



**Indakwa & another v Koech (Environment & Land Case  
122 of 2013) [2024] KEELC 5208 (KLR) (15 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5208 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 122 OF 2013**

**MAO ODENY, J  
JULY 15, 2024**

**BETWEEN**

**NANCY WACHEKE INDAKWA ..... 1<sup>ST</sup> PLAINTIFF**

**SIMON MBOTE KARIUKI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSEPH KIPRONOH KOECH ..... DEFENDANT**

**JUDGMENT**

1. By a further amended plaint dated 22<sup>nd</sup> February, 2022, the Plaintiffs sued the defendant seeking the following orders:
  - a. A permanent injunction restraining the defendant by himself, his agents, his employees from entering, advertising for sale or in any way disposing of the parcel of land namely Njoro/NjoroBlock 4/206.
  - b. Cancellation of the title issued to the defendant and amendment of the Register to reflect Nancy Wacheke Indakwa as the owner of LR No Njoro/NjoroBlock 4/206, Simon Mbote Kariuki as the owner of LR NO Njoro/NjoroBlock 4/270 (Belbur) and holding in trust LR Njoro/NjoroBlock 4/271 for the late Wanjiro Waiithema children and Teresia Njeri Karanja holding LR No Njoro/NjoroBlock 4/272 in trust for the late Wachera Wanjiku Kariuki's beneficiaries.
  - c. Costs of suit and interest.
2. The Defendant filed a defence and counter-claim dated 27<sup>th</sup> August, 2012 and sought judgment against the Plaintiff for:



- a. A declaration that the Defendant now Plaintiff is entitled to title No. Njoro Block 4/206 approximately 3.8 Hectares and that the Defendant now Plaintiff's title No. Njoro/NjoroBlock 4/206 measuring approximately 1.881 Hectares be cancelled forthwith.
- b. The Plaintiffs now Defendants evicted from Njoro/NjoroBlock 4/206.
- c. Costs of this suit.

## **PLAINTIFFS' CASE**

3. PW1 Simon Mbote Kariuki, the 2<sup>nd</sup> Plaintiff, testified that he knew Kipkemoi Siele in 1992 as he had met him at Belbur farm in Njoro while he was living in Kipkelion. It was PW1's evidence that during the 1992 tribal clashes in Kipkelion he escaped to Belbur where they agreed to exchange their plots with Kipkemoi Siele.
4. PW1 stated that he had a four-acre plot in Kipkelion which had buildings and that Kipkemoi Siele had ten acres in Njoro which they agreed that he would give him five acres out of his ten acres in exchange for his four acres plus his buildings. They therefore entered into an agreement dated 26<sup>th</sup> September, 1992 which he produced it in court as PExb 1.
5. PW1 further testified that they also wrote another agreement dated 3<sup>rd</sup> October, 1992 whereby they indicated that plot Nos. 70 measuring 2 acres, 71 and 72 at Memorial Kipkelion measuring 1 acre each belonging to PW1, No. 71 to his step mothers Wanjiro Waithera Kariuki and No. 72 to Wachera Wanjiku Kariuki respectively.
6. It was PW1's evidence that to exchange the Belbur plot, one had to go to an office at Rongai and later to Bomet Fraser Advocates office where they paid the money and were issued with receipts dated 5<sup>th</sup> January, 1995 for Kshs. 4, 405/= for plot No 270 and a receipt dated 5<sup>th</sup> January, 1995 in the name of Wanjiro Waithera Kariuki for Kshs. 3,905/=.
7. PW 1 further testified that they were later issued with title deeds on 17<sup>th</sup> March, 1995 for plot number Njoro/NjoroBlock 4/270 (Belbur), and one in the name of a Wanjiro Waithera Kariuki for plot No Njoro Block 4/271 which were produced as exhibits.
8. PW1 produced a copy of search for plot Nos. 270 and 271 and stated that his step-mother Wachera Wanjiku Kariuki was not issued with title deed because her son in whose name the title was to be issued passed away.
9. It was PW1's testimony that he took possession of his plot at Belbur in 1992 and is still in possession to date. Further that plot 271 is currently being occupied by his brother's wife and her children since 1992 and that the brother who passed away together with their parents were buried on these new plots.
10. PW1 testified that they filed this case because the Defendant started claiming the land after Kipkemoi Siele passed away; further that they are in possession and if the defendant had a claim he could have done so much earlier before Kipkemoi Siele died.
11. Upon cross-examination by Mr. Waiganjo, PW1 stated that they exchanged the plot with Kipkemoi Siele which was from block 206 measuring 10 acres and got 3 acres out of the 10 acres known as Plot No Njoro/NjoroBlock 4/270 (Belbur). PW1 informed the court that the exchange agreement was between him and Kipkemoi Siele and not the Defendant whom he saw for the first time in court. He also stated that during the exchange, Kipkemoi Siele showed him the documents/share receipts for plot No.206.



