



**Kotut v Kirui & another (Environment and Land Appeal  
E004 of 2023) [2024] KEELC 4967 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4967 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT AND LAND APPEAL E004 OF 2023  
L WAITHAKA, J  
JUNE 13, 2024**

**BETWEEN**

**LUKA KOTUT ..... APPELLANT**

**AND**

**RICHARD RUTO KIRUI ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Charles Ariba Kutwa  
SPM delivered on 6th September 2023 in Iten SPM ELC Case No. 24 of 2018)*

**JUDGMENT**

**Introduction**

1. Through a judgment delivered on 6<sup>th</sup> September 2023, the learned trial magistrate, Hon. Charles Ariba Kutwa, allowed the plaintiff's suit in the following terms:-
  - “(a). A declaration be and is hereby issued that the plaintiff is the bona fide owner of all that parcel of land known as Kabiemit/Flax Block (Chepkorio)/163 as shown in the original survey of the plot and which parcel of land known as Kabiemit/Flax Block 1 (Chepkorio)/512 was excised and further that the purported subdivision/excision of the latter parcel from the former without the knowledge or consent of the plaintiff who is owner is unjust, illegal, null and void.
  - b) An injunction do issue restraining the 1<sup>st</sup> defendant whether by himself, his successors or assigns or any of them from disposing off, leasing, charging or dealing with the portion of land that has been renamed.



- c) The 2<sup>nd</sup> defendant be and is hereby ordered to rectify the register of land by cancelling the subdivision and or allocation of that portion of land that has been renamed Kabiemit/Flax Block 1 (Chepkorio)/512 and the same do revert back to the plaintiff so as to form an undivided parcel known as Kabiemit/Flax Block 1 (Chepkorio)/163 measuring 6.9 acres.
  - d) Costs to the plaintiff.
2. The circumstances that led to the making of that decision are that the plaintiff had instituted a suit in the lower court to wit Iten SPM ELC Case No. 24 of 2018 seeking judgment against the defendants in terms of the judgment delivered by the trial court.
3. Through his amended plaint, dated 15<sup>th</sup> January 2016, the plaintiff contended that the parcel of land known as Kabiemit/Flax Block 1 (Chepkorio)/512 was irregularly, illegally, unprocedurally, fraudulently and through a corrupt scheme hived off from his parcel of land known as Kabiemit/Flax Block 1 (Chepkorio)/163 at a time and facts unknown to him. The particulars of the pleaded fraud and/or irregularity on the part of the 1<sup>st</sup> defendant are listed in paragraph 4 of the plaint, thus:-
  - (a) Corruptly influencing members of Chepkorio Farmers' Cooperative to be included as a member No. 512;
  - (b) Causing and/or influencing the creation of parcel No.512 when the same did not exist at the time of demarcation;
  - (c) That plot 512 could not and did not exist between parcel No.163 and 167 in view of the fact that all the parcels within Kabiemit/Flax Block 1 (Chepkorio) Map sheet No.1 part of 104/1/16 and 17 contained plots and/or parcels between No.1 to 194 except No.513 and 514 which are a subdivision of plot No. 37.
  - (d) Altering the registry index map to create land parcel No.512
  - (e) Hiving off a portion of the plaintiff's land measuring approximately 1 acre.
4. It was the plaintiff's case that he acquired parcel Kabiemit/Flax Block 1 (Chepkorio)/163 by virtue of having been a member of Chepkorio Farmers' Cooperative Society which was established to buy land and distribute land bought from Wellwood and that he was allocated 5 acres and bought additional parcels of land from other members thereby obtaining approximately 6.9 acres.
5. The 1<sup>st</sup> defendant filed a statement of defence, amended on 22<sup>nd</sup> January 2016, denying the averments contained in the plaint and the pleaded particulars of fraud, irregularity and corruption.
6. The 1<sup>st</sup> defendant contended that matters of Chepkorio Farmers' Cooperative Society cannot be raised when the Cooperative Society is not a party to the suit; that he is the sole absolute proprietor of Kabiemit/Flax Block 1 (Chepkorio)/512 measuring 0.4047 hectares having become proprietor thereof on 26<sup>th</sup> August 1998; that at the time he acquired interest in his parcel of land, the register of the land showed that the land was registered in the name of the Government of Kenya and that he has enjoyed peaceful use of the land since 26<sup>th</sup> August, 1998.
7. Terming the plaintiff's claim time barred, the 1<sup>st</sup> defendant pleaded that he has no interest in plot No. Kabiemit/Flax Block 1 (Chepkorio)/163 and that his land was never hived off parcel Kabiemit/Flax Block 1 (Chepkorio)/163.
8. The 1<sup>st</sup> defendant further contended that issues of ownership of shares of Chepkorio Farmers' Cooperative Society ought to be dealt with by the Cooperative Society Tribunal and not this court.



