



Kirui & another (Both Suing as Administrators of the Estate of Obadiah Kipruto Kirui) v Rono & 2 others (Environment & Land Case 18 of 2022) [2025] KEELC 768 (KLR) (24 February 2025) (Judgment)

Neutral citation: [2025] KEELC 768 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 18 OF 2022
MN MWANYALE, J
FEBRUARY 24, 2025**

BETWEEN

**SARA JEPKEMBOI KIRUI 1ST PLAINTIFF
VICTOR KEMEI 2ND PLAINTIFF
BOTH SUING AS ADMINISTRATORS OF THE ESTATE OF OBADIAH
KIPRUTO KIRUI**

AND

**JONATHAN KIPKEMBOI RONO 1ST DEFENDANT
REJOIN INVESTMENTS LIMITED 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT**

JUDGMENT

1. The original plaintiff Obadiah Kirui (now deceased) file this suit against original defendant; Peter Kipkemboi Rono vide his plaint dated January 21, 2004 before the High Court at Eldoret, being HCCC NO. 10/2004 Eldoret. The original plaint was amended severally whilst before the High Court at Eldoret and various interlocutory applications were heard and determined.
2. Via the undated further amended plaint filed pursuant to leave granted on 19.05.2010, the original Defendant was substituted with Jonathan Kipkemboi Rono as first defendant and two additional defendants were joined in the proceedings being rejoin investment limited, and the Honourable the Attorney General, being 2nd and 3rd Defendants.
3. Upon the establishment of the Environment and Land Court at Eldoret, the matter was given a new number being Case No. ELC 135 OF 2012 Eldoret; and the matter proceeded partly thereat and the plaintiff closed his case.



4. On 19th May 2022 Justice Kibunja transferred the suit to the ELC Court at Kapsabet for hearing and determination. At the time of transfer of the suit, to Kapsabet, the original plaintiff Obadiah Kirui had passed on, and an application for substitution was heard and allowed, allowing Sarah Jepkemboi Kirui and Victor Kirui as administrators of the Estate of Obadiah Kirui to be the new plaintiffs.
5. Directions were taken for the matter to proceed from where it had reached. Pursuant to the transfer the suit was given a number Kapsabet ELC NO. 18/2022. Pursuant to leave having been granted for substitution of the original plaintiff as aforesaid, a 2nd further amended plaint dated 25th January, 2023 was filed.
6. In this 2nd further amended plaint, the plaintiffs seek Judgment against the Defendants for
 - i. An order of permanent injunction against the 1st and 2nd defendants by themselves their servants, agents from entering, demarcating trespassing taking possession, selling charging and/or in any other manner dealing with land parcel No. Nandi/Chepterit/856 or any part of the land formerly known as Nandi/Chepterit/856.
 - ii. The cancellation of Kiprono Tegerei as proprietor of land parcel No. Nandi/Chepterit/856 and the 3rd Defendant be commanded to do so and cancel the registration and entry aforesaid.
 - iii. Cancellation of Nandi/Chepterit/855 and Nandi/Chepterit/856 and the plaintiff be the sole proprietor of land parcel Nandi/Chepterit/292 and the 3rd Defendant be commanded to cancel the aforementioned titles and restore the records to Nandi/Chepterit showing the plaintiff as proprietor.
 - iv. Costs of the suit.
 - v. Interest.

Plaintiff's Case And Evidence

7. It is the plaintiff case that he had been in occupation of Nandi/Chepterit/292 since 21st December 1994 having purchased the same from one Rael Chepnetich and had developed the same extension. That one Tegerei Kiprono had lodged a claim of 6.4 acres of the said suit parcel via Kapsabet SRMCC NO. 133/1995 which matter was referred to the land disputes tribunal that awarded Tegerei Kiprono the said 6.4 acres.
8. That the plaintiff filed a Judicial Review against the findings of the Land Dispute Tribunal vide Eldoret HC MISC APP NO. 256/1996 which granted orders of stay against the finding of the tribunal. That the plaintiff filed a substantive application vide HC MISC APP NO. 7 OF 1997 and obtained certiorari orders quashing the decision of the Land Dispute Tribunal.
9. That Kiprono Tegerei despite the existence of the certiorari orders secretly and fraudulently with the Land Registrar Kapsabet subdivided Nandi/Chepterit/292 into Nandi/Chepterit/855 measuring 2.55 hectares in the name of the plaintiff and Nandi/Chepterit/856 measuring 1.2 hectares registered in the plaintiff. The plaintiff pleaded fraud on part on Kiprono Tegerei, the 1st and 2nd defendants. On the strength of the above the plaintiff sought for the prayers set out at paragraph 6 of this judgment.
10. In support of the plaintiff's case 4 witnesses testified. PW1, was the original plaintiff Obadiah Kipruto Kirui, he stated that he had bought Nandi/Chepterit/292 measuring 9.3 acres, from Rael Chepnetich he produced an Agreement dated 21.12.1994 through which he bought initially 3 acres agreement was



produced as P.Exhibit 1 and that on 2015/1995 he bought the remaining 6.3 acres. He had bought from the widow of Kipkoskei Marisin, Chepsopkoskei Marisin, the Agreement dated 20.05.1995 was produced as P.Exhibit 2.