12. PW1 informed the court that he is not the administrator of his father's estate in respect of plots 71 and 72 and further that he has not obtained letters of administration for the estate of Wanjiro Waithera Kariuki for plot 271 and the estate of Wachera Kariuki for plot 272. He also stated that the plot was 10 acres but he was not involved in the subdivision of the same.
13. PW1 stated that he neither knows the plot which the 1<sup>st</sup> Plaintiff occupies nor its size and was shown item No 11 in the Plaintiff's list of documents and he stated that it is in the name of Alphan Muchangi Magu. Further that from the annexure in the Plaintiff's Notice of Motion application dated 30<sup>th</sup> January, 2012 plot No. 206 was transferred to the 1<sup>st</sup> Plaintiff on 4<sup>th</sup> May, 2011.
14. PW1 was shown DExh.b 1 and he stated that Plot No. Njoro/NjoroBlock 4/206 measures 3.8 hectares which is approximately 10 acres is registered in the Defendant's name and the title was issued on 16<sup>th</sup> March, 2006 and entry No 4 shows that it was opened on 14<sup>th</sup> September, 1993 which title was initially issued on 11<sup>th</sup> September, 2000 to Sonoiya Arap Kositany and re-issued on 16<sup>th</sup> March, 2006.
15. PW1 stated that he is not aware that the Defendant's title was deposited with Agricultural Finance Corporation as security and that he saw on the Daily Nation Newspaper of 16<sup>th</sup> January, 2012 that plot 206 was being auctioned. He stated that they even approached the court seeking to stay the auction but noticed that the plot which was being auctioned was neither Njoro/NjoroBlock 4/270 nor 271. PW1 stated that in the auction notice in the newspaper, it is stated that the plot that was being sold was that of Sonoiya Arap Kositany. He finally stated that it is not true that Kipkemoi Siele misled him into believing that he owned the plot.
16. Upon re-examination by Ms. Njoroge, PW1 testified that he verified that the plot belonged to Siele Kipkemoi at the offices of Belbur whereby the directors confirmed to him that the plot belonged to Siele Kipkemoi. Further that the plot that the Defendant claims is one and the same as the one he exchanged with Siele Kipkemoi and that the titles were processed by Bomett Fraser who was the advocate for Belbur.
17. PW2 Nancy Wacheke Indakwa testified that on 6<sup>th</sup> September, 2001, Alphan Muchangi Magu and herself entered into a sale agreement for a plot at Belbur measuring 3 acres for a consideration of Kshs. 300,000/-. She stated that Alphan Muchangi Magu had a title deed for the plot which she produced it as PExhb 9 and that she was later issued with a title deed on 4<sup>th</sup> May 2001.
18. PW2 further testified that upon buying the plot, she took possession and remains in possession to date. It was her evidence that she has developed the plot and that the 2<sup>nd</sup> Plaintiff is her neighbour and does not know the defendant.
19. Upon cross-examination by Mr. Waiganjo, PW2 stated that she saw the Defendant for the first time in court and does not know the exact acreage of her plot and it was her late husband who bought it for her but they bought only 3 acres. Further that she did not know that the transfer was for the whole plot.
20. It was PW2's evidence that she has never used her title as security for a loan at AFC and never saw the newspaper advert in respect of plot 206. Further that her husband moved to court to stop the auction but does not know who paid the money AFC was claiming.
21. Upon re-examination by Ms. Njoroge, PW2 testified that Mr. Magu showed them his title when they were buying and later transferred the title to her and have cultivated the suit land since 2006 and nobody has come to claim it.
22. PW3, Raymond Gitonga, a Land Registrar Nakuru produced a green card for Njoro/NjoroBlock 4/270 and testified that the registered owner is Simon Mbote Kariuki and he obtained the title on 17<sup>th</sup>



