



**Kimani v Kimani (Environment & Land Case 85 of 2018)
[2024] KEELC 3575 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 85 OF 2018**

AA OMOLLO, J

APRIL 11, 2024

BETWEEN

ANDREW KIMANI PLAINTIFF

AND

JECINTA WANJIKU KIMANI DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated 19/02/2018. The said plaint was subsequently amended on 20th April, 2018.
2. He avers that he is the registered proprietor of LR No. NAKURU/GICHOBO/509 the suit property.
3. It is also his averment that in 2017, the Defendant unlawfully and without his consent trespassed onto the suit property and started cultivating.
4. He avers that the said trespass has curtailed his right of occupancy to the suit property and that he has since suffered damages.
5. The Plaintiff prays for judgement against the Defendant for:
 - a. The Defendant by herself, her agents and servants be restrained by an order of permanent injunction from trespassing on the Plaintiff's parcel of land known as NAKURU/GICHOBO/509.
 - b. An order that the Defendant vacates the Plaintiff's parcel of land known as NAKURU/GICHOBO/509 and in default eviction to issue.
 - c. Costs of this suit
 - d. Any other order that this Honourable Court may deem fit to grant.



6. The Defendant filed her Defence and Counter claim dated 19th September, 2018 where she denied the allegations in the plaint.
7. She avers that the matter had been heard and determined in NAKURU CHIEF MAGISTRATE'S COURT, LAND DISPUTES NO. 30B of 2008.
8. In her counter claim, she prayed for judgment against the Plaintiff now Defendant for:
 - a. A declaration that the Defendant is the rightful owner of all that parcel of land known as NAKURU/GICHOBO/509
 - b. An order compelling the Plaintiff now Defendant to transfer L.R NO. NAKURU/GICHOBO/509 to the Defendant now Plaintiff.
 - c. Plaintiff's suit be dismissed with costs.
9. The Plaintiff also filed a Reply to the Defence and Counter-claim dated 13th November, 2018 where he denied all the allegations.
10. This matter was initially slated for Judgement on 24/11/2022. Judgement was not delivered as schedule. The reason is that the Court noted that there were certain gaps in the evidence tendered that would make it impossible to reach a just conclusion.
11. The Court invoked its inherent powers as read together with Order 18 Rule 10 of the Civil Procedure Rules, Section 146(4) of the Evidence Act and gave the following order;
 - a. The District Land Surveyor Nakuru County shall carry out a survey to determine the extent, ground position and description of the parcel of land occupied by the defendant
 - b. The Plaintiff shall extract this order, serve it upon the District Land Surveyor Nakuru County and follow up on its filing in court
 - c. Parties shall at the opportune time submit on the contents of the report and the nexus between Nakuru/Gichobo 509 and Rare/Gichobo /509
 - d. The matter shall be mentioned on 6/3/2023 to ***confirm filing the report.***
12. On 6/3/2023 the parties were absent and the court issued another mention date for 27/3/2023 and asked the Deputy Registrar to serve the parties.
13. On 27/3/2023 counsel for the Defendant appeared, counsel for the Plaintiff was absent and the court was informed that the survey report had not been filed. The court issued a further mention for 29/5/2023.
14. On 29/5/2023 the matter was mentioned, again, counsel for the Plaintiff was absent, the survey report had also not been filed. The matter was again adjourned and another mention slated for 4/7/2023.
15. On the 4/7/223 both parties were absent and the Deputy registrar was directed to serve the parties for a mention on 27/9/2023.
16. On 27/9/2023 counsel for the Defendant appeared but the Plaintiff's counsel was absent. Counsel for the Defendant confirmed to the court that the surveyor had visited the suit parcel. The court was constrained to issue a further mention date for 30/10/2023 to confirm filing of the survey report.



17. On the 30/10/2023, counsel for the Defendant appeared before this court but counsel for the Plaintiff was absent. Counsel for the Defendant informed the court that the survey report had been filed. the matter was slated for Judgment on 29/2/204.
18. In the intervening period, I received communication on my transfer to Kericho and issued a notice that all matters pending judgment and ruling would be delivered on notice.
19. Subsequently a notice was sent out that out that the judgement in this matter would be delivered on 14/03/2024.