## Evidence

### The Plaintiff's Case

9. Richard Korir P.W.1, relied on his statement dated 10<sup>th</sup> September, 2021 after it was adopted as his evidence in chief.
10. In cross examination, he stated that his parcel of land is 163; that the defendant took the land in 2010; that the defendant's parcel of land, plot No. 512 was curved from his land and that he is claiming the defendant's parcel.
11. In re-examination, he stated that he has not collected the title deed for his parcel of land, plot No. 163 and maintained that he became aware of the defendant's title deed in 2010.
12. Charles Koech, relied on his witness statement dated 10<sup>th</sup> September 2021 after it was adopted as his evidence in chief.
13. He inter alia stated that the defendant took the plaintiff's land, 2 acres in 2010.
14. Edward Limo Chebor, relied on his statement dated 10<sup>th</sup> September 2021 after it was adopted as his evidence in chief.
15. In cross examination, he informed the court that he was the Vice Chairman of the Society until 2019; that the plaintiff's father bought 5 acres of land from the society's members and that because the plaintiff's land was swampy, he (the plaintiff) was given more land.
16. Rokocho Chesirori, relied on his witness statement dated 10<sup>th</sup> September 2021 after it was adopted as his evidence in chief
17. In cross examination, he stated that he knows the plaintiff but does not know the defendant.
18. John Gumen, informed the court that the suit land belongs to the plaintiff and that he does not know the defendant.

### Defendant's Case.

19. D.W.1 Luka Kotut, relied on his statement dated 8<sup>th</sup> June 2015 after it was adopted as his evidence in chief.
20. In cross examination, he acknowledged that he was not a member of the society. He informed the court that he obtained title deed for his parcel of land, plot No. 512 in 1998 and that he had been in the land for over ten years. He was given the land by the society's committee members. He could not remember when he fenced his parcel of land.
21. D.W.2 Wilson Chesang, relied on his statement dated 23<sup>rd</sup> November 2022, after it was adopted as his evidence in chief. He informed the court that he is aware that the defendant was issued with a title deed. He produced the documents contained in the defendant's list of documents, dated 23<sup>rd</sup> October, 2022 as Dexbt 1, 2 and 3.
22. In cross examination, he stated that the defendant was not a member of the society; that the minutes he produced do not show how the defendant was cooperated and that from the minutes each shareholder has a number, receipt number; that plot No.512 has no receipt number and that the plot is the only one with alterations. He further stated that he had no agreement to show that the defendant advanced



the society Kshs. 69,000/-; that they hived off the defendant's parcel from the plaintiff's from and that they did not hold an annual general meeting to authorize them to hive off the plaintiff's parcel of land.

23. It is on the basis of the foregoing pleadings and evidence that the learned trial magistrate entered judgment in favour of the plaintiff/respondent. In so doing, the learned trial magistrate inter alia held/observed: -

“...It was not in dispute that the 1<sup>st</sup> defendant was not a member of Chepkerio Cooperative Society. He has no receipts nor transfer documents from the Society to show he was legally given 512. A look at the Society's records and minutes contained in the defendant's list of documents dated 23<sup>rd</sup> November 2021 shows the 1<sup>st</sup> defendant land was hived off from the plaintiff's land without following due process. A perusal of the records shows the 1<sup>st</sup> defendant was given 0.375ha. However, the title deed issued to the 1<sup>st</sup> defendant shows he owns 0.4047ha. One Wilson Chesang, was not able to give an explanation for this discrepancy. The court can only conclude this was a massive conspiracy between some officials of the Society and the 1<sup>st</sup> defendant to defraud the plaintiff.