- March, 1995. He also stated that there was no previous owner of the land and that the acreage is 1.214 Hectares.
23. PW3 also produced a certified copy of the green card for Njoro/NjoroBlock 4/271 registered in the name of Wanjiru Wathema Kariuki issued on 17<sup>th</sup> March, 1995 measuring 0.4017 hectares and that there was no previous owner of the land.
  24. PW3 produced another certified copy of the green card for Njoro/NjoroBlock 4/272 which is not registered in anybody's name measuring 0.4047 hectares and two further green cards for Njoro/NjoroBlock 4/206 whereby the first green card shows registration in favour of Alphan Muchangi Magu on 23<sup>rd</sup> January, 1996 measuring 1.881 Hectares. PW3 testified that the land was transferred to the 1<sup>st</sup> Plaintiff on 4<sup>th</sup> May, 2011 and that there has been no other transfer after that.
  25. PW3 further stated that a second green card for plot No 206 measuring 3.8 hectares in the name of Sonoiya Arap Kositany with a title deed issued on 11<sup>th</sup> September, 2000. PW3 also stated that the land has not been transferred to any other person although it was charged to Agricultural Finance Corporation on 6<sup>th</sup> June, 2006 to secure Kenya Shillings 100,000/= and there has been no discharge.
  26. It was PW3's evidence that there are two titles to plot 206 and would need the members register which he was not able to trace to enable him clarify the ownership.
  27. Upon cross-examination by Mr. Waiganjo, PW3 stated that the green cards cannot conclusively determine ownership of plot 206 and that the members' register of Belbur should be produced as his office issues titles on the basis of the members' register provided by Belbur which was in their custody but is no longer available. PW3 further stated that one cannot issue titles for a land buying company without a register.
  28. PW3 was shown PExhb 14 and stated that the property has never been subdivided and the original owner was Alphan Muchangi. It was PW3's testimony that the property owned by the 1<sup>st</sup> Plaintiff has not been charged in favour of any institution and that he did not see Sonoiya Arap Kositany's name in the green card that bear's the 1<sup>st</sup> Plaintiff's name.
  29. PW3 further informed court that in the encumbrance section, it is stated that there is a notification of charge registered on 6<sup>th</sup> June, 2006 and this was about three months after the title was issued. He also stated that he does not have a register which can confirm if Alphan Muchangi or Wanjiru Wathema Kariuki or Simon Mbote Kariuki were members of Belbur Farm.
  30. PW4, Paul Kiplangat Sang testified that he became secretary to the Board of Directors of Belbur Company Limited from 1978 to 2005 and the records of the company were kept by the chairman Mr. Elijah Murubi who is now deceased. He stated that Kipkemoi Arap Siele was employed as a herdsman by an Italian white man who was the owner of the land before Belbur Company Limited bought the land.
  31. It was PW4's testimony that Kipkemoi Arap Siele was not a member of Belbur Company Limited and that Sonoiya Arap Kositany was one of the three workers of the Italian who asked the directors of Belbur to allow them to pay for what was required by Belbur.
  32. PW4 testified that Sonoiya Arap Kositany Mr. Siele did not become shareholders of Belbur but were allocated land on a section which Belbur was selling to non-members whereby Siele paid Kshs.4000/ to the company so as to get land. He testified that his name was however not in the list of people who were allocated land during the meeting at Rongai.