PLAINTIFFS EVIDENCE

20. At the hearing, Andrew Kimani testified as PW1. He acknowledged that he knows Parcel Number Nakuru/ Gichobo/509 adding that it belongs to him.
21. He narrated that in the year 2017, he sent his son to check on the said parcel of land and when he got there, he found certain people on the parcel and they chased him away.
22. He stated that one of the persons who chased his son away is the defendant herein.
23. PW1 went on to state that he had filed his written statement and prayed that the same be adopted as part of his evidence.
24. He also produced a list of documents dated 19th February, 2018. The documents were produced in the following order:
 - a. Demand Letter dated 16/5/2017 as Exhibit P1
 - b. Copy of Certificate of Title for NAKURU/GICHOBO/509 as Exhibit P2
25. He further testified that he never sold or authorized any person to sell the suit land to the Defendant. He added that his brother is Simon Kabiru Kuira and that he had never donated any power of attorney to him.
26. It was his testimony that that the suit land is agricultural land and that he never appeared before the Land Control Board to obtain consent to transfer it. It was his further evidence that he is a married man with 13 children and that his wife did not give any consent for sale of the suit land.
27. He testified that the only person on the suit land is the Defendant who has since set up a shanty.
28. In his written statement, PW1 states that he bought the **suit property in 1984 when residing in Njoro area of Nakuru.**
29. The Plaintiff in his statement states that he later bought another parcel of land at Mwea where he moved and currently resides. He states that he has made efforts, in vain, to evict the Defendant so as to enable him develop the suit land.
30. In conclusion he urges the court to grant him orders of eviction against the Defendant and that he be granted prayers contained in his amended plaint.
31. On cross examination, he confirmed that Simon Kabiru is his brother and that his brother lives in Njoro Township. He also confirmed that the suit land is 1¼ acres.
32. PW1 denied that on 13/06/1997 he authorized his brother to sell the suit land on his behalf.
33. He admitted to have written the letter dated 19/09/1999



but stated that it was addressed to another person. He testified that he did not know about the Defendant or the tribunal case.

34. He further testified that he was not aware of the ruling dated 16/10/2008 which was adopted as an order of the court. He also testified that he was not aware of a decree issued on 8/10/2009.
35. PW1 further stated that he was not aware that his brother swore an affidavit stating that he gave him the proceeds from the sale of the suit land.
36. He denied that he asked for more money from the Defendant and also denied that his sons have approached the Defendant asking for more money.
37. On re-examination, PW1, was referred to the letter dated 19/9/1999 and he confirmed that the letter is addressed to Mr. Kimani. He was also referred to the agreement dated 13/06/1997 (Exhibit D1) and confirmed that the agreement was between Simon Kabiru and the Defendant.
38. He added that he was never served with the decree and that it was ever executed.
39. This marked the close of the Plaintiff's case.

DEFENDANT'S CASE.

40. Jecinter Wanjiku Kimani testified as DW1. She prayed that her witness statement dated 19th September be adopted as part of her evidence.
41. She also stated that she has a list of documents dated 19th September, 2019 and prayed that the documents attached to it be produced in support of her case. The documents were produced and marked as follows:
 1. Copy of Sale Agreement dated Exhibit D1**13/06/1997**
 2. Copies of Njoro Land Tribunal Exhibit D2 **proceedings**
 3. Copy of Decree from Magistrates Exhibit D3**court Nakuru dated 3/11/2009**
 4. Copy of fund acknowledgement Exhibit D4**note dated 19/09/1999**
 5. Copy of Affidavit sworn by Exhibit D5**Simon Kabiru**
 6. Copy of Land Certificate for Exhibit D6
NAKURU/GICHOBO/509
 7. Caution dated 15/11/2007 Exhibit
and receipt dated 9/02/2018 D7(a) & (b)
42. She testified that she lives in Njoro and is unemployed. She stated that she wants the court to assist her get the title to the suit property from the Plaintiff.
43. It was her testimony that the suit parcel was sold to her by the Plaintiff's brother at Kshs. 63,000. She further testified that they signed a written agreement dated 13th June, 1997.
44. In her written statement she states that she is the bona fide purchaser for value of the suit property registered in the Plaintiff's name. She states that she has been in occupation of the suit land since she purchased it from the Plaintiff.



