



**Thuo v Ahmacha & 3 others (Environment & Land Case  
240 of 2014) [2024] KEELC 4490 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4490 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 240 OF 2014**

**A OMBWAYO, J**

**JUNE 6, 2024**

**BETWEEN**

**SAMUEL NG'ANG'A THUO ..... PLAINTIFF**

**AND**

**YUSUF JUMA AHMACHA ..... 1<sup>ST</sup> DEFENDANT**

**ISAAC MOKAYA MAKORI ..... 2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, NAKURU ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

- 1 The Plaintiffs commenced this suit vide a Plaint dated 18<sup>th</sup> August, 2014 against the Defendants seeking the following orders:
- a. A declaration that the registration of the Parent Suit land herein Nakuru/municipality Block 29/767 (ronda) and issuance of title deed thereto in favour of the 1st Defendant herein was illegal, unlawful and or null and void.
  - b. A declaration that the subsequent subdivision of the Parent Suitland herein Nakuru/ municipality Block 29/767 (ronda) Into Nakuru Municipality Block 29/2284 And Nakuru Municipality Block 29/2285 by the 1st Defendant was illegal, unlawful and or null and void.
  - c. A declaration that the registration of the Suitland herein Nakuru/municipality Block 29/2284 and Nakuru/municipality Block 29/2285 and issuance of title deed thereto in favour of the 1st and or 2nd Defendant herein was and still is illegal, unlawful and or null and void.
  - d. An order for cancellation, revocation, annulment and or rectification of register in respect to the 1st and or 2nd Defendants' title to the Suit lands herein Nakuru Municipality Block



29/2284 and Nakuru /municipality Block 29/2285 with directions that the same be registered in the Plaintiff's name and consequently fresh title documents be re-issued to the plaintiff and in his name.

- e. Demolition and or Eviction orders and or delivery of vacant possession of the Suit lands herein Nakuru/municipality Block 29/2284 and Nakuru/municipality Block 29/2285 to the Plaintiff.
  - f. A temporary and or permanent injunction restraining the Defendants herein jointly and or severally either by themselves, their agents, servants and or any person claiming through them from disposing, alienating and or dealing with the Suit lands herein Nakuru/municipality Block 29/2284 and Nakuru /municipality Block 29/2285 in any manner whatsoever to the detriment of the Plaintiff herein.
  - g. Further and or in alternative to any and or all of the foregoing prayers, an order that the Suit lands herein be valued at market rate and the Plaintiff be compensated for the value thereof and or any other sum/compensation be it in damages and or otherwise as this honorable court may deem fit in the circumstances of this case.
  - h. Costs of this suit.
  - i. Any other relief or order that this court may deem fit and just to grant taking into consideration the nature and circumstances of this case.
- 2 The 1<sup>st</sup> and 2<sup>nd</sup> Defendant entered appearance and filed their statement of defence dated 5<sup>th</sup> November, 2014 where they denied the allegations in the plaint.
- 3 The 3<sup>rd</sup> and 4<sup>th</sup> Defendant filed their statement of defence dated 25<sup>th</sup> August, 2016 where they also denied the allegations in the plaint. They never participated in the proceedings.

#### **Plaintiffs' Case**

- 4 Samuel Nga'nga' Thuo testified as PW1. He testified that he is the landlord and that the case involves plot no. 735. He testified that he bought the land from Joseph Kiprotich Arap Chepkoigat a member of Kalenjin Enterprise. He produced a copy of the sale agreement as PEX 1. He stated that the land belonged to the company. He produced the certificate of ordinary share as PEX2, transfer of share PEX 3, letter of transfer of shares PEX 4, schedule of register of members PEX 5 and ballot paper PEX 6. He testified that Joseph Kiprotich was member 602 and added that for plot no 735 he was given the authority to construct PEX 7. He testified that he constructed a house and the directors confirmed. He further testified that the 1<sup>st</sup> Defendant was claiming ownership. He produced a copy of the minutes as PEX 8, agreement between the Plaintiff and the 1<sup>st</sup> Defendant PEX9, payment receipt for title PEX 10, rates payment PEX 11, survey fees PEX 12, clearance certificate receipt PEX 13, copy of title PEX 14, copy of judgment PEX 15, copy of search dated 31/1/2014 PEX 16, copy of searches dated 4/2/2014 PEX 17 and PEX 18, search receipts PEX19 and letter dated 12/8/2016 PEX 20.
- 5 Upon cross examination by Mr. Ombui for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, PW1 stated that he bought the land in 1997. He admitted that from the statement dated 18/8/2014, he stated that he bought the land in 1997. He stated that he could not recall when the Defendant occupied the land. He further stated that he bought the land in 1977 and added that he was illiterate. He confirmed that he brought the land from Joseph Kiprotich Arap Chepkoigat. He stated that they did so before an advocate and added that he had viewed the land. He further stated that Joseph gave him the share certificate which he admitted that he did not have the original share certificate. He also stated that they went to the company where they did a transfer, his name placed on the registration and the share transferred on