33. It was PW4's evidence that they got land parcels after Sonoiya produced a receipt for Kshs. 2000/= and got a 6.4 acres and Arap Siele had paid Kshs. 4000/= for 9.4 acres and that in 1992, he exchanged his land with Kariuki Mbote's land in Kericho, Momongat (Chepseon) and took Kariuki to the chairman (now deceased) Kositany.
34. PW4 stated that Sonoiya sold his land to Chebusi Arap Soi, plot No. 206 was subdivided into three parcels and two allocated to his step mothers. PW4 stated that page 48 of the copy of the register indicates the name of Chepusit Arap Soi serial No. 26 and at page 50 of the register is the name of Kipkemoi Arap Siele, ID number 3650702/66 serial number 34. PW4 produced a copy of the register as PExhb 16
35. Upon cross-examination by Mr. Waiganjo, PW4 stated that Siele shouted at the meeting in 1981 as he was not listed in the list that was produced and that the name in that register was Sonoiya Arap Kositany's. PW4 further stated that he attended the meeting of 10<sup>th</sup> October 1981 with Arap Siele and Sonoiya
36. PW4 stated that the Land Registrar received a stamped copy of the register and the Belbur minutes were also stamped.
37. Upon re-examination by Ms. Njoroge, PW4 stated that he prepared the Belbur Register produced as PExhb 16 and that the register was given to their lawyers and he remembers that there was an Asian lawyer, a Mr. Chepchirchir and later a Mr. Machage. PW4 testified that Sonoiya and two others were absorbed into the farm by virtue of the request by the white man who was the previous owner of the land and he was given two shares and sold to his son-in law. He stated that his daughter lives on that land to date. PW4 was shown the map produced as DMF 1-11 and he stated that he can see parcels 206, 271, 272 and 270 in DMFI-11.
38. PW5, Teresia Njeri Karanja adopted her witness statement as her evidence in chief in this case and testified that she is the daughter to Wachera Wanjiku Kariuki (deceased) and Kariuki had two wives. She stated that Mbote is her step-brother and that she has a grant of letters of administration issued on 16<sup>th</sup> May, 2018. It was her evidence that her late mother was buried on plot No 272 Belbur Farm in 1994 and that they came from Kipkelion in 1992 and exchanged land with Siele Kipkemoi which was facilitated by Mr. Mbote. She testified that Siele Kipkemoi transferred the land to Mbote and her mother.
39. Upon cross-examination by Mr. Waiganjo, PW 5 stated that she does not have the title to plot 272 and that she did not participate in the negotiation for the exchange but her mother and Mbote dealt with everything concerning the office issues. PW5 was shown the exchange agreement dated 6<sup>th</sup> September, 1992 and stated that it only mentions Mbote.
40. Upon re-examination by Ms. Njoroge, PW5 was shown the agreement of 3<sup>rd</sup> October, 1992 and she testified that her mother and Mbote used to live in the Momoniat land but they exchanged their respective parcels.

## **DEFENDANT'S CASE**

41. DW1, Sonoiya Arap Kositany adopted his witness statement dated 27<sup>th</sup> August 2012 as his evidence and testified that he does not know the Plaintiffs who also do not know him. It was his evidence that he is the owner of Njoro/ Njoro Block 4/2016 and that has the original title to the suit land issued on 11<sup>th</sup> September 2000 and reissued on 16<sup>th</sup> March 2006 with the green card opened on 14<sup>th</sup> September, 1993.



