectification of the register. The court of appeal upheld the decision of the High Court in making an order of rectification of the register. The court held that the registered proprietor, even if he had bought the land bona fide, was not protected by Section 143 (2) of the Registered Land Act because he was not in possession. In our case, the 2nd defendant is not immune for the reason that he did not acquire the suit land for valuable consideration.

67. I have held that the transfer to the 2nd defendant was aimed at defeating the judgment and such transfer cannot be said to be a bona fide transfer but a fraudulent transfer. The 2nd defendant, given the

surrounding circumstances, must have been involved in the fraudulent transfer but even if he was not so involved, he is not protected, for he did not acquire title for valuable consideration. The title of the 2nd defendant ought therefore to be cancelled.

68. The defendants raised the issue of limitation. It is the argument of the defendants that the plaintiff's cause of action is time barred. It appears as though the argument of the defendants is that the cause of action ought to have been filed within either three or six years which is the limitation period for actions based on tort and contract respectively, pursuant to the provisions of Section 4 of the Limitation of Actions Act, CAP 22, Laws of Kenya. However, the action of the plaintiff, is not one based on tort or contract. No tort has been alleged against the defendants. The cause of action cannot also be one based on contract as the plaintiff, is not seeking to enforce the 1965 contract that he had with the 1st defendant, and he has never had any sort of contract with the 2nd defendant. The action of the plaintiff in my view, is an action for the recovery of land, for which the limitation period is 12 years as laid out in Section 7 of the Limitation of Actions Act, which provides as follows :-

7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

69. What the plaintiff is seeking in this action is to recover the 18.5 acres of land that was awarded to him by the tribunal and as decreed by the Kapsabet Magistrate's Court, and which he is unable to get, as the land has since been transferred from the 1st to the 2nd defendant. If the plaintiff was going to execute that decree, then he had 12 years from the day that the decree was passed as prescribed in Section 4 (4) of the Limitation of Actions Act. However, this action strictly, is not an action in the form of execution of the decree of the Kapsabet Magistrate's Court. It is an action seeking to cancel the registration of the 2nd defendant as owner of the suit land. In my view, the cause of action arose when the land became registered in the name of the 2nd defendant which is 18th August 1999. The plaintiff had 12 years from this date to file suit, and this action, having been filed on 31st March 2006, is within the limitation period prescribed in Section 7 of the Limitation of Actions Act. I am therefore not of the opinion that this suit is time barred.

70. Finally, is it necessary for an order of court to go through the land control board as argued by Mr. Birech?

71. Section 6 of the Land Control Act, Chapter 302, Laws of Kenya, provides for the transactions that require the consent of the land control boards. The same provides as follows :-

6. *(1) Each of the following transactions -*

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) This section does not apply to -

(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or

(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.

72. From the above provision, I cannot see a court order touching on agricultural land, as being one of the matters that requires consent of the land control board. That is indeed the proper position, for to hold otherwise, would mean that the court is sub-ordinate to the land control board and that its orders are subject to review by the land control board. The position in law, is that a court order does not require validation through consent of the land control board. The argument that the judgment and decree of the Kapsabet court needed consent of the land control board does not therefore hold any water.

73. I believe that I have dealt with all issues arising from this suit. In my view the plaintiff's suit must succeed. Since the judgment of Kapsabet LDT Case No. 36 of 1997 has not been set aside, the same must be affirmed and the plaintiff is therefore entitled to 18.5 acres of the land parcel Nandi/Kipkarren Salient/119. However, if the plaintiff is entitled to the 18.5 acres of the suit land, in all fairness, he cannot keep the 6 acres of the Cheptil land and he must relinquish possession thereof to the 1st defendant, who in turn, ought also to cede possession of 18.5 acres of the suit land to the plaintiff. The plaintiff has succeeded in this suit and I also award him costs.

74. In summary, I allow the plaintiff's suit and make the following final orders :-

(a) That the transfer of the land parcel Nandi/Kipkarren Salient/ 119 from the 1st defendant to the 2nd defendant is hereby declared to have been a fraudulent transfer.

(b) That the register of the land parcel Nandi/Kipkarren Salient/119 be rectified by the cancellation of the 2nd defendant as proprietor thereof.

(c) That flowing from the judgment and decree in Kapsabet LDT Case No. 36 of 1997, the plaintiff is entitled to 18.5 acres of the land parcel Nandi/Kipkarren Salient /119.

(d) That the 1st defendant to sign all requisite documents required to transfer 18.5 acres of the land parcel Nandi/Kipkarren Salient/119 to the plaintiff, within 45 days from today and in default the Deputy Registrar of the Court to execute the documents, but the plaintiff to bear all conveyance fees.

(e) That the plaintiff must, upon being given possession of 18.5 acres of the land parcel Nandi/Kipkarren Salient/119, cede possession of the land parcel Nandi/Cheptil/430, to the 1st defendant.

(f) That the plaintiff shall have costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. E.M. Makuto holding brief for Mr. Momanyi for the plaintiff.

Mrs L.C. Kamau of M/s Birech Ruto & Co Advocates for the 1st defendant.

Mr. C.K. Mitei of M/s Arap Mitei & Co Advocates for the 2nd defendant.