45. The Defendant in her statement states that the present matter was heard and determined vide NAKURU CHIEF MAGISTRATE'S COURT, LAND DISPUTES NO. 30B of 2008 where the Plaintiff was ordered to transfer the suit land to her. She added that the Plaintiff is yet to effect the said transfer.
46. DW1 states that she met the Plaintiff at his home in Mwea Kirinyaga County on 19th September, 1999 where he acknowledged receipt of the land purchase price from Simon Kabiru. She further states that the Plaintiff had promised to transfer the suit land to her but he is yet to do so.
47. On cross examination she confirmed that the suit parcel is in the Plaintiff's name and that the Plaintiff's brother sold it to her at Kshs. 63,000.
48. She testified that owing to the current dispute, she is yet to pay Kshs. 6,000. DW1 testified that one Simon Kabiru, the Plaintiff's brother, informed her that he had permission to sell the property.
49. She confirmed that she did not visit to the Land Control Board. It was also her testimony that Kimani wrote his number as well as that of the suit property in Exhibit D4. (Funds acknowledgment note.
50. The court inquired from DW1 as to who signed Exhibit D4 (Funds acknowledgment note) and the witness stated that it was been signed by the Plaintiff.
51. DWI stated that Kimani never attended the tribunal proceedings despite being summoned numerous times.
52. Upon re- examination, DW1 testified that she went to see Kimani (The Plaintiff) in the company of Kabiru and that it was Kimani who gave her Exhibit D4 (funds acknowledgement note.)
53. Simon Kabiru Kuria testified as DW2. He prayed that his witness statement filed on 12th May,2022 be adopted as part of his evidence and the court did.
54. It was his testimony that he lives in Njoro and is currently unemployed.
55. He testified that the Plaintiff is his brother and that they both had land in Lari. It was his testimony that they subdivided their mother's land after which each one of them got 5 acres.
56. He stated that he and the plaintiff currently live in Mwea. It was his further testimony that he sold 1 ½ acres of his land after which his brother (the plaintiff) requested him to him to find a buyer for his parcel. He went on to narrate that he travelled to Njoro to find a buyer and that he found as the Defendant herein.
57. It was his evidence that they entered into an agreement with the Defendant but stated that he could not remember the purchase price as payment was made in installments. He testified that the Defendant would pay the said installments to his brother Andrew (The Plaintiff).
58. In his oral evidence, he stated that they all appeared at the tribunal in Njoro for hearing of the dispute and the Plaintiff when given an opportunity to speak stated that he needed to consult his children but never came back.
59. It was his evidence that the tribunal made a decision that the plaintiff takes the suit parcel.
60. He confirmed that he swore an affidavit in respect of the suit land and that the same had been produced in court (Exhibit D5). DW2 testified that the plaintiff visited Mwea in a bid to find him and the Plaintiff and that after asking around, she was able to trace him and the Plaintiff.