42. DW1 testified that he took a loan using the first title which he cleared and was given the present title by Richard Machage advocate. DW1 testified that he had three shares at Belbur company and was issued with three receipts but the third one got lost.
43. DW1 testified that the two receipts are dated 16<sup>th</sup> November, 1973 and 11<sup>th</sup> December, 1974 which he produced as DExhb 2 (a) and (b) respectively and was to be given 10 hectares for his shares but he got only 3.8 hectares. DW1 testified that he was given a title deed when he had finished paying and that Entry No 1 in the encumbrance section of his title is a notification of charge where he had taken a loan of Ksh 100,000/= from Agricultural Finance Corporation (AFC). That the land was advertised for auction but he paid the loan and got back his title.
44. DW1 testified that he moved back to Bomet and left Siele Kipkemoi to take care of the land and he neither gave the land to Arap Siele Kipkemoi to own nor to sell. He did not authorize him to sell the land to the plaintiff. DW1 further stated that he never received any land in Kipkelion from the 2<sup>nd</sup> Plaintiff and he does not know if Arap Siele had any land in Kipkelion. He testified that he does not know how the 1<sup>st</sup> Plaintiff came to claim part of his land.
45. DW1 testified that before this case was filed in 2012, he went to the land and that before he charged his land in 2006, he used to visit it daily and at that time, one of the Plaintiffs (Simon Mbote Kariuki) had planted maize on his land and he waited for him to harvest then he took the loan.
46. DW1 testified that at that time, Simon's brother had built a house on the land but he told them to demolish it. He also stated that he neither knows Alphan Muchangi Magu nor how he got his title.
47. Upon cross-examination by Ms. Njoroge, DW1 stated that he was a shareholder and it is true that he left his plot in the care of Kipkemoi Arap Siele, that a survey was done and they were given their receipts by the secretary. That the daughter Esther did not tell him that the land was being sold; that the daughter still resides on a neighboring plot.
48. DW1 stated that he does not remember the year when he discovered that someone else was on his land and that he took action by reporting the matter to the District Officer but did not take them to court. Further that he has neither asked them to vacate nor sought any damages from the Plaintiffs. DW1 informed the court that there was no case in 1980 between him and Siele Kipkemoi concerning the plot and that Siele Kipkemoi was awarded his land.
49. Upon re-examination, DW1 testified that the plot belongs to him and that he did not allow Siele Kipkemoi to exchange any part of his land with the 2<sup>nd</sup> Plaintiff.
50. DW2, Joseph Kipronoh Koech adopted his witness statement dated 15<sup>th</sup> March 2022 and testified that Sonoiya Arap Kositany is his father and produced a copy of a grant to his estate dated 15<sup>th</sup> March, 2021 as DExhb 11. He stated that he has the original title of Plot No. Njoro/NjoroBlock 4/206 in Belbur which belongs to Sonoiya.
51. DW2 stated that he got the that title from Machage advocates office who wrote a letter dated 12<sup>th</sup> September, 2000 in respect of an error in the names in the register. DW2 further testified that his father worked for Belbur as a veterinary officer who got shares from the Belbur Company.
52. DW 2 was shown a copy of the title and attached to the Certificate of Urgency dated 30<sup>th</sup> January, 2012 for Block 4/206 and testified that it is in the name of Nancy Wacheke Indakwa issued on 4<sup>th</sup> May, 2011, shown PExhb 4 in the name of Simon Mbote Kariuki for Block 4/270 issued on 17<sup>th</sup> March, 1995 and PExhb 5 for B4/271 issued to Wathema Kariuki issued on 17<sup>th</sup> March, 1995 and that they were not sub-divisions of 2000. DW2 testified that the first amendment to the Registry Index Map is dated 28<sup>th</sup>