The plaintiff led evidence that the land was initially owned by a Society. He also confirmed that the 1<sup>st</sup> defendant was not a member of the Society. He explained that the business of a Society is carried out in accordance with approval of the members in a meeting in which a Cooperative officer is present; that in this case there are no minutes approving the loan of Kshs. 69,000/- allegedly given to the Society by the 1<sup>st</sup> defendant and that the plaintiff's evidence that the 1<sup>st</sup> defendant's land was hived off from his land without his consent and knowledge is credible. I therefore fault the transfer on two grounds; first, because in accordance with Sections 27 and 28 of the Cooperative Society Act, decisions involving the transfer of land require to be voted upon by members of the society at a duly convened Annual General Meeting and a resolution thereon passed.

From the evidence on record, this was not done. Secondly, it is unclear from the 1<sup>st</sup> defendant's testimony whether the transfer was by way of a consideration of Kshs.69000. either way, there are no minutes or sale agreement signed evidencing the transaction.

It is the finding of the court that the transfer of the plaintiff's land to the 1<sup>st</sup> defendant was illegal. The plaintiff proved fraud to the required standard....I find that the 1<sup>st</sup> defendant was one of the chief architects of fraud having executed transfer of the suit land in favour of himself knowing too well that the land belonged to the plaintiff and knowing too well that he had no interest or right in the suit land. I also find that the title registered in the name of the 1<sup>st</sup> defendant is a product of fraud and in the eyes of the law is tainted and must be cancelled”.

24. Aggrieved by the decision of the trial court, the 1<sup>st</sup> defendant appealed to this court on the grounds that the learned trial magistrate erred by: -
- i. Failing to find that the 1<sup>st</sup> respondent's claim to land parcel Kabiemit/Flax Block 1 (Chepkorio)/512 was time barred by dint of the provisions of Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya;
  - ii. Failing to find that the 1<sup>st</sup> respondent had not proved his case to the required standard;
  - iii. Failing to find that the court was devoid of jurisdiction to entertain the suit by dint of Section 76 of the Cooperative *Societies Act*, Cap 490 Laws of Kenya.



25. Pursuant to directions given on 22<sup>nd</sup> February 2024, the appeal was disposed of by way of written submissions.

## Submissions

### Appellant's Submissions

26. In his submissions, dated 21<sup>st</sup> March 2024, the appellant submits that the plaintiff did not prove his pleaded case; that he is the registered proprietor of parcel number 163 measuring 6.9 acres; that the plaintiff could not have proved that he is the registered owner of plot No.163 because he did not produce a certified extract of the register for plot No. 163. In that regard, reference is made to Section 32(2) of the Registered Land Act (repealed) and submitted that without production of the register, the court was devoid of jurisdiction to order rectification of the register. Further, reference in that regard, is made to the provisions of Order 21 Rule 6 of the Civil Procedure Rules, 2010.
27. The appellant submits that the trial court erred by failing to address its jurisdiction under the said provisions of the law and by failing to refrain from rendering judgment. Based on the decision in the case of Dubai Bank Kenya Ltd v. Kwanza Estates Ltd (2015)e KLR, it is submitted that the issue of the court's jurisdiction can be raised even on appeal.
28. It is reiterated that the plaintiff neither tendered relevant documentary evidence nor produced them in evidence.
29. It is further submitted that the plaintiff/respondent did not prove fraud on the part of the appellant with the members or officials of the Cooperative Society as pleaded in paragraph 4 of his amended plaint.
30. The learned trial magistrate is faulted for determining that the 1<sup>st</sup> defendant was one of the chief architects of the fraud having executed a transfer of the suit land in his favour knowing too well that he had no interest or right in the suit land and by holding that the title registered in the name of the appellant is a product of fraud in the eyes of the law, is tainted and must be cancelled.
31. The learned trial magistrate is said to have misdirected himself on the issue of acquisition of the land over the issue of agreements and receipts. According to the appellant, the minutes of the Society were good enough evidence of acknowledgment of indebtedness by the Society.
32. The appellant further submits that issues about resolution of the society and minutes sanctioning the same were of no consequence as they are internal arrangements of the society which as an outsider, he was not bound to be concerned with.
33. On the issue of failure to produce a sale agreement between himself and the society, the appellant points out that the transaction took place before amendment of the Law of Contract Act was done to require for written agreement and based on the decisions in the cases of Rubo Kipngetich Arap Cheruiyot v. Peter Kiprop Rotich (2013)e KLR and Kivindu & Another v. Musau & 4 others (Civil Appeal 233 of 2020) (2023) KECA 1015 (KLR)(28 July 2023) (Judgment) submits that a written sale agreement was not a requirement of law as at the time he obtained interest in his parcel of land.
34. Arguing that only the officials of the cooperative society could answer to the pleaded fraud, the appellant submits that failure to add the society to the suit militated against proof of the pleaded fraud.



35. It is further submitted that the plaintiff/respondent did not prove the pleaded fraud to the required standard. On standard of proof, reference is made to the case of Central Bank of Kenya Ltd vs. Trust Bank Ltd & 4 others Nairobi CA no. 215 of 1996 UR where the Court of Appeal stated: -

“The appellant made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in the ordinary civil case” and reiterated that the plaintiff/respondent did not prove his pleaded case to the required standard.

36. Arguing that the dispute was about acquisition of shares in a cooperative society, the appellant submits that if the Plaintiff/respondent had issues over the same ought to have presented a claim before the Cooperative Tribunal in line with Section 76 of the Cooperative Societies Act.

### **Respondent’s Submissions**

37. In his submissions, dated 14<sup>th</sup> May 2024, the plaintiff /Respondent gives an overview of his pleaded case and identifies three issues for the court’s determination. These are:-

- a. Whether a certificate of title is prima facie evidence of title;
- b. Whether his suit is time barred; and
- c. Whether the trial court had jurisdiction to hear and determine his case.

38. On whether a certificate of title is prima facie evidence of title, the plaintiff/respondent acknowledges that the appellant is the registered proprietor of parcel number 512 but submits that the title is under challenge by himself on the ground that it was fraudulently obtained. Based on the decision in the case of Munyu Maina vs. Hiram Githiha Maina (2009) e KLR, the plaintiff /respondent submits that it is not enough for the appellant to dangle the instrument of title as proof of ownership of the suit land.

39. The plaintiff/appellant submits that the appellant must go beyond the instrument and prove the legality of the title: - (show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register). Further reference is made to the case of Elijah Makeri Nyangwra vs. Stephen Mungai Njuguna & Another 2013) e KLR where based on Section 26 (1) (a) (b) of the Land Registration Act, it was held that title is challengeable where it was obtained by fraud or misrepresentation to which the person is proved to be a party or where the certificate of title was acquired through a corrupt scheme.

40. The plaintiff/respondent further submits that he proved that the title held by the appellant was acquired through a corrupt scheme in that at the time the suit property was being allocated, the appellant was not a member of the society. Based on Section 17 of the Cooperative Societies Act and Rule 13(2) of the Cooperative Societies Rules 2004, the plaintiff/respondent submits that the applicable law and procedures were not complied with in the purported allocation of the suit property to the appellant, hence the allocation was unprocedural and illegal. Reference is made to the case of Mary Wanjiku Kihugu & 6 Others vs. Regency Cooperative Savings and Credit Society Limited (2021)e KLR and submitted that the cooperative societies committee acted ultra vires by borrowing money from a none member of the society.

41. The plaintiff/respondent submits that the decision to allocate the suit property to the appellant offends Section 3(3) of the Law of Contract Act in that no written agreement was prepared in respect thereof. In that regard, the plaintiff/respondent has referred to the cases of Rainald Schumacher vs. Aubrey Garth Monsey (2008) e KLR; Laikipia Mifugo Co. Ltd vs. Nanyuki Ranching Co. Ltd (2007)e KLR



- and John Michael Wanjao vs. Alubala Abanayo and Arubi (2011) e KLR in which courts declined to enforce contracts which violated Section 3(3) of the *Law of Contract Act*.
42. The plaintiff/respondent further points out that the consent of the land control board was not obtained and submits that the provisions of Section 6 and 7 of the *Land Control Act*, Cap 302 Laws of Kenya were also contravened.
  43. The plaintiff/respondent further submits that the decision to hive off his parcel of land alone was biased, unlawful and discriminatory.
  44. On whether the suit was time barred, the plaintiff /respondent submits that he gave evidence and confirmed that he only became aware of the fraud in 2010.
  45. Based on the provisions of Section 26 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, the plaintiff /respondent submits that his case was not time barred as he moved to court immediately he became aware of the fraud committed by the appellant on his parcel of land.
  46. As to whether the court had jurisdiction to hear the case he presented before it, the plaintiff/respondent has made reference to Section 76 of the Cooperative *Societies Act* and the case of Freizer Mumo vs. Jonah Kariithi Daniel and Magdalene Wayua Daniel (Sued as the Representative of the estate of Daniel Mulwa & 3 others) and the case of Kennedy Kimani Ndarwa v. Methi & Methi Swami Farmers Cooperative Society Limited & another (2016) e KLR and submitted that the Cooperative Tribunal does not have jurisdiction to make a declaration on the bona fide owner of a particular parcel of land.
  47. In conclusion, the plaintiff/respondent submits that the trial court had power to intervene and grant the orders he sought.

### **Analysis and Determination**

48. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see the cases of *Selle & another vs. Associated Motor Boat Co. Ltd* (1968) E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
49. It is not in dispute that the appellant was not a member of Chepkorio Cooperative Society. His title for parcel number 512, measuring 0.4047 hectares was issued on 26<sup>th</sup> August, 1998.
50. The circumstances surrounding issuance of the appellant's title deed in respect of parcel number 512 are that he advanced a loan of Kshs. 69,000/- to the committee of the cooperative society. The borrowing was not sanctioned by the members of the cooperative society. There was no resolution of by the cooperative society that the debt would be paid through giving the appellant land and if so how much land.
51. The decision to give plot number 512 appears to have been made by the committee of the cooperative society without the sanction or approval of the cooperative societies members through an annual general meeting as by law required.
52. Copies of the society's records which were produced in evidence by the appellant show that plot number 512 was hived off plot No.163, formerly 123, which belonged to Richard Kirui, the plaintiff/respondent's father.



53. The minutes of the cooperative society of 27<sup>th</sup> June 1998, which were produced in evidence by the appellant show that plot No. 512 was identified as a blank plot and resolved that it be given to Luka Kotut (the appellant) since he lent the society Kshs. 69000 to settle survey fees and other farm expenses.
54. It is noteworthy that there are overwriting on that minute.
55. The minutes of 21<sup>st</sup> October 2014 show that the plaintiff /respondent had lodged a complaint over hiving off plot No.512 from 163. Because the plaintiff/respondent did not attend that meeting, it was resolved that the plaintiff/respondent and the appellant continue occupying their respective parcels.
56. There is a remark on the cooperative society's register that there is No 512 from the block/parcel number 123 which was originally owned by Chepsoi Cherutich, Kipyego Chepsongol, Chirchir Chepkemei and Joseph Kimurei Morogo all under the umbrella of Richard Kirui (the plaintiff/respondent's father).
57. Parcel No. 123 was later renamed 163 and amended to include parcel number 512. According to the amended record for plot No. 123, plot No.163 measuring 1.86 ha belongs to Richard Kirui (the plaintiff/respondent's father) while plot No. 512 measuring 0.375 ha belongs to Luka Kotut (the appellant).
58. The title deed issued to the appellant for parcel No. 512 measuring 0.4047 ha is not supported by the member's registers which shows that his parcel was 0.375 ha.
59. The evidence adduced also shows that the appellant's title was created from parcel number 123 which belonged to the plaintiff/respondent's father after it was renamed 163. There is no evidence that the plot was created from a blank plot as purported by the cooperative society's committee.
60. There being evidence that the appellant was not a member of the cooperative society and in the absence of any approval by the members of the society for hiving off of the plaintiff/respondent's plot and giving a portion thereof to the appellant, I agree with the learned trial magistrate that the acquisition of the appellant's title 512, was tainted by fraud to which he was proved to be a party hence challengeable under Section 26(1)(a) of the [Land Registration Act](#), 2012.
61. As to whether the plaintiff/respondent's case was time barred, in the special circumstances of this case, where the fraud committed by the appellant and officials of the cooperative society was not discovered until 2010, when time for purposes of Section 7 of the Limitations of Actions Act began to run, I find and hold that the plaintiff's suit was not time barred.
62. On whether the court had jurisdiction to hear and determine the suit filed by the plaintiff/respondent noting that the suit by the plaintiff/respondent touched on ownership of land and not a dispute between a cooperative society and its members as contemplated by Section 76 of the Cooperative [Societies Act](#), I find and hold that it is the court as opposed to the Cooperative Tribunal which had jurisdiction to hear and determine the plaintiff/respondent's case.
63. The upshot of the foregoing is that the appeal has no merit. Consequently, I dismiss it with costs to the plaintiff/respondent.
64. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

**L. N. WAITHAKA**

**JUDGE**



Judgment delivered electronically in the absence of:-

N/A for the appellant

N/A for the 1<sup>st</sup> respondent

N/A for the 2<sup>nd</sup> respondent

Court Assistant: Alex