61. When referred to Exhibit D4, DW2 confirmed that he knew it and explained that he asked the Defendant to ask his brother (the Plaintiff) to transfer the suit parcel to her. He went on to narrate that subsequently, the Plaintiff wrote a note to the Defendant in which he explained that the note by the Plaintiff stated that the title to the suit property was in Nairobi and that when he got the title back he would transfer the suit parcel to the Defendant.
62. DW2 confirmed that the note is in his brother's (the plaintiff) handwriting and also signed by him. He further testified that the note was written on 19/9/99 in Mwea.
63. He stated that the defendant is the one in occupation of the suit land and had been cultivating it. He prayed that the court gives the Defendant the suit parcel.
64. In his witness statement, DW2 states that the final installment on the suit land was paid on 19th September, 1999 after which the Plaintiff promised to surrender the title to the Defendant.
65. He states that the Plaintiff has since refused to surrender the title resulting in the instant case and states that that the Defendant is a bonafide purchaser.
66. On cross-examination, DW2 confirmed that they always worked together with the Plaintiff. He testified that his brother signed Exhibit D4 when he received the money and that what was pending was for him to obtain the title from Nairobi.
67. He further testified that his job was to ensure the Plaintiff and Defendant met, which he did. He denied using part of the money and stated that what was recorded in his statement is also true and if there were any discrepancies it was because it had been many years since the transaction.
68. It was his further testimony that any installment he received from the defendant, he would give to the Plaintiff adding that it was not the first time he was transacting on behalf of the Plaintiff.
69. DW2 also testified that the Plaintiff made excuses about consulting his family during the transaction. He testified that the Plaintiff has four wives and that he would not know if he is a conman.
70. DW2 stated that whenever he visited his family in Njoro, he would ask the Defendant if she had any money for him to take to the Plaintiff. He confirmed that he took all the purchase price money to the Plaintiff and that was the reason **the Plaintiff signed Exhibit D4.**
71. Magdaline Njoki Kimani testified as DW3. She prayed that her witness statement filed on 12th May, 2022 be adopted as part of her evidence.
72. She testified that she lives on the suit property with her mother the Defendant.
73. She testified that she was present when the sale agreement was entered into but did not sign as a witness.
74. According to her witness statement, she states that deposit was paid and the balance was to be paid in installments. She states that the Defendant informed her that she had cleared the balance and was only waiting for the title deed.
75. She states that the Plaintiff has since refused to deliver the title and requests the court to compel the Plaintiff to surrender the title deed to the Defendant.
76. Advocate for the plaintiff did not cross examine the witness.



77. Julia Wangui Chira testified as DW4. She prayed that the court adopts her witness statement as part of her evidence and the court did.
78. She testified that she was a witness to the sale agreement dated 13th June, 1997 adding that the suit property was sold to the Defendant and that the Defendant has not received the title deed.
79. In her witness statement she states that the Defendant had requested her to witness the sale agreement. She states that the Defendant purchased the suit property from the Plaintiff through his brother Simon Kimani.
80. Counsel for the plaintiff did not cross examine the witness.
81. This marked the close of the Defence case.

SUBMISSIONS

82. The Plaintiff filed his submissions on 21st June, 2022.
83. He submits that in 2017, the Defendant trespassed on his parcel of land and cultivated it. He states that he has since made efforts to have her vacate the suit property but the Defendant has remained adamant. He contends that as a result, he continues to suffer damages.
84. The Plaintiff also submits that his testimony in court was to the effect that he never sold the suit property to the Defendant nor authorized any person to sell on his behalf. He added that he never donated any Power of Attorney to his brother to sell the land on his behalf.
85. He submits that the suit land being agricultural land, they neither applied for nor obtained the Land Control Board Consent and this would therefore render the sale agreement null and void.
86. He also submits that the sale would have required spousal consent and other dependents which consent was never obtained.
87. He argues that the sale would have been unenforceable for non-performance on the part of the Defendant because the agreed purchase price had not been paid in full.
88. The Plaintiff urges the court to find that the occupation of the Defendant on the suit land is illegal, order her to give vacant possession and in default, eviction orders to issue. He also urges the court to dismiss the Defendant's Counter-claim with costs.
89. The Defendant on the other hand filed her submissions dated on 29th June, 2022 wherein she gave a brief background of the case and identified one main issue for determination that is; Whether the Defendant is entitled to the prayers sought.
90. The Defendant answers the question for determination in the affirmative and relied on Section 28 of the Registered *Land Act* and the judicial decision of *Macharia Mwangi Maina & 87 Others V Davidson Mwangi Kagiri [2014] eKLR*.
91. The Defendant submits that her testimony is that the Plaintiff's brother, who testified in support of her case, stated that the Plaintiff gave him full authority to sell the suit land on his behalf.
92. She submits that the seller received the full purchase price and the Plaintiff acknowledged having received part of the purchase price vide an acknowledgement date 19th September, 1999. (Exhibit D4)
93. She cites the decision of the Court of Appeal in *Willy Kitilit V Michael Kibet [2018] eKLR* and submits that the Plaintiff is estopped from claiming the suit property by the doctrine of estoppel. The



Defendant submits that she has been in possession of the suit property since 1997 to date. She submits that a dispute arose between her and the plaintiff when the Plaintiff demanded that she adds more money so that he can surrender the title to the suit property.