- April, 2004. It was his evidence that he was present when Sang gave evidence that there was a dispute between Sonoiya Kositany and Siele Kipkemoi.
53. Upon cross-examination by Ms. Njoroge, DW2 stated that he was born in 1970 and his father bought the land in 1973 when he was three years old. DW2 stated that Sonoiya Arap Kositany is the owner and he knows where the suit land is located. He stated that he was last there in 2019 and there were people living on the land and he only saw one homestead and he never inquired as to who lives on the suit land.
  54. DW2 stated that his sister stays just across the suit plot divides by a road and has never told her that someone encroached on the land. He also stated that he does not know when his father left the land for Arap Siele to take care of.
  55. Upon re-examination, DW2 testified that he did not know of any dispute between his father and Arap Siele. He testified that he knows that Machage Advocate has a register by which the title was issued and does not know the contents of the Register with the Land Registrar.
  56. DW3, Peter Wanyama, the Regional Surveyor in Rift Valley produced RIM for Njoro/NjoroBlock 4 Belbur and stated that the same is on sheet 1 and that it has not been sub-divided. DW3 testified that plot Nos 270, 271 and 272 are on the map and that there is no writing from the partial amendments where they emanated from and that plot No 206 does not appear in the amendments.
  57. Upon cross-examination, DW3 stated that parcels numbers 270, 271 and 272 are next to 206 in the map and there is no history of sub-division and where the parcels emanated from.
  58. Upon re-examination, DW3 testified that if plot number 206 was subdivided, it would not appear in the map as the parcel captures the amendment to show the subdivision.
  59. DW4, Richard Machage, Advocate testified that he knows a land buying company known as Belbur Company Limited as he has been their Advocate for over 25 years. He testified that the letter dated 12<sup>th</sup> September, 2000 emanated from his office and was addressed to one of his late clients called Sonoiya Arap Kositany who was known to him.
  60. Upon cross-examination by Ms. Njoroge, DW4 stated that he has been an advocate for Belbur for over 25 years and that Bomett Fraser was their former Advocate. He stated that the members had already been registered by the time he took over from Belbur company and that Sonoiya Kositany was a member in the company register.
  61. DW4 was shown members register PExh 16 and stated that member No 34 is Kipkemoi A. Siele parcel No 206 according to the document and that the letter he has produced does not indicate the parcel number and that he did not know that it is the parcel in the name of Kipkemoi A. Siele.
  62. DW4 stated that the register is in his office but he was not asked to bring it to court and that there was problem where there were three different names but the directors sorted out and told him to issue the title to Sonoiya Kositany. He stated that the directors were Paul; Sang, Elijah Mubii and Isaiah Ngetich who are all deceased apart from Paul Sang.
  63. DW4 stated that he is the only surviving director and he would not know why Sang said that Sonoiya was no longer a member as he had sold the land to his son-in-law. He stated that there was an issue about Sonoiya Kositany and he called the directors to correct the anomaly in names which were to be corrected by the directors. He stated that he issued a title to Sonoiya Kositany under the instructions of the directors.



64. Upon re-examination, DW4 testified that he issued a title to Sonoiya Arap Kositany under the instructions of the directors of Belbur company. He testified that he was correcting the name and there was no title that could be issued outside his office because there was a process to be followed.
65. DW4 testified that he did not issue a title to Kipkemoi A. Siele and he has not seen such title and that the members register in court is not the same as the one he had.

### **PLAINTIFFS' SUBMISSIONS**

66. Counsel relied on Section 26 (1) of the [Land Registration Act](#) and submitted that the title by the Defendant has been corruptly and unprocedurally procured and a fallacy for R. Machage to come to court and state he issued a title to the Defendant yet he did not come with a register to ascertain he was eligible for issuance of a title yet he is the company lawyer.
67. Counsel asked the court to find R. Machage acted irregularly and issued a title to a person who was not even in the member's register of Belbur Company Ltd and urged the court to cancel the title deed issued to the Defendant.
68. Counsel relied on the cases of Hubert L. Martin & 2 others v Margaret J. Kamar & 5 others [2016] eKLR, Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR and submitted that the Plaintiffs have demonstrated to this court the root of their title to the satisfaction of the court and urged the court to enter judgment as prayed with costs.

### **DEFENDANT'S SUBMISSIONS**

69. Counsel for the Defendant identified the following issues for determination:
  - a. Who is the legal and rightful owner of the suit property?
  - b. Who holds a valid title deed to the suit land?
70. On the first issue, counsel relied on Section 107 of the [Evidence Act](#), Section 108 of the [Evidence Act](#), Section 24 of the [Land Registration Act](#) 2012 and Section 25 of the [Land Registration Act](#) 2012 and the cases of Munyu Maina v Hiram Gathiha Maina [2013] eKLR, Hubert L, Martin & 2 others v Margaret J. Kamar & 5 others [2016] eKLR and M' Mugwika M' Rugongo v Settlement Fund Trustee & another [2022] eKLR.
71. Counsel submitted that the Plaintiffs have failed to prove the root of their parcels of land and as such their claim fails. Counsel further submitted that the Defendant is the legal and rightful owner of the suit property and the Plaintiffs do not have a claim to the said parcel of land.
72. On the second issue, counsel relied on Section 26 of the [Land Registration Act](#), Order 2 Rule 10 (1) of the Civil Procedure Rules and the cases of Vijay Morjara vs Nausingh Maddhusing Darbar & another [2000] eKLR, William Kabogo Gitau vs George Thuo & 2 others [2010] 1 KLR 526 and Palace Investment Ltd vs Geoffrey Kariuki Mwenda & another [2015] eKLR and submitted that the Plaintiffs have not demonstrated sufficient reasons and or proved their case on a balance of probability to warrant the cancelation of the title deed held by the Defendant and prayed that the Plaintiffs' suit be dismissed and judgment entered for the defendant in the counter-claim with costs.