11. He stated that he had bought the 6 acres for Kshs.510,000/= and he paid Kshs.350,000 at execution of the Agreement and the balance he paid on 17.05.1996 he produced an acknowledgement as P.Exhibit No. 3.PW1 further produced a copy of the green card as P.Exhibit 4 and a copy of plaint in Kapsabet SRMCC NO. 133/1995 as P.Exhibit 5, the memo and defence filed in Kapsabet SRMCC NO. 133/1995 as P.Exhibit 6(a) and 6(b).
12. The witness further produced the proceedings of Kapsabet SRMCC NO. 133/1995 as P.Exhibit 7. The witness further produced proceeding of Kapsabet Land Dispute Tribunal as P.Exhibit 8, the Kapsabet SRMSS NO. 133/1995 had been transferred to Kapsabet Land Dispute Tribunal for hearing and determination. The witness further testified that the Kapsabet Land Dispute Tribunal had awarded the property to Tegerei, and as a result he filed before Eldoret High Court proceedings to quash the tribunals findings in Eldoret HCMSC. NO. 265/1996, where a stay order was issued and registered in the register on 09.09.1996, as entry No. 4 on the green card, it was his testimony that the stay order was never lifted and the award was quashed on 04.10.1997 By Lady Justice R. Nambuye in Eldoret High court Misc Civil Application no.7 of 1997.
13. The production of the ruling by Lady Justice R. Nambuye dated 04.10.1997 in Eldoret Misc. Application No. 7 of 1997 quashing the award of the Land Disputes Tribunal was objected which objection was upheld and the Ruling was marked as PMF1.
14. The witness stated that pursuant to the ruling quashing the decision of the tribunal an application was filed before Kapsabet court vide an application dated 04.11.2000 and an order was issued on 21.12.2000 cancelling the new subdivisions, to wit, Nandi/Chepterit/855 and Nandi/Chepterit/856 and the witness produced a mutation form of Nandi/Chepterit/292 as P. Exhibit 9, the application and order as P.Exhibit 10(a) and (b), and a letter dated 03.11.2000.
15. It was the witness further testimony that Mr. Kiprono Tegerei filed a High Court case at Nakuru being High court Miscellaneous case No. 240/2002 seeking challenge the procedure followed by the Land Registrar, and a Ruling was issued by Justice Visram dated 29.07.2003, where at the court in Nakuru ordered the reinstatement of the parcels. The ruling was marked as PMFI.2. After the case in Nakuru, Kiprono Tegerei died, and at the time of his death the parcel stood in its original number as No. was Nandi/chepterit/292. The witness stated that the 1st defendant moved to the suit land and occupied 6.4 acres in parcel No. 856.
16. The witness produced green cards of parcel no. 855 and 856 as P.Exhibit 12 and 13. The witness stated that he was not aware of the subdivisions of parcel No. 292. The stay orders were never lifted. The witness stated that he was entitled to the whole 9.3 acres in parcel no. 292 and he prayed for the orders in his plaint.
17. The witness stated that parcel no. 856 was now registered in the name of the 2nd defendant Rejoin Investments and he produced a search dated 10.10.2011 as P Exhibit 14, before registration to the 2nd Defendant the suit property was in the name of Jonathan Rono the 1st defendant.
18. In cross-examination by Mr. Mbugua for the 1st and 2nd Defendants, the witness stated that the first person to sell to him a portion of the suit property was Rael Chepngetich, at the time the property was in the name of Kipkoskei Marisin, and that Kipkoskei Marisin had died. Rael Chepngetich was selling her share of inheritance but no succession had been filed in respect of Estate of Kipkoskei Marisin. The witness had bought 3 acres and the whole family had agreed for the sale of the 3 acres and Jepkoskei



Marisin, the mother of Rael had signed the agreement. Later the family of the late Kipkoskei Marisin had sold him the remaining 6.3 acres by which time the witness was not aware that another person had purchased the same and the succession in respect of the Estate of Marisin had also not been filed; he had bought the same on 20.05.1995 and he did not go to the Land Control Board to obtain the relevant consent.

19. The witness in further cross-examination stated that he was not aware whether the stay order he obtained had been served upon the Kapsabet Magistrate's court. The witness stated that Kiprono Tegerei had challenged the manner in which the titles had been cancelled and that the decision of Visram J. was on the process but did not touch on the merits, but he had not appealed against the said decision.
20. The witness stated that he was aware of the Ruling by Justice Dullu in this very matter in which he declined to issue an injunction; although he had challenged the decision but was not aware of the outcome at the Court of Appeal. The witness was not aware of the particulars of the Estate of Kiprono Tegerei but was aware that an order from the succession cause was registered at the Lands registry. That the 1st defendant had invaded his suit land and apportioned himself about 7 acres. PW1 confirmed that he had been charged in Kapsabet Criminal Case No. 1458/2004 found guilty and fined Kshs. 15,000 and he had appealed against the said conviction but could not remember the Appeal Number.
21. On cross-examination by Mr. Odongo for the 3rd defendant, PW1 stated that he was aware that the tribunal had ruled in favour of Mr. Kiprono Tegerei, and that the Kapsabet Magistrate's court had entered judgment in accordance with the award of the tribunal. The witness was not aware whether a decree had been issued. He equally was not aware whether the award had been registered in the register of the land parcel. He had obtained a stay order from the High Court in 1996, the subdivision had been made pursuant to Entry No. 10 while the stay order was entry No. 11, thus the stay order had been entered after the award.
22. On Re-examination, the witness stated that the family of Kipkoskei Marisin had no objection to him purchasing the entire property. That on entries 7 and 8 of the P Exhibit No. 4, the green card to parcel 292, entry No. 7 was transmission while entry No. 8 was transfer by personal representative. The witness had occupied the 6.3 acres from 1994 but was no longer in occupation of 6.3 acres, after the defendant invaded the land and took over the same.
23. He stated that entry No. 12 in exhibit 4 was a stay order, issued in Eldoret High Court, while entry No. 13 is a mutation and closes the title to subdivide into parcels No. 855 and 856, there was entry that the stay had been lifted, thus entry No. 13 was done fraudulently as there was a stay order.
24. PW2, Christopher Kipsongok Koech a Senior Assistant Chief of Chepterit location testified. It was his testimony that Rael Jepngetich had lived in his area and she owned land that had been in the name of Kipkoskei Marisin, which she had inherited from her father together with her mother Jepkoskei Marisin. The two had moved to Olenguruone after selling the land to Obadiah Kirui 3 acres, and they had written an agreement in which he had signed as a witness. PW2 identified the Agreement P.Exhibit No.1
25. On cross-examination by Mr. Karanja Mbugua for the 1st and 2nd Defendants the witness indicated that he had advised that a search be done, and that the land was in the name of Kipkoskei Marisin, the father to Rael. Rael had brothers but the witness was not aware how many brothers were there, but PW2 had not called them when the Agreement was being signed. Marisin was dead at time and Rael had her mother's consent to sale the suit property, although he had not seen a written authority. The witness did not know Tegerei, he had only heard about him, as he was a resident in another location.