94. She submits that the dispute was heard and determined in Njoro Land Tribunal where the said order was adopted by the court in NAKURU CHIEF MAGISTRATE'S COURT, LAND DISPUTES NO. 30B of 2008.
95. The Defendant contends that it is trite in law that superior courts cannot interfere with decisions of subordinate courts unless the said decision is appealed or reviewed. She submits that the decree issued by the Magistrates Court remains unchallenged.
96. She submits that she is the rightful and legal owner of the suit property and that the Plaintiff has since been trespassing. The Defendant also submits that she is entitled to exclusive possession and she ought to be protected.
97. In conclusion, she urges the court to declare her as the owner of the suit land and compel the Plaintiff to transfer the title document to her.

ANALYSIS AND DETERMINATION

98. I have considered the pleadings, evidence adduced and the rival submissions filed in respect of this case. In my view, these are the issues that arise for determination:
 - a. Whether there was a valid agreement for the sale of the suit land as between the Plaintiff and Defendant.
 - b. Whether the Plaintiff and defendant are entitled to the orders sought in the plaint and counterclaim respectively.
 - c. Who should bear the costs of the suit.
99. Before I address my mind to the questions for determination, there is an issue that came up during trial that needs to be dealt with first.
100. The Defendant claims that this matter had already been heard and determined in NAKURU CHIEF MAGISTRATE'S COURT, LAND DISPUTES NO. 30B of 2008.
101. I have perused the court record and found that there was indeed a dispute in the Njoro Lands Tribunal involving the suit property.
102. I have also established that there is an award of the tribunal which was to the effect that the Plaintiff should surrender the suit land to the Defendant.
103. This award was adopted in the NAKURU CHIEF MAGISTRATE'S COURT, LAND DISPUTES NO. 30B of 2008 as an order of the court.
104. It is important to note that the Land Dispute Tribunal was established pursuant to Section 4 of the Land Disputes Tribunals Act, 1990. The Act has since been repealed by Section 31 of the *Environment and Land Court Act*, 2011. The jurisdiction of the tribunal was provided for under Section 3 (1) of the Land Disputes Tribunals Act, 1990 to determine cases of a civil nature involving disputes as to the division of land, the determination of boundaries to land, including land held in common and claims to occupy or work land or trespass to land.
105. It is evident that the tribunal's jurisdiction did not include determination of title to or ownership of registered land.



106. In the case of Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR the Court of Appeal restated the law relating to jurisdiction of Land Disputes Tribunal when it comes to ownership of registered land as follows:

“On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabor it. Section 3 of the Land Disputes Tribunal Act (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only: “3(1) subject to this Act, all cases of a civil nature involving a dispute as to: - (a) The division of, or the determination of boundaries to land, including land held on in common, (b) A claim to occupy, or work land or (c) Trespass to land.” Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land... Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity....”

107. From the evidence placed before this court, the dispute herein relates to ownership of the suit parcel. The Plaintiff has title to the suit property while the Defendant who is in occupation claims that she has beneficial interest by virtue of a sale agreement entered into by her and the Plaintiff's brother on behalf of the Plaintiff (Exhibit D1) and also on the strength of a subsequent acknowledgment issued by the Plaintiff (Exhibit D4).
108. In its decision dated 16th October, 2008, the Lands Tribunal purported to determine ownership of the suit property in favour of the Defendant. Clearly, it did so in excess of its jurisdiction thereby rendering its proceedings and the said decision null and void. It follows that the adoption of the said order by NAKURU CHIEF MAGISTRATE'S COURT in LAND DISPUTES NO. 30B of 2008 cannot stand. The decree issued by Hon. E. Tanui RM on 3rd November, 2009 is therefore null and void.
109. Having settled this preliminary issue, I will proceed to determine the other questions.
- A. Whether there was an agreement for the sale of the suit land as between the Plaintiff and Defendant.
110. The defendant has produced a sale agreement dated 13th June, 1997. The said agreement is not in the language of the court and there is no certificate of translation attached.
111. The Defendant and Simon Kabiru Kuria (DW2) testified and what emerges from his and the Plaintiff's testimony is that he acted as an agent for his brother (the Plaintiff) and entered into an agreement for the sale of the suit parcel of land from the Defendant.
112. DW2's contention is that he has been involved in other transactions on behalf of his brother and that the one pertaining to the suit parcel was not the first one.
113. The Plaintiff's evidence is that he did not at any time give his brother authority to act for him in any transaction for the sale of the suit parcel or give him any power of attorney.
114. While there is no evidence of a letter of authority or power of attorney produced to support the fact of authority to sell, the defendant has produced a document that she refers to as a “funds acknowledgement” – Exhibit D4. The said document is a note by the Plaintiff and written on a paper