21/4/1983. He stated that the transfer was done at the office of the chief. He further stated that they went to the chief due to the claim by the 3<sup>rd</sup> party and added that he could not recall the name. He stated that the director had a list of members of Kalenjini Enterprise. He denied that the 1<sup>st</sup> Defendant occupied the land in 1977. He stated that the 1<sup>st</sup> Defendant came after he had received the title and added that the plot was transferred from Joseph in 2001. He stated that he got the title in 2001 and later paid the surveyor. He further stated that the 1<sup>st</sup> Defendant entered the land after 2001. He also stated that they went to the Land Tribunal but admitted that he did not know its decision. He stated that he got the title on 13/11/2001. He stated that on 12/2001, he went to the tribunal where they were informed to go to court. He further stated that the tribunal awarded him the land. He added that the Provincial Lands Appeals Committee gave the land to the 1<sup>st</sup> Defendant. He stated that the High court quashed the proceedings and added that he had known the 1<sup>st</sup> Defendant and that the case began after he got the title.

- 6 PW1 was shown PEX 8 where he confirmed that he had not seen the 1<sup>st</sup> Defendant in 1981. He was further shown PEX 9 where he stated that they had met in 1985 when he was already on the plot. He stated that both of them were on the plot and added that he was the first to construct a semi-permanent house in 1977. He stated that he could not recall when the 1<sup>st</sup> Defendant constructed his. He confirmed that the 1<sup>st</sup> Defendant currently stays on the plot. He also confirmed that he could not recall when he was evicted. He admitted that his title was cancelled vide the decision of the appeal's tribunal but that he did not receive the letter of cancellation. He stated that he filed an application to the High Court and added that he appeared in High court Civil Appeal No. 10 of 2007. He confirmed that he did not stop the construction and added that he became a director of Kalenjini Enterprises for 2 months in 1999.
- 7 Upon reexamination, he stated that he bought the plot in the year indicated on the agreement and that the original share certificate remained with the company. He stated that the titles were produced by the Directors and that they paid at Kalenjini Enterprises. He stated that he was evicted after the 1<sup>st</sup> Defendant constructed. He further stated that he constructed in 1977 while the 1<sup>st</sup> Defendant constructed later. He also stated that they lived together and that the land was half an acre. He stated that the 1<sup>st</sup> Defendant used the provincial administrator to evict them. He also stated that he was the director of Kalenjini Enterprises for 3 months in 1998.
- 8 Benard Kipkemoi Koskei testified as PW2 where he testified that he is the Director of Kalenjini Enterprises. He testified that he was familiar with the statement dated 14/8/2020 and filed on 18/8/2020 which the court adopted as evidence in chief. He produced company documents PEX 21, certificate of change of name PEX 22, Income Tax PIN PEX 23 and letter dated 28/2/2014 as PEX 24. He testified that the Plaintiff became a member after purchasing a share certificate of Joseph Chepkoigat and was allocated plot number 735 (old number). He further testified that he had the balloting register for block 20 and added that the register had been there as from 1980. He also testified that Joseph Kiprotich was given plot number 735 and added that their members balloted but did not return to register. He explained that the register had printed ones but that the handwritten ones were for the members who came back late after the register had been typed. He testified that the register they have was not original as it was with the former chairman. It was his testimony that the Register by the Defendant was a hand-written letter and added that the fonts were not the same. He testified that the 1<sup>st</sup> Defendant's name was not present and therefore he was not a member. He produced the extract of the Register as PEX 25. He further testified that Kipkoech Arap Sigei was a member with No. 159. He testified that the name appears as Sigei Kipkoech. He added that he could not confirm the name Kipkoech Arap Sigei. He further testified that he could not confirm the plot Sigei Kipkoech was allocated and added that he did not appear on the ballot register.



- 9 PW2 was referred to PEX 26 where he testified that after survey of the parcel number 735 was removed and it became Nakuru/Municipality Block 29/767 (Rhoda). He testified that he could not confirm that the certificate belongs to the 1<sup>st</sup> Defendant. He went on to testify that he could not have acquired the certificate of shares in his name as he was an original member. PW2 testified that a non-member could not be issued with a ballot card. It was his testimony that the transfer was allowed by the company but added that Sigei did not have a plot to transfer. He testified that Sigei transferred his shares to the 1<sup>st</sup> Defendant. He produced the Register at page 7 as PEX 27.
- 10 Upon cross examination by Mr. Ombui, he stated that he became a director of Rift Valley Enterprise Limited in November 1999. He further stated that he was a shareholder of Rift Valley Enterprise in 1985 and a shareholder member of Miti Mingi block 3. He denied knowing the present dispute between the Plaintiff and 1<sup>st</sup> Defendant. He stated that they appeared before the tribunal and added that they had details of the members of the Enterprise. He confirmed that they do not capture their ID numbers. He further confirmed that Chelaite was a director from 2014 to 2023. He also confirmed that the records were surrendered to the lands office before issuance of title deed. He stated that the Plaintiff purchased the property in 1977 from the original owner.
- 11 PW2 was shown PEX 6 where he confirmed that the same was a ballot paper. He further confirmed that Rift Valley Enterprise was incorporated in 1980 and added that in the members register, all names were typed while the original was hand written. He admitted that he did not have the handwritten register but the ballot register. He stated that Joseph Kipkoech balloted but never came back. He went on to state that after surveying the parcel number 735 it became Block 29/767 (Rhonda). He further stated that he could not confirm that the certificate belongs to the 1<sup>st</sup> Defendant. He further stated that he could not have acquired the shares in his name as he was an only member. He confirmed that the certificate did not originate from their records and added that a non-member could not be issued with a ballot card. He explained that the transfer was allowed by the company but Sigei did not have any plot to transfer as he had transferred his shares to the 1<sup>st</sup> Defendant. He produced the register as PEX 27.
- 12 This marked the close of the Plaintiffs case.

### **1<sup>st</sup> Defendant's case**

- 13 Yusuf Juma Ahmacha testified as DW1. He testified that his case revolves around plot No. 733 and added that he lives on court number 2284 where while the 2<sup>nd</sup> Defendant lives on 2285. He produced his statement dated 14/10/2014 which the court adopted as evidence-in-chief. He also produced a copy of list of directors dated 14/10/2014 as DEX 1 – DEX10. He further produced an affidavit dated 4/9/1979 as DEX.11. He testified that he bought the plot 735 from Kipkoech Arap Sigei. He added that the advocate was known as K. M. Patel. DW1 testified that he went to the ground and established that the plot was owned by Kalenjin Enterprises. He went on to testify that they opened a register for the officials of Kalenjin Enterprises at Rhonda near the chief's office and that they found the security known as Henry Chepkangat and the Director (deceased). He testified that he paid Kshs.6,000/= and added that the agreement followed after. It was his testimony that the plot was vacant and the company allocated the same to him. He testified that he had the transfer of shares DEX 2b page 17 and that he was given a share certificate in 1980. He testified that he entered the plot in the year 1979 and constructed with the company's authority.
- 14 He testified that he lives on the plot and which consists of 21 permanent rooms with no tenants. He also testified that his family lives on the land. He testified that the Plaintiff never entered the land and added that the dispute started in 1980. He testified that the Plaintiff reported to the police that he was in his plot but the police found that it was a civil case. He testified that the transfer was conducted in