## ANALYSIS AND DETERMINATION

73. The issues for determination are whether there was a valid agreement for exchange between the Plaintiff and Kipkemoi Siele, who is the rightful owner of the suit land Njoro/NjoroBlock 4/206 between the plaintiffs and the defendant, whether the defendant has proved his counterclaim, who is to pay costs of the suit.
74. The gist of this case is whether there was a valid exchange agreement between the Plaintiffs and Kipkemoi Arap Siele. PW1 stated that he had met Kipkemoi Arap Siele in 1992 in Belbur Farm in Njoro and that during the 1992 land clashes he escaped to Belbur where they agreed to exchange their plots in Kipkelion and Belbur Njoro.
75. It is on record that the Plaintiff and Kipkemoi Siele entered into a land exchange agreement on 26<sup>th</sup> September 1992 which he produced in court. Vide a further agreement dated 3<sup>rd</sup> October 1992 they agreed that plot Nos. 70, 71, and 72 Kipkelion belonged to Simon Mbote, Wanjiru Waithera and Wachera Wanjiku Kariuki respectively.
76. PW1 also explained the process they followed during the exchange as they were required to go to Belbur office and later to Bomet Fraser Advocate which they did and paid the requisite amounts and were issued with receipts which he produced.
77. It is further on record that they were issued with title deeds on 17<sup>th</sup> March, 1995 for plot No. Njoro/NjoroBlock 4/270 (Belbur), and one in the name of a Wanjiru Waithera Kariuki for plot No Njoro Block 4/271 which he produced as exhibits. Further, that the step-mother Wachera Wanjiku Kariuki was not issued with a title as the son whose name the title was to be issued passed on.
78. PW1's evidence was corroborated by the other witnesses who confirmed that there was an exchange agreement and that the plaintiff took possession and has been in possession to date.
79. PW3 the Land Registrar who is the custodian of land records produced a green card for Njoro/NjoroBlock 4/270 and testified that the registered owner is Simon Mbote Kariuki who obtained the title on 17<sup>th</sup> March, 1995 and that there was no previous owner of the land. He further produced a certified copy of the green card for Njoro/NjoroBlock 4/271 registered in the name of Wanjiru Wathema Kariuki issued on 17<sup>th</sup> March, 1995. This is evidence that the suit parcels of land belong to the plaintiffs.
80. PW3 also produced a further certified copy of the green card for Njoro/NjoroBlock 4/272 which is not registered in anybody's name measuring 0.4047 hectares and two further green cards for Njoro/NjoroBlock 4/206 whereby the first green card shows registration in favour of Alphan Muchangi Magu on 23<sup>rd</sup> January, 1996 measuring 1.881 Hectares which was transferred to the 1<sup>st</sup> Plaintiff on 4<sup>th</sup> May, 2011 and there has been no other transfer to date.
81. Section 26 (1) of the [Land Registration Act](#) states as follows:
  - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

82. The above section clarifies that a certificate of title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except where it has been procured by fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme.
83. The evidence on record shows the root of the plaintiff’s title and the process through which they got their titles. There is no evidence to prove that it was procured fraudulently or through corrupt means. The plaintiff produced a title deed which was confirmed by the Land Registrar vide a certified copy of the green card which is a reflection of what is on the title. The evidence challenging the plaintiff’s title did not impeach the title as it were.
84. PW