bearing a copy of his National Identity card. It is in the English language and the wording of it is as follows;

Mr. Kimani,

“I acknowledge having received part payment of 1.25 acres of land at Rare/ Gichobo, no 509

Because the title deed is in Nairobi, at bank I shall withdraw and send it to you-original-while you await my transfer it to you.

Please bear with me as I am moving my families to new homes.

Yours sincerely,

A. Kimani Adam

Sunday 19/9/99

Mwea.

115. The note is in possession of the Defendant and evidence has been led by the Defendant and DW2 on circumstances leading to the writing of the said note. They are as follows:
 - a. The Defendant made an unannounced visit to Mwea in search of the Plaintiff and DW2.
 - b. The Defendant was led to DW2 who then took her to the Plaintiff.
 - c. DW2 advised the Defendant to have the Plaintiff write a note stating that he would transfer land to her.
 - d. The Plaintiff wrote the said note.
116. The Plaintiff does not deny that he wrote the note but claims that it is addressed to another person-Mr. Kimani – and not the Defendant. I have also noted that the Defendant’s last name is Kimani. In my view it is more probable than not that the Plaintiff wrote this note.
117. My further view if DW2 (The Plaintiff’s brother) had no authority to sell the suit parcel, he acted as an agent without authority. This invariably makes the contract entered into null and void. However, the Law of Agency provides that an agent who acts without authority can subsequently bind a principal when the principal ratifies any act that was done by an agent without the Principal’s authority.
118. In the instant case the Plaintiff is the Principal. The note produced as Exhibit D4 has the legal effect of ratifying the sale of the suit parcel which was allegedly sold by DW2 (the Plaintiff’s brother) did without the Plaintiff’s authority.
119. Taking these circumstances into consideration, I find that there was an agreement for sale of the suit land as between the Plaintiff and the Defendant through his agent (Dw2). Though DW2 may not have had authority to sell the suit parcel without authority, the act of selling without authority was subsequently ratified by the Plaintiff and the Plaintiff is therefore bound by the agreement entered into by his brother (DW2)
120. It is important to mention that while the agreement was not translated into a language of the court, oral evidence has been led as to its existence. More specifically, evidence has been led that the agreement was entered into in 1997. Section 3(3) of the Law of contract Act which requires contracts for the sale of Lad to be in writing was introduced as an amendment in the year 2002. Essentially, there was no requirement in 1997 that contracts for the sale of land must be in writing. Therefore, failure to have it



translated is not fatal. The fact of its existence has not been disputed. The only thing in contention is whether the Plaintiff is bound by it and I have found in the affirmative.