- PW2 was aware that the Tribunal had sat, he was not a member of the tribunal. PW2 was not aware of the Kapsabet case between Tegerei and Obadiah, he had been sent away at the tribunal.
26. He stated that it was normal to involve a chief in land transactions, as the chief usually attends the Land Control Board meetings and not the Assistant Chief. The witness stated that he was only involved in the transaction of 3 acres and wasn't aware if the rest of the land had been sold.
 27. PW3, Mark Kipkoskei Kirui testified it was his testimony that he knew the late Kipkoskei Arap Marisin, who was his neighbour as they had adjacent properties, his property being Chepterit 293, while 292 belonged to Marisin, who was now deceased and he knew the daughter Rael, while Jepkoskei Marisin was the daughter of the deceased. That Rael and her mother had moved out of the suit property after selling the same to Obadiah Kirui.
 28. On cross-examination by Mr. Karanja, PW3 stated that he knew the late Kipkoskei Marisin, who was the owner of Chepterit 292 stated that he was not aware of the Agreement.
 29. PW3, stated that he knew Kiplagat Arap Soi, the 1st born of Kipkoskei Marisin and said that Rael sold the land and not Kiplagat Arap Soi.
 30. The evidence of PW4 and PW5, Rael Chepngetich and Esther Chirchir Chepkemboi was similar. The two were sisters and daughters of the late Kipkoskei Marisin and Jepkoskei Marisin. On her part PW4 indicated that she had sold her land to Obadiah Kipruto Arap Kirui, that the property was never sold to Kipngetich Arap Soi.
 31. On cross-examination by Mr. Karanja PW4 stated that she had sold her 3 acres to Obadiah and her mother equally sold her 6 acres. The title was the same, she recalled having signed an Agreement and that her mother had signed the Agreement too. She stated that she had gone to Land Control Board with her mother and were given the consent. That her father had died and she had undertaken succession where she was given 3 acres from the Estate and her mother was given 6 acres. She did not have the letters of administration and the consent in court.
 32. The witness knew Kiplagat Arap Soi who was her elder brother and had his own property in Olenguruone.
 33. PW4 in further cross-examination stated that her late father had purchased the property from Arap Bitok who later claimed the same, but she was not aware who had helped her father. She was not aware of the case between her mother Tegerei and Obadiah. She was not aware of the case before the elders.
 34. On her part PW5 stated that the land they were occupying in Nandi had been sold to Obadiah Kirui.
 35. On cross-examination by Mr. Karanja PW5 stated that Kiplagat Soi was not present during the sale as he had his own land, but his uncle Toronkei was present as well as the other children of Chepkoskei Marisin, the witness had signed the Agreement which had been prepared at Kapsabet, Rael had sold 3 acres and the balance was 6 acres, and her mother had sold the remaining 6 acres; and moved to Olenguruone. The witness did not know Kipruto Arap Tegerei.
 36. After the testimony of the 5 witnesses before the ELC Court at Eldoret, the plaintiff case was closed.

1st And 2nd Defendant's Case And Evidence

37. In their 28 paragraphs statement of defence dated 26th September 2012 the 1st and 2nd Defendants pleaded their case to be as follows;



- i. That the plaintiff was never lawfully procedurally ever entitled to any legitimate or legal registration as a proprietor or a beneficiary or having any registrable or beneficial interest in land parcel number Nandi/Chepterit/292.
 - ii. That the plaintiff wrongful and fraudulently caused himself to be so registered and his registration was challenged before court which cancelled and quashed such registration and reverted the said land to the lawful and legitimate proprietor.
 - iii. That no Land Control Board consent was obtained by the Plaintiff, as required under Section 6 of the Land Control Act Chapter 302.
38. The 1st and 2nd Defendant denied the Plaintiff's occupation of the suit land and described any such occupation as Trespass. That the action to recover the suit property having bought the same in 1994 was time barred.
 39. That the Plaintiff only cause of action if any was for recovery of any money from Rael Chepngetich. The Plaintiff was non-suited against the 1st and 2nd Defendants, and any denied developments were undertaken by the Plaintiff on the suit property. The 1st and 2nd Defendants reserved her right to raise preliminary objection that being time barred offended the provisions of the law of contract Act Land Control Act and Limitations of Actions Act.
 40. The 1st and 2nd Defendant reiterated their ownership of the suit property, and were not aware of any orders issued under Eldoret High Court Misc Application No. 256 of 1997. The 1st and 2nd Defendant pleaded that the orders in Nakuru H.C Misc Civil Application No. 240 of 2002, quashed cancelled the Land Registrar's decision to cancel the title in the name of Kiprono Tegerei and restored him as the only person with proprietary interest in Nandi/Chepterit/856.
 41. The 1st Defendant pleads that the acquired Nandi/Chepterit/856 procedurally through transmission as a result of succession in the Estate of Kiprono Tegerei and that the 2nd Defendant was an innocent purchaser for valued. The 1st and 2nd Defendant pleaded that the suit was an abuse of the court process commenced by a vexatious litigant. On the strength of the above averments the 1st and 2nd Defendants sought for the dismissal of the suit.
 42. DW1, Jonathan Kipkemoi Rono the 1st Defendant testified. He adopted his witness statement dated 01.07.2013 and a further statement of even date as part of his evidence in chief. He gave a sort background of the friendship between his late father the late Kiprono Tegerei and the late Kipkosgei Marisin, whom he said both hailed from Kericho and settled in Chepterit area of Nandi. It was his testimony that the late Kipkosgei Marisin was the owner of Nandi/Chepterit/292 having purchased the same from Mr. Bito, and upon his death, 3 acres went to Rael Chepngetich and 6.3 acres went to Chepkosgei Marisin who requested his late father to source her a property in Kericho and Kericho/ Kipcharian/Lelu/block 45 (Mutaragon/405) measuring 3.370 hectares belonging to the Kimani Joseph Macharia, was purchased through the financing of the 1st Defendant's father, from Mr. Kimani Joseph Macharia and was exchanged for 6.3 acres in Nandi/Chepterit/292. The Mutaragon property was bought for 53,000 per acre for 7.2 acres vide an Agreement made on 15.09.1994 at the chief's office and Chepkosgei Marisin became the owner on 23.09.1994.
 43. It was DW1's testimony that his father later learnt that the whole 9.3 acres had been sold to Obadiah Kirui initially Rael had sold her share of 3 acres and later Chepkosgei Marisin sold her 6.3 acres to Obadiah Kirui, Prompting filing of suit by Kiprono Tegerei at Kapsabet SRMCC No. 133/1995 between Kpronon Tegeri and Obadiah Kirui and Chepkosgei Marisin, which matter was referred to the elders and a verdict was passed granting Kiprono Tegerei 6.3 acres and Obadiah Kirui 3 acres, the award



registered in court, Obadiah challenged award at Eldoret High Court through Misc. Civil Application No. 265/1996, which sought a stay of execution against the decision of the panel.

44. The substantive motion was to be filed within 21 days none was filed at Eldoret Misc Application No. 7/1997 and orders were issued on the green card on 04.04.2000 and title was Nandi/Chepterit/856 and Obadiah Kirui got Nandi/Chepterit/855. Obadiah Kirui then sued at Kapsabet Magistrates Court for cancellation of the title belonging to Tegerei, leading to cancellation of title in 2001, Tegerei thereafter filed Nakuru High Court Misc. Civil Application 240/2000 and the title reverted to Kiprono Tegerei. No appeal had been filed against the said decision.
45. Upon death of Kiprono Tegerei, PW1 applied through Succession Cause No. 11/2005 before Nakuru High Court and a Grant was confirmed on 30.05.2005 and parcel number 856 was distributed to PW1 and title issued on 06.06.2005. There were no objections nor protests.
46. Obadiah Kirui attacked people in July 2004, and he was arrested charged convicted and fined Kshs.20,000 in default in Kapsabet SRM Criminal Case No. 1458/2004, which he did not appeal. The Plaintiff had filed caution but the same was lifted through Misc. Civil Application, and the lifting of the caution was not challenged.
47. DW1 stated that he then transferred the property to 2nd Defendant after obtaining the necessary Land Control Board consent. In this matter an application for injunction before Justice Dullu was dismissed and the resultant appeal thereof equally dismissed.
48. The witness produced the following exhibits in support of his case
 - i. Ruling in case No. 240/2002 as D.Exhibit 1.
 - ii. Copy of letter of consent dated 13.07.2011 – D.Exhibit 2.
 - iii. Ruling of 23.07.2004 in 240/2002 – D.Exhibit 3.
 - iv. Certificate of confirmation of Grant issued on 30.03.2005 and rectified on 27.10.2008 as D.Exhibit 4(a) and (b).
 - v. Grant issued on 22.05.2005 as D.Exhibit 5.
 - vi. Official search on 22.05.2005, Nandi/Chepterit/856 – D.Exhibit 6.
 - vii. Official search dated 10.10.2014 – D.Exhibit 7.
49. On cross-examination by Mr. Mwetich for the Plaintiff. The witness indicated that the suit property had been subject of many court cases, his late father had sued at the tribunal over the suit property and that his father's claim had been that Obadiah Kirui had changed the title himself without the involvement of Kipkosgei Marsei, Obadiah had purchased when Kiprono Tegerei had already purchased.
50. DW 1 in further cross-examination stated that his late father's interest in case NO. 292 was through exchanged different parcels, there was no written agreement between his late father and Kipkosgei Marsei, Chepkosgei Marsei was the beneficiary of Kipkogei Marsei and an exchange was between Chepkosgei Marsei and his late father. By the time of exchange of the suit property Kipkosgei Marsei was already deceased. the exchange had been reduced in a written Agreement, through no Land Control Board consent, was issued.



51. The witness was aware of the Agreement about 6.3 acres by Chepkosgei Marsei to Obadiah Kirui hence it was a case of double sale, which was challenged; through no report was made of the double sale to the police. The tribunal had made an award of 6.3 acres to the 1st Defendant's father.
52. Entry No. 10 of green card, shows the decree was registered on 15.12.1995, title was issued vide entry 9. Stay of execution entered on 04.01.1996 as entry No. 11. Entry No. 12 – stay of execution order registered on 09.09.1996. entry No. 13 Mutation of title and closure upon subdivision, parcels No. 855 and parcel No. 856. That the Mutation had been facilitated by the court upon a request by his late father; there was no order varying the entry No. 12, Entries No. 14 to 17 were all cancelled and Land Registrar had cancelled 856 and 855 and Reinstated 292. There was Case No. 240/02 before Nakuru High Court which ordered the cancellation of entries 14 to 17.
53. The witness was not sure whether the Registrar had powers to subdivide. The decision of Kapsabet SRMCC No. 133/1995 was quashed by J.R No. 7/1997. The witness stated that he obtained the consent to subdivide. He had transferred to the 2nd Defendant. The order for stay was lapsed.
54. In cross-examination by Ms. Odeyo learned Senior state Counsel for the 3rd Defendant, the witness stated that he exchanged between his late father and Chepkosgei Marisin related to 6.3 acres in Nandi/Chepterit/292 and a property in Kericho; Nandi/Chepterit/292 was measured 9.3 acres; the Land Registrar was not involved in the negotiations between the witnesses' late father and Chepkosgei Marisin.
55. The Land Registrar had not been sued before the Tribunal. The decree had been registered as entry No. 10 on parcel No. 292. That is when the Land Registrar had become aware. There had been a stay of execution order which had not specific length, a substantive motion to the JR was to be filed within 21 days, the application lapsed and the witness proceeded with subdivision in 1998.
56. The subdivision request had been made by the witness's late father and the Land Registrar did not act on his own. Title No. 856 had been sued pursuant to a court order and the Registrar had cancelled it without a court order but the same was Reinstated by the High Court at Nakuru. Entries No. 14 to 17 were as a result of Court Orders, the land had reverted to the witnesses' father and he was registered as the owner and transferred to the 2nd Defendant; upon production of all documents. The witness confirmed he had not been charged with the Land Registrar on the fraud.
57. On re-examination the witness stated that: Entry No. 8 on the green card Obadiah Kirui obtained transfer through transmission but there was no any succession cause. In Nakuru Misc. Application No. 240/02 Obadiah Kirui had been a party and participated therein and there was no appeal by the decision of Visram J. The witness indicated that he filed a succession cause upon the demise of his father and Nandi/Chepterit/856 was transmitted to him.
58. There was a Ruling by Muga Apondi J as well a case before CM Nakuru; a Court of Appeal case Nairobi Civil Application (Appeal No. 68/2004) Obadiah Kirui Vs. Peter Rono. He had transferred to his Company not to escape liability but there was no Land Control Board consent for the exchange. No Agreement for the 9.3 acres; between Kipkosgei Marisin and Obadiah Kirui. There can be no Sale of land before succession in the case of death of the registered owner.
59. With the testimony of this sole witness the 1st and 2nd Defendants case.

3rd Defendants Case And Evidence

60. In its Defence dated 2nd July 2013, the 3rd Defendant who was joined in the proceedings vide the further Amended Plaintiff, denied the allegations of fraud pleaded at 10 of the Further Amended Plaintiff, and



- pleaded that Nandi/Chepterit/856 was registered in the name of the 2nd Defendant who was issued with a title deed on 17.06.2011. That Notice before institution of the suit was not issued and served upon the 3rd Defendant.
61. The 3rd Defendant called 1 witness, DW2, the Land Registrar Nandi County Ms. Judith Cherotich who testified as follows;
- i. That Registrar of Nandi/Chepterit/292 was opened on 27.10.1970 and was registered in the name of Obadiah Kipruto Kirui on 05.06.1995, and a title deed issued on the same day as evidenced by entries No. 8 and 9 of the copy of the register where paragraph 6 stated that the court shall all subdivisions and transfers documents in favour of the plaintiff.
 - ii. The Land Registrar had not been charged with fraud in respect of the subdivisions neither cited for contempt of court in respect of entries 11, 12 and 13 on the green card of Nandi/Chepterit/292. The Land Registrar was only exercising their mandate.
 - iii. Entry No. 10, shows a decree in favour of Kiprono Tegeri awarding him 6.3 acres, and a subdivision was conducted. A stay of execution order was registered as entry No. 11 and 12. Order was dated 05.09.1996, and stated that “substantive application was to be filed within 21 days of the said order” issued in Eldoret Misc. Civil Application suit 265/1996.
 - iv. That the stay order was only 21 days. It was time bound.
 - v. Entry No. 13, Mutation registered on 10.12.1998 way past the order of stay. P.Exhibit No. 9 is the mutation from for entry No. 13. The mutation from was signed by the Resident Magistrate court, as appearing in the decree dated 15.12.1995 in Kapsabet Civil Case No. 133/1995.
62. On cross-examination by Mr. Mwetich for the Plaintiff, the witness stated that she was an Advocate of the High Court and was aware of court processes, although she was not sure of the mode of challenging a decision. In a J.R matter, leave has to be sought, and a substantive application thereafter filed, the witness was not aware applications for leave and substantive are separate. She stated Land Registrar can cancel register when there is fraud. Parcels 855 and 856 were cancelled at entry 14 by a court order from Resident Magistrates court at Kapsabet Civil Case NO. 133/1995 on 05.02.2011. Subdivisions and mutations of 292 was registered on 10.12.1998. Mutation pursuant to an award through Civil Case No. 133/1995 the same court that allowed the subdivisions also cancelled them at entry No. 14.
63. Entry No. 18 order quashed entries No. 14, 15, 16 and 17, same was issued in Nakuru High Court Misc. Application No. 240/2002. The witness did not have the order reinstating parcel No. 292 in entry No. 14. The witness could not confirm the basis of entry No. 14. The Land Registrar confirmed that he had not colluded with the Defendants and was following court orders.
64. On re-examination by Ms. Odeyo the witness stated that the order of stay, is granted when a party applies for JR substantive application has to be filed within 21 days. The leave lapsed as the substantive application was not filed within 21 days.
65. The witness stated that the orders quashing entries 14 – 16 are not in the parcel file, and she could not confirm whether they existed, but that she had registered everything in accordance with the court order.
66. After the testimony of the sole witness on behalf of the 3rd Defendant, the 3rd Defendant’s case closed.
67. Parties were directed to file her written submissions on the matter. The rival submissions are as hereunder summarized.



Plaintiff's Submissions

68. The plaintiff framed and submitted on eight issues are herefollows:
- i. On issue (a) the Plaintiff has framed the issue as to whether there was any legal and valid agreement for exchange of land parcel known as Nandi/Chepterit/856 by the legal Tegerei. Under this issue the plaintiff submits that the late Tegerei having not been the registered owner of (Kericho Kipchorian Lelu Block 4/Mutaragon 405) he did not have capacity to exchange the said property with Nandi/Chepterit/292. In support of this position the Plaintiff cites the decision in the case of Joseph K. Cheronon Vs. Kiplagat Kimitei (1995) JELR.
 - ii. On issued b, the Plaintiff framed the same as whether the Defendants can legally challenge the contract between the late Obadiah Kirui and Chepkosgei Marisin.
 - iii. The Plaintiff submits that the late Obadiah Kirui had entered into a valid Agreement with Chepkosgei Marisin and that the validity of the succession proceedings is not in issue herein. Having established privity of contract the plaintiff submits that the Defendants cannot claim otherwise.
 - iv. On issue C, whether the title to land parcel known as Nandi/Chepterit/856 was legally and procedurally registered in the name of Tegerei Kiprono, the plaintiff submits that the Registration of Kiprono Tegerei was illegal, unprocedural, since the registration to Obadiah Kirui, that Rael Chepngetich and Chepkosgei Marisin testified in favour of the plaintiff confirming the sale of the property to Obadiah Kirui.
 - v. That notwithstanding the subsisting order of stay or execution, Kiprono Tegerei was registered as the proprietor making the registration unprocedural and thus illegal.
 - vi. Issue No. 4, whether the suit is Resjudicata.
 - vii. The Plaintiff submits that the suit was never conclusively litigated, since the other matters were all judicial review matters which challenged the procedure but did not go into merits of the suit.
69. On the strength of the above the Plaintiff submits for grant of the prayers in the Further Amended Plaint.

1st And 2nd Defendant's Submissions

70. The 1st and 2nd Defendants filed two sets of submissions, one set of submission was filed on 12.11.2014 without the benefit of the Plaintiff's submission which were filed on 19th November 2024, prompting on second set of submissions filed on 2nd December 2024.
71. The 1st and 2nd Defendants have framed and submitted on the following 4 issues: -
- i. Issue 1, whether documents only marked for identification can be considered as evidence.
 - ii. The 1st and 2nd Defendant submit that the Plaintiff cannot place reliance on the Ruling by Hon. Lady Justice Nambeye dated 4th October 1997, as the production of the said Ruling had been objected to and the same was marked as PMFL.1; and hence the same was not an exhibit. In support of this limb of submission, they have cited the decision in the case of Kenneth Nyaga Mwige vs Austin Kiguta and 2 Others.
 - iii. The 1st and 2nd Defendant have also framed the issue as to whether the matter is Resjudicata and/or Subjudice. On this issue they submit that the doctrine of Resjudicata is founded on



public policy as embodied in Section 7 of the Civil Procedure Act. They place reliance on the decision in the case of John Florence Maritime Services Limited and Another vs. Cabinet Secretary Transport and Infrastructure and 3 Others (2021) KESC 39 KLR where the court held inter alia;

- a. There is a former judgment or order which is final.
 - b. The judgment or order was final.
 - c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties and
 - d. There must be between the first and the second action identical parties, subject matter and cause of action.
- iv. The 1st and 2nd Defendants submit that the suit is Resjudicata in view of Kapsabet SRMCC NO. 133 of 1995 and Nakuru High Court Misc. App. No. 240/2004 which determined the ownership and conclusively addressed the validity of the Defendants title.
 - v. They further cite the decision in the case of Ngugi vs. Kinyanjui and 3 others which held inter alia “Any decision reached if not set aside, it can only be challenged in an inferior court, tribunal or in the same court except in case of review.”
 - vi. On issue number 3, the 1st and 2nd Defendants, submit on who owns the suit land, Nandi/ Cheperit/856, and submit there was no transmission of the suit land to Chepkosgei Marisin from the Estate of Kipkoskei Marisin to enable Chepkosgei Marisin transfer good tile to Obadiah Kirui and that Chepkosgei Marisin dealt with the property contrary to Section 82 (a) (ii) of the Law of Succession Act and further place reliance on the decision in the case of the Estate of Jamin Inyanda Kadambi (deceased)2021 eKLR.
 - vii. On issue number 4, the 1st and 2nd Defendant submit that under Section 34 (1) court orders affecting land such as prohibition or restrictions are instruments that must be registered so as to bind 3rd parties. They further submit that unregistered order cannot form the basis of a claim of an innocent third party who transacts in reliance on the green card. To buttress the point, they have cited the decision in the case of Gitwe any Investments Ltd Vs. Tajmal Ltd and 3 Others (2006) eKLR.
72. On the strength of the above submissions the 1st and 2nd Defendants submit for the dismissal of the Plaintiff’s Case.

3Rd Defendant’s Submissions

73. The 3rd Defendants have framed and submitted on 4 issues.
- i. On issue 1, whether the suit is Resjudicata the 3rd Defendant whilst placing reliance on Section 7 of the Civil Procedure submits on the strength of D.Exhibit1 the ruling of Justice Visram in Nakuru High Court Civil Application No. 240/02 that the parties slightly different the subject matter is the same, and that this suit is a non-starter and the issues therein were executed and implemented.
- the issue of ownership having been raised and settled in the Nakuru High Court matter, rendering this matter as Resjudicata.



To buttress the point of Resjudicata the 3rd Defendant cites the decision in the case of Independent Electoral and Boundaries Commission vs. Maina Kai and 5 Others (2017) eKLR as well as E.T Vs Attorney General (20212) eKLR.

The 3rd Defendant further submitted on each element to be proven on Resjudicata.

- ii. On issue No. 2, the 3rd Defendant submits that after the court Ruling in Nakuru High Court Misc Civil Application 240/2002 the ownership of Nandi/Chepterit/292 was reinstated to Mr. Tegerei as evidenced by the green cards vide entry No. 6 of P.Exh 13.
- iii. That vide Ruling delivered by Justice Dullu on 11.02.2004, the learned Judge had declined to confirm injunctive orders in the matter on the basis that the Ruling in Nakuru High Court Misc. Civil Application No. 240/2002 had not been challenged.

The 3rd Defendant submits that upon demise of Kiprono Tegerei, the 1st Defendant took out succession proceedings and land transferred to him, thereafter he transferred it to the 2nd Defendant.

- iv. Thus, Nakuru High Court Misc. Civil Application Number 240/02 confirmed ownership of Nandi/Chepterit/856 to Kiprono Tegerei, never challenged the said case.
- v. On issue No. 3, the 3rd Defendant framed the issue of the effect of not registering an order on the green card. The 3rd Defendant submits that the entry No. 13 in P.Exhibit 4 was entered 2 years after leave had been granted and that the leave only ought to have been in force for 21 days; since stay could not operate separately from the leave that lasted for 21 days.
- vi. On the effects of not producing a document issue No. 4 the 3rd Defendant submits placing reliance on the decision in the case of Des Raj Sharma vs. Reginam (1953) 19 EACA 310, as well as the decision in the case of Kenneth Nyaga Mwige vs. Austin Kiguta and 2 Others 2015 (eKLR), as well as Finmax Community based Group and 3 Others vs. Kericho Technical Institute (2021) eKLR that a document marked for identification is not an exhibit.
- vii. The 3rd Defendant further submits that the Plaintiff did not prove any fraud against the Defendants and that he fell short of the required burden and standard of proof at Sections 107, 109 and 112 of the Evidence Act and that the suit is speculative and ought to be dismissed.

74. Before framing issues for determination, a number of issues were settled in the course of the trial which the court notes as follows;

1. The Plaintiff is the registered proprietor of Nandi/Chepterit/855 and is in possession of the same.
2. The Plaintiff lost possession of Nandi/Chepterit/856 to the 1st Defendant who transferred the same to the 2nd Defendant.
3. The suit property, Nandi/Chepterit/292 and its subdivision Nandi/Chepterit/855 and Nandi/Chepterit/856 have been litigated before Kapsabet SRMCC No 355 of 1995., before Eldoret High Court in Misc. Civil Application No s256 of 1996 and 7 of 1997 and before Nakuru High Court Application No. 240/2002.
4. That the decisions by the High Court both in Eldoret and Nakuru were not set aside by the Court of Appeal.



Issues For Determination

75. Having analyzed the pleadings, the evidence on Record, submissions by the parties on their issues for determination and authorities cited by the parties and having looked at relevant provisions of the law, the court frames the following as issues for determination;
- i. What is the import of the previous court cases in respect of Nandi/Chepterit/292 and its subdivisions, Nandi/Chepterit/855 and 856,
 - a. Eldoret High Court Misc. Application No 256 of 1996
 - b. Eldoret High Court Misc. Application No7 of 1997
 - c. Nakuru High Court Misc. Application No. 240/2002.
 - (aa) do they have a bearing and relevance in this suit, if so, do they render
 - (bb) Do this suit Resjudicata?
 - ii. Whether or not the Plaintiff has proven their case.
 - iii. Whether or not the Defences should be upheld?
 - iv. What reliefs ought to issue?
 - v. Who should bear the costs of the suit.

Analysis And Determination

76. By pleading at paragraphs 8, 9 and 12 of the 2nd further Amended Plaintiff of the previous suits to wit Eldoret High Court Misc. Application No. 256 of 1996, Eldoret High Court Misc. Application No. 7 of 1997 and Nakuru High Court Misc. Application No. 240/2002, on the part of the plaintiff and at paragraphs 13 and 19 of the 1st and 2nd Defendants statement of Defence, the plaintiff and the 1st and 2nd Defendants were inviting the court to make findings on the import and relevance of the previous suits and resulting orders in this matter.
77. Indeed, Section 43 of the Evidence Act which provides as follows;
- “ 43. The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial may be proved when the question is whether such court ought to take cognizance of such suit or to hold such trial.”
78. It is the Plaintiff’s case that the Kapsabet Land Dispute Tribunal award which was in favour of Kiprono Tegerei and which was adapted in Kapsabet SRMCC No. 335/1995, was successfully challenged by himself when he obtained leave which was to operate as a stay vide Eldoret High Court Misc. Application No. 256 of 1996 and later the said award was quashed in Eldoret Misc. Civil Application No. 7/1997 thus there was no basis of the subdivision and the plaintiff is the rightful owner.
79. The Plaintiff produced a copy of the green card as P.Exhibit 4, and at entry No. 12 thereof, showing the registration of the said order.
80. Section 107 as read together with Section 109 of the Evidence Act places the burden of proof as to the proof of a particular fact by the person who wishes the court to believe in the existence of the said fact and enter judgment on it.



81. Thus, in so far as the Plaintiff sought judgment on the fact that Eldoret Misc. Civil Application No. 7/1997 quashed the award of the Kapsabet Lands Dispute Tribunal, that burden did not shift from the Plaintiff the question thus will be did the Plaintiff discharge this burden?
82. The Plaintiff marked for identification the Ruling By Lady Justice Nambuye in Eldoret Misc. Civil Application number 7 of 1997 as PMFI.1. He did not produce the said Ruling as an exhibit in these proceedings. The effect of non-production of a document as an exhibit is that the same is not an exhibit hence any fact that was to be proved by the said exhibit is thus not proved. In arriving at the said conclusion, I am guided by the decision in the case of Kenneth Nyaga Mwigie vs. Austin Kigura and 2 Others, 2015 (eKLR) as cited by the Defendants where the court held inter alia; “18. The mere marking of a document for identification does not dispense with to formal proof thereof. How does a document become part of the evidence. Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved.
- “ 19. The marking of a document is only for purposes of identification and is not proof of the contents of the documents....a document is not proved merely because it has been marked for identification.
20. Once a document has been marked for identification, it must be proved....
-If the document is not marked as an exhibit, it is not part of the record, if admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account.
83. Similarly in Des Raj Sharma vs. Reginam 1953 19 EACA 310.....it was held inter alia “that there is a distinction between exhibits and articles marked for identification; and that the term exhibit should be confined to articles which have been formally proved and admitted in evidence....”
84. The Plaintiff thus having failed short of the requirements of producing of the document as an exhibit under Section 107 as read together Section 109 of the Evidence Act cannot seek the existence of the said order to act in his favour under Section 43 of the Evidence Act.
85. On the other hand, the 1st and 2nd Defendants have placed reliance of the Ruling by Visram J in Nakuru Civil Application No. 240/2002 and produced the same as an exhibit being D.Exhibit No. 1 as captured at paragraph 48 of this judgment. The 1st and 2nd Defendants thus met the evidential burden placed under Section 107 and 109 of the Evidence Act and having submitted that the case is Resjudicata have rightfully invoked Section 43 of the Evidence Act, for the court to look into whether that Ruling has relevance and bearing in this suit under that Section 43.
86. The court thus in answer to issue number (i) (a) is that the Ruling and order in Eldoret High court Civil Application No. 7 of 1997 having not been proven has no bearing and no relevance in this suit; and that Ruling and order, Nakuru High Court Misc. Civil Application No. 240/2002, bearing and a relevance in this matter.what then is the relevance and bearing of Nakuru High Court Civil Application No. 240/2002, to this matter, the first relevance of the said Ruling (D.Exhibit No. 4) was captured by Justice George Dulu in his Ruling in this matter, and while dismissing an Application for injunction, the learned Judge observed inter alia “On whether I should grant injunction in this matter pending hearing of the suit, I have to consider the probability of success for the Applicant, whether the Applicant will suffer irreparable loss or the balance of convenience for the affected parties. Considering that the ruling of Justice Visram is the latest ruling on this matter which was given on 29th July 2003 and there being no indication of any challenge having been fled on that ruling. I consider that this is not



an appropriate case for granting the injunction sought. The decision of justice Visram was in favour of the respondent.....”

87. The second relevance and bearing of the now proven previous orders, to wit, Nakuru High Court Misc. Civil Application No. 240/2002, is that having proven the Ruling and order under Section 43 of the Evidence Act, the provisions of Section 44 of the Evidence Act came into play bearing in mind that the 1st and 2nd Defendant at paragraph 27 of their Defence pleaded that the issues in this suit had been previously adjudicated upon, in effect pleaded the plea of Resjudicata.
88. All the parties herein had framed the issue of Resjudicata as the one of the issues for determination and the court framed the same as sub-issue (i) (bb) and the court shall now examine the same.
89. Having found that the Nakuru High Court Misc. Civil Application No. 240/2002 was proven under Section 43 of the Evidence Act and that the provisions of Section 44 of the Evidence Act now apply. The said section provides as follows;
- 44 (1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely is admissible when the existence of any such legal character or the title of any such thing is admissible.
- (2) Such judgment, order or decree is conclusive proof.
- (a)
- (b)
- (c)
- (d) that anything to which any person to be so entitled was the property of that person at the time from which suit such judgement, order or decree declares that it had been or should be his property”
90. The Ruling of Visram J delivered on 29th July 2003 in Nakuru High Court Mis Civil Application No. 240/2002 reinstated Nandi/Chepterit/855 and Nandi/Chepterit/856, and in terms of Section 44 of the Evidence Act, the same is conclusive proof of ownership of the said property which it restored to Obadiah Kirui and Kiprono Tegerei as observed at paragraph 74 of this judgment.
91. It follows therefrom that D. Exhibit 4 the Ruling of Justice Visram J, that the issue in dispute in Nakuru High Court Misc. Civil Application No. 240/2002, was the onwership of Nandi/Chepterit/855 and 856, which issue is also directly in issue before this court, and which the Ruling resolved in favour of the original owner Kiprono Tegerei.
92. In the Nakuru Misc. Civil Application No. 240/2002, the Exparte Applicant was Kiprono Tegerei, the original owner of NANDI/ CHEPTERIT/856 herein, and the Respondent was Obadiah Kirui, the original plaintiff herein. The original parties herein were the same in the Nakuru matter.
93. The judgment in Nakuru Misc. Civil Application No. 240/2002 was final and not having been appealed from and was issued by the High Court, a court of competent jurisdiction
94. From the above analysis all the 4 elements of Resjudicata as provided under Section 7 of the Civil Procedure Act and expounded in the John Florence Maritime decision of the Supreme court have been met, thus Rendering this suit Resjudicata, as the court hereby finds, and holds.



95. Having found that the issue of ownership of Nandi/Chepterit/855 and 856 were resolved by the Ruling in Nakuru Misc. Civil Application No. 240/2002 by a court of Competent jurisdiction and concurrent jurisdiction with this court renders this suit as Resjudicata thus the court shall not deal with the other issues that it had framed for determination as the suit is hereby fails
96. The court wishes to acknowledge the industry and dedication of the counsels who appeared in the matter for their well elaborate submissions they put on behalf of their clients, and to commitment to having the matter finalized, special mention to Ms. Odeyo learned Senior State Counsel for her commitment in meeting the timeliness set by court despite a span turbulent indisposition on her part. The court thanks the counsels most sincerely.
97. This matter having filed been initially filed in 2004, was handled by more than 5 judges some of whom have since retired and one in the Apex Court, and the litigants have waited with bated breath for the outcome, despite the delay.
98. In view of the long history of litigation herein, the court orders each party to bear its own costs.

Disposition

99. The suit is hereby dismissed with each party to bear its own costs.
100. Judgment accordingly.

DATED AT KILGORIS THIS 24TH DAY OF FEBRUARY 2025.

HON. M.N. MWANYALE

JUDGE

In the presence of:

Ms. Salim h/b for Mr. Mwetich for the Plaintiff

Mr. Karanja Mbugua for the 1st and 2nd Defendant

Ms Odeyo for the 3rd Defendant.

C/A Emmanuel/ Slyvia