the land buying office. DW1 was referred to DEX 9 where he testified that he signed the agreement and added that since the plaintiff wanted a solution, he agreed since he was to construct a house on the plot which he was to be given by Kalenjin Enterprises. He testified that the Plaintiff was not to interfere until another plot was to be found for him. He testified that the Director of Kalenjin Enterprises were not involved and added that the Plaintiff was to follow up with Kalenjin Enterprises. It was his testimony that he was not shown any plot in view of the agreement. He also testified that he had never seen the register at page 22 produced as DEX.5. He testified that in 1987 at Afraha Stadium, the company told them to go to their respective plots. He testified that the Plaintiff was issued with a title deed as he was a director. He added that the Plaintiff deleted his name and wrote his name in 2001. It was his testimony that the Plaintiff took him to Nakuru Municipality Land Tribunal after which he appealed to the Appeals Tribunal Committee which found that the Plaintiff did not have land. He testified that the said decision was adopted as a judgment of the court and the title was cancelled and issued in his name in 2006. He went on to testify that there was an appeal in the High Court which did not cancel the title. He testified that he has since developed the plot and subdivided it on 2013 and sold to the 2<sup>nd</sup> Defendant. He urged the court to dismiss the suit with costs.

- 15 Upon cross examination by Mr. Ojoo for the Plaintiff, he confirmed that he bought plot number 735 from Kipkoech Arap Sigei. He was shown DEX11 where he confirmed that the date was not clear. He further stated that Arap Kipkoech Sigei was a member where he gave him receipts and membership card serial number 3096 receipt No. is 4522. He stated that the receipt remained with the company. He further stated that he was given a card after the transfer and added that the card in the name of Sigei was destroyed. He was also shown DEX 2 where he confirmed that he was given the same by the Kalenjin Enterprises. He also confirmed that before buying the plot, he was not a member of Kalenjin Enterprises. DW1 was also shown DEX 2(a), certificate dated 11/6/1980 where he stated that he bought the land in 1979 while the share certificate came out in 1980. He went on to state that when Sigei bought the plot, he did not have a share certificate but only a receipt. He confirmed that he was buying the property of Kipkoech Sigei and that he was given the authority to construct. He stated that he did not agree with DEX 7 and added that Chepkoigat was a member but that he did not know his plot number or his association with the Plaintiff. He stated that they met with the Plaintiff to negotiate a settlement where they agreed to settle the matter before the D.O. He stated that they never went back to the company and added that the land belonged to the company. He stated that the Tribunal gave a decision in favour of the Plaintiff while the Appeals Committee gave a decision in his favour and that the High Court questioned the decision. He stated that he got his title in 2008 while the High Court judgment was in 2013.
- 16 On reexamination, he stated that the register for Kalenjin Enterprises was given to him in 2021.
- 17 This marked the close of the 1<sup>st</sup> Defendant's case.

## **2<sup>nd</sup> Defendant's case**

- 18 Isaac Mokaya Makori testified as DW2 where he produced his statement dated 14/10/2014 and the court adopted as evidence-in-chief. He testified that he purchased a plot from the 1<sup>st</sup> Defendant in 2011. It was his testimony that he saw the plot, did an agreement and paid Ksh.735,000. He testified that the plot had not been subdivided and added that the original number was 29/767 Rhonda. He further testified that his plot came as 29/2283 Rhonda (Nakuru Municipality) and that he took possession on 5/7/2011. He also testified that he got the title on 25/4/2013 and added that the delay was due to subdivision. He testified that the 1<sup>st</sup> Defendant was living on the other property. It was his testimony that he has developed the property with 31 double rooms and that he got a monthly rent



- of Kshs. 90,000 from the tenants. He testified that no one has claimed the property and added that he followed the procedure in buying the property. He urged the court to dismiss the case.
- 19 Upon cross examination, he confirmed that he purchased a piece of land from the 1<sup>st</sup> Defendant where he paid Kshs.735,000/=. He admitted that he did not have the evidence in court. He stated that he had the consent to subdivide and approval but added that he had not filed the same. He further stated that the property was transferred to him and that he had obtained the consent to transfer. He also stated that valuation was done at the point of transfer at Kshs. 735,000/=. He stated that he paid for the stamp duty but admitted that he did not have the evidence of payment. He also admitted that he did not have photos of the building or the valuation report. He stated that the property was valued at Kshs.18,000,000/= but added that he could not recall the name of the valuer.
- 20 On reexamination he stated that he had adhered to the terms of offer of sale. He also stated that he took the value of plots of the same size in Rhonda to come up with a valuer. He stated that he was not a valuer but stated that he could do an estimate.
- 21 That marked the close of 2<sup>nd</sup> Defendant's case.

### Submissions

- 22 The Plaintiff filed his submissions dated 25<sup>th</sup> March, 2024 where he gave a summary of the case and evidence and identified two issues for determination. Whether the claim is statute barred and whether the Plaintiff is entitled to the prayers sought. On the first issue, he submitted in the negative. He argued that by dint of the agreement dated 14<sup>th</sup> November, 1985 between the Plaintiff and 1<sup>st</sup> Defendant, the cause of action stopped running as the dispute stood resolved pending procurement of the plot by the 1<sup>st</sup> Defendant. He submitted that this was for the purpose of the Plaintiff to compensate him by building a similar building. The Plaintiff relied on Section 39 of the *Limitation of Actions Act* and the Court of Appeal case in *William Gatubi Murathe V Gakuru Gathimbi* [1998] eKLR. He submitted that if a cause of action arose then the same arose again in 2001 which is unlikely when the 1<sup>st</sup> Defendant failed to point out his plot for compensation and failed to move out of the suit property after missing out his plot prompting moving the tribunal for eviction orders. The Plaintiff further submitted that the cause of action arose when the Plaintiff discovered that the suit land had been transferred to the 1<sup>st</sup> Defendant and later sub divided to two portions in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He added that the same was in 2013 after the delivery of the judgment in Nakuru Civil Appeal No. 10 of 2007 and upon conducting the search. He submitted that the instant suit was filed in 2014 barely less than a year of the alleged illegality hence not time barred. He cited the case of *Edward Moonge Lengusuranga V James Lanaiyara & Another* [2019] eKLR and Section 26 of the *Limitation of Actions Act*.
- 23 On the second issue for determination, the Plaintiff submitted that the transfer of the parent suit to the 1<sup>st</sup> Defendant and issuance of titles to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in collusion with the 3<sup>rd</sup> Defendant was done illegally and unprocedurally. He submitted that the suit property belonged to him by virtue of purchase from Joseph Kiprotich arap Chepkoiget a member of the Kalenjin Enterprise Limited. The Plaintiff further submitted that the 1<sup>st</sup> Defendant was not a member of the said group and that Kipkoech arap Sigei (the person the 1<sup>st</sup> Defendant alleged to have bought from) was also not a member of the company. He also submitted that from PW2's evidence, that only the original members owned a share certificate in their name and that a subsequent purchaser could not be issued with a balloting paper. The Plaintiff argued that the Defendants tampered with the records at lands registry to defeat justice. He further argues that the process of transfer and subdivision was marred with illegality as evidenced by the lack of transfer documents, consent to transfer and subdivide and stamp duty.



- 24 The Plaintiff submitted that transferring of the suit property to the 1<sup>st</sup> Defendant and subdividing the same pending the hearing and determination in Nakuru Civil Appeal No. 10 of 2007 sums up the Defendants' acts of fraud. He further submitted that the particulars of fraud were never rebutted and urged the court to find in his favour. He relied on Section 26 of the [Land Registration Act](#) and the cases in [Vijay Morjaria V Nansigh Madhusingh Darrbar & Another](#) [2000] eKLR and [Euro Bank Limited \(In Liquidation\) V Twictor Investments Limited & 2 Others](#) [2020] eKLR.
- 25 In conclusion, the Plaintiff urged the court to allow his case vide the prayers sought in the plaint.
- 26 The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their submissions dated 26<sup>th</sup> March, 2024 where they gave a summary of the case and identified the following issues for determination:
1. Whether the [Limitation of Actions Act](#) is applicable in this case and what impact the proceedings have on the limitation period
  2. Whether the Plaintiff has sufficiently pleaded fraud allegations against the Defendant and if the burden of proof as required by Section 107 of the [Evidence Act](#) has been met.
  3. Whether the Plaintiff is guilty of laches.
  4. Whether the use of a final decision from another court as grounds for instituting fresh proceedings is permissible under Section 34(1) of the [Civil Procedure Act](#).
  5. Whether the witness from Kalenjin Enterprises possesses credibility to testify.
  6. Why did Kalenjin Enterprises fail to report the trespass on the property despite being the custodians of the records and having the responsibility to safeguard the land from encroachment.
  7. Whether the 2<sup>nd</sup> Defendant was an innocent purchaser for value.
- 27 On the first issue, they argued that the cause of action arose between 1977 and 1985 but the Plaintiff commenced proceedings in 2001 at the Nakuru Lands Tribunal. They relied on Section 7 of the [Limitation of Action Act](#) and submitted that given that the suit was filed over 13 years after the cause of action arose, the suit was statute barred. They argued that the proceedings in the tribunal and High court did not necessarily stop time from running under the said section of the law. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued that the Plaintiff's claim of ignorance in 2013 is undermined by his prior participation in the tribunal appeal. They cited the case in [Sobanlaldurgadass Rajput & Another V Divisional Intergrated Development Programmes Co. Ltd](#) [2021] eKLR.
- 28 On the second issue, they submitted that the Plaintiff having brought the claim over 15 years after the cause of action arose, exhibited significant delay. They relied on the case of [Edward Akong'o Oyugi & 2 Others V Attorney General](#) [2019] eKLR. They argued that the Plaintiff's failure to apply for a stay in the High Court or file a caution indicating a pending dispute raises concerns about his vigilance in safeguarding his interests. They further argued that the delay in the instant suit poses significant prejudice to them in light of the substantial developments made by the 2<sup>nd</sup> Defendant.
- 29 On the third issue, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on Section 107 of the [Evidence Act](#) and submitted that it was incumbent upon the Plaintiff to distinctly allege and substantiate the alleged fraud in obtaining the title deed. They submitted that the alleged fraud by the Plaintiff lacked the requisite specificity required by law since he failed to prove the said particulars.
- 30 Regarding the fourth issue, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on Section 34 of the [Civil Procedure Act](#) and submitted that if the consequences of the nullification of the tribunal proceedings led to



fresh disputes, the proper recourse for the Plaintiff would be to seek review instead of initiating new proceedings. They submitted that in the Plaintiff, the entire issues were founded in the decision of the High Court in Nakuru Civil Appeal No. 10 of 2007 which contradicts the said section. It was their submission that the suit is res judicata and incompetent as it was triggered out of a final decree of a court with similar and competent jurisdiction.

- 31 Going to the fifth issue, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant submitted that the credibility of the witness from Kalenjin Enterprises Limited was questionable. They argued that the witness failure to take active steps in addressing the matter is perceived as lack of diligence. They further argued that the failure of the witness to produce a copy of the updated register instead of the one covering the period from 1977-1980 casts doubt on their willingness to provide comprehensive evidence. They submitted that the Plaintiff lacked the legal standing to bring the case forward since they could not demonstrate a valid claim to ownership through a proper share transfer.
- 32 On the sixth issue, they submitted that failure by the Kalenjin Enterprises Limited to report the alleged trespass on the suit property raised questions regarding their responsibilities and actions. They submitted that the said company being the custodians of the records relating to the suit land held a critical role in ensuring proper management and protection of the property. They further submitted that failure by the Plaintiff to include the company in the suit raised significant questions for consideration.
- 33 On the final issue, they submitted that the 2<sup>nd</sup> Defendant was an innocent purchaser for value as he acquired the suit property in good faith and without knowledge of any legal defects. They relied on Sections 26(1) and 80(2) of the [Land Registration Act](#) and the case of [Lawrence Mukiri V Attorney General & 4 Others](#) [2013] eKLR.

### **Analysis and Determination**

- 34 I have considered the pleadings, evidence on record and submissions and I am of the view that the following issues arise for determination:
- a. Whether the suit is statute barred.
  - b. Who between the Plaintiff and the 1<sup>st</sup> Defendant is the lawful owner of the suit property?
  - c. Whether the Plaintiff is entitled to the orders sought.
  - d. Whether the 2<sup>nd</sup> Defendant is an innocent purchaser for value.
  - e. Who should bear the costs of the suit.

### **Whether the suit is statute barred.**

- 35 Section 7 of the [Limitation of Actions Act](#) provides as follows:

An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him and if it first accrued to some person through whom he claims to that person”

- 36 Further Section 26 of the same [Act](#) on the other hand provides for an extension of the limitation of time in case of fraud or mistake wherein time starts running at the point when the fraud is discovered by the plaintiff. The section provides as follows:

Where, in the case of an action for which a period of limitation is prescribed, either:



- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.” [Emphasis mine]

37 In the instant case, it is clear that from the plaint, the main cause of action is fraud as highlighted under paragraph 9 of the plaint. The Plaintiff averred that upon delivery of the judgment by the High Court on 15<sup>th</sup> November, 2013 in Civil Appeal No. 10 of 2007, he visited the Lands office only to discover that the 1<sup>st</sup> Defendant had transferred the same to himself. It is this court’s view that from the above, the cause of action arose from the year 2013 as this was when the Plaintiff discovered fraud upon confirming the status of the suit property at lands office.

In view of the above, this court finds that the suit is not statute barred as it still within the time frame provided under the statute.

### **Who is the lawful owner of the suit property?**

38 The Plaintiff testified that he bought the land from Joseph Kiprotich Arap Chepkoigat a member of Kalenjini Enterprise. He produced a copy of the sale agreement dated 30<sup>th</sup> September, 1977 and a title deed issued on 13<sup>th</sup> November, 2001. It was his evidence that Joseph Kiprotich transferred his shares to him before an advocate. He produced a copy of the transfer of shares dated 21<sup>st</sup> April, 1983. On cross examination, he stated that the 1<sup>st</sup> Defendant occupied the land in 2001 and that he is currently still in occupation. PW2 testified that the Plaintiff became a member after purchasing a share certificate of Joseph Chepkoigat and was allocated plot number 735 (old number). Upon cross examination, he stated that that the Plaintiff purchased the property in 1977 from the original owner and added that after survey, the parcel number 735 became Block 29/767 (Rhonda), the suit property herein. PW2 also stated that he could not confirm that DEX2(a), the certificate of shares belonged to the 1<sup>st</sup> Defendant. He confirmed that the certificate did not originate from their records and added that a non-member could not be issued with a ballot card.

39 The Defendant DW1 on the other hand testified that he bought the plot 735 from Kipkoech Arap Sigei who was a member at Kalenjini Enterprises Limited. It was his evidence that the plot was vacant and the company allocated the same to him. He produced the sale agreement, transfer of shares and a share certificate. He testified that he entered the plot in the year 1979 and added that he has since developed the plot, subdivided it on 2013 and sold to the 2<sup>nd</sup> Defendant. On cross examination, DW1 admitted that the date in the sale agreement was not clear. He also confirmed that Kipkoech Sigei gave him receipts and membership card. He added that the company later gave him a card after transfer which he stated that it was destroyed. He also confirmed that Sigei did not have a share certificate but only a receipt when he bought the plot.

40 From the above, it is clear that both the Plaintiff and 1<sup>st</sup> Defendant claim ownership of the suit property. They have presented before this court two title deeds issued to both of them on the same property by Kalenjini Enterprises Limited. This court has keenly perused the sale agreement by Kipkoech arap Sigei and the 1<sup>st</sup> Defendant and it is this courts view that the 1<sup>st</sup> Defendant’s case points to the fact that the transaction for the purchase of the suit property was suspect. The description of the property under paragraph 1 of the sale agreement showed that there were two properties where the first one is not clear. In addition, the 1<sup>st</sup> Defendant admitted that the date of the sale agreement was not clear.



Furthermore, whereas it is clear that the 1<sup>st</sup> Defendant produced title to the suit property as evidence of ownership, it is also clear that from the material evidence on record that Kipkoech arap Sigei was not initially allocated the suit property.

41 Section 24(a) of the [Land Registration Act](#) provides that:

Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

42 Section 26(1) of the [Land Registration Act](#) further provides that:

..The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” [Emphasis mine]

43 The Supreme Court in the case of [Dina Management Limited v County Government of Mombasa & 5 others](#) (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) cited the case of [Munyu Maina V Hiram Gathiba Maina](#) [2013] KECA, where the court held as follows:

We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

44 Furthermore, in the case of [Kinyanjui Kamau V George Kamau](#) [2015] eKLR expressed itself as follows; -

...it is trite law that any allegations of fraud must be pleaded and strictly proved. See [Ndolo v Ndolo](#) [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

45 The Plaintiff alleged that the 1<sup>st</sup> Defendant acquired the suit property fraudulently, however, he did not adduce sufficient evidence to prove the same. It is this court’s view that in cases where fraud is alleged, it is not enough to simply infer fraud from the facts, the Plaintiff ought to have strictly proved the alleged particulars of fraud as stated in the plaint. This court finds that even though the 1<sup>st</sup> Defendant may hold a title to the suit property he failed to convince this court how he acquired it. The documentary evidence tendered vis a vis the testimony was not consistent. The Plaintiff’s evidence on the other hand



remained unshaken and flowed consistently with the documentary evidence tendered. The Plaintiff clearly explained how he came to acquire the suit property and the Defendants did not challenge the same. This court therefore finds that the Plaintiff is indeed the lawful owner of the suit property and the title held by the 1<sup>st</sup> Defendant over the suit property is invalid and of no legal effect for the reason that it was obtained illegally and unprocedurally.

**Whether the Plaintiff is entitled to the orders sought.**

46 This court having established that the suit property belonged to the Plaintiff, he is therefore entitled to the orders sought in his plaint dated 18<sup>th</sup> August, 2014.

**Whether the 2<sup>nd</sup> Defendant is an innocent purchaser for value.**

47 The 2<sup>nd</sup> Defendant testified that he followed the due process in purchasing the suit property from the 1<sup>st</sup> Defendant in 2011 for Kshs. 735,000/=. He however admitted that he did not have evidence of proof for purchase or the consent to subdivide and approvals. He stated that he paid for the stamp duty but admitted that he did not have the evidence of payment. He also admitted that he did not have photos of the building or the valuation report. It is this court's view that having established that 1<sup>st</sup> Defendant root title was never proved, it meant that he had not acquired a valid title and therefore he could not pass a good title to the 2<sup>nd</sup> Defendant. It is also noteworthy that the 2<sup>nd</sup> Defendant failed to adduce evidence in support of his claim. This court therefore finds that the 2<sup>nd</sup> Defendant was not an innocent purchaser for value.

48 The upshot of the above is that the Plaintiff has established his case on a balance of probabilities.

49 Consequently, this court grants judgment in favour of the Plaintiff in the following terms:

- a. A declaration that the Plaintiff is the lawful owner of Nakuru/municipality Block 29/767 (ronda).
- b. A declaration that the subsequent subdivision of the Parent Suit land herein Nakuru/ municipality Block 29/767 (ronda) into Nakuru Municipality Block 29/2284 and Nakuru Municipality Block 29/2285 by the 1<sup>st</sup> Defendant was illegal and unlawful.
- c. An order be and is hereby issued directing the Land Registrar Nakuru to cancel the title deeds issued in respect to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' to wit Nakuru Municipality Block 29/2284 and Nakuru /municipality Block 29/2285.
- d. An order be and is hereby issued directing the Land Registrar Nakuru to rectify the register in respect to Nakuru Municipality Block 29/2284 and Nakuru /municipality Block 29/2285 and the same be registered in the Plaintiff's name.
- e. The Land Registrar be and is hereby directed and ordered to effect rectification of the registers of the parcels of land referred in (a) and (b) above to the Plaintiff's name and re-issue fresh titles in his name.
- f. An eviction order is hereby issued against the Defendants to vacate the suit property within 60 days failure which the OCS Nakuru Police Station shall ensure compliance with the said orders
- g. The Defendants shall bear the costs of the suit.

50 It is so ordered.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 6<sup>TH</sup> DAY  
OF JUNE 2024**

**A.O. OMBWAYO**

**JUDGE**