121. In further answer to this question, I noted and struggled to understand why the suit property is described as Nakuru/Gichobo/509 in pleadings filed by the parties but numerous documents produced by the defendant in opposition to the claim and in support of her counterclaim are in respect of a property described as Rare/Gichobo/509. To be precise, the following documents produced by the Defendant describe the property as Rare/Gichobo/509:
 - a. Caution dated 15/11/07 (Exhibit D6 a)
 - b. Acknowledgment Note (Exhibit D4)
 - c. Affidavit sworn by DW2 (Exhibit D5)
 - d. Decree (Exhibit D3)
122. No explanation was offered by either party as to the difference in description of the suit land. This necessitated the issuance of the orders requiring a survey to be done to establish the extent, ground position and description of the parcel of land occupied by the Defendant.
123. The Survey Report was filed and is dated 3/10/2023. Parties were given an opportunity to comment on the report and make submissions on the nexus between the parcels of land described as Nakuru/Gichobo/509 and Rare Gichobo/509.
124. The Plaintiff was mostly absent from the proceedings after 24/11/2022. The Defendant on 30/10/32 while informing the court that the survey report had been filed added that the report states that Nakuru Gichobo/509 and Rare/Gichobo 509 refer to the same parcel of land.
125. By and large, the question on the nexus between the varying descriptions of the suit parcels, as contained in pleadings and in evidence, that lingered on my mind has been answered. The report states that Nakuru Gichobo/509 and Rare/Gichobo 509 refer to the same parcel of land. It further confirms that the Defendant is in occupation of the suit parcel.
126. This court finds that there is evidence of sale of the suit property by the Plaintiff to the defendant.
B. Whether the Plaintiff and Defendant are entitled to the orders sought in the Plaintiff and Counterclaim respectively.
127. The Plaintiff has sought orders of Permanent Injunction and eviction against the Defendant.
128. According to the plaintiff, the Defendant is in occupation of and has trespassed upon the suit property. He prays that orders of eviction be issued against her.
129. It is trite law that he who alleges must prove. Section 107 of the [evidence Act](#) provides as follows:
Burden of proof.
 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
130. In his examination-in-chief, the Plaintiff stated that there



is no one occupying the suit parcel but also states that there is a shanty that the Defendant has built on the suit parcel. The Defendant denies these allegations of trespass and states that she is in occupation after purchase.

131. I find that the Defendant is in occupation of the suit parcel as a purchaser and not a trespasser. I decline to issue orders of eviction against her.
132. In her counterclaim, the defendant seeks the following orders:
 - a. A declaration that the Defendant is the rightful owner of all that parcel of land known as NAKURU/GICHOBO/509.
 - b. An order compelling the Plaintiff now Defendant to transfer L.R NO. NAKURU/GICHOBO/509 to the Defendant now Plaintiff.
 - c. Plaintiff's suit be dismissed with costs
133. The defendant's evidence is that she is bought a parcel of land described as RARE/ GICHOBO/509 from the Plaintiff through his brother and that she has been in occupation of it since 1997.
134. The Defendant produced the acknowledgement note by the Plaintiff as proof of payment. The defendant also called witnesses who have testified that she is in occupation. DW2's evidence corroborates the testimony of the Defendant as relates to acquisition and occupation. I find that the Defendant is deserving of the orders sought in the counterclaim.

C. Who should bear the costs of the suit?

135. The general rule is that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

DISPOSITION.

136. In the result, the Plaintiff's suit is hereby dismissed with costs to the Defendant. The Defendant's counterclaim succeeds and judgment is entered in her favour in the following terms:

SUBPARA a.

A declaration is hereby issued that the Defendant is the rightful owner of all that parcel of land known as LR NO. NAKURU/GICHOBO/509.

SUBPARA b.

The Plaintiff shall within 30 days of this judgment provide and execute all documents necessary to enable the Defendant acquire title for parcel of land known as L.R NO. NAKURU/GICHOBO/509.

SUBPARA c.

In the event of failure to comply with (b) above, the Deputy Registrar of this court shall execute all documents necessary on behalf of the Plaintiff in execution of the decree.

SUBPARA d.

To ensure implementation of the order in (c) above, the Land Registrar shall process the title document for L.R NO. NAKURU/GICHOBO/509 whether or not the original title for L.R NO. NAKURU/GICHOBO/509 is availed.



SUBPARA e.

The Defendant shall meet the costs of the transfer and registration.

SUBPARA f.

The Defendant shall have costs of the counterclaim.

137. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 11TH DAY OF APRIL 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Plaintiff.

No appearance for the Defendant.

Court Assistant; Mr. Joseph Makori.

-----NAKURU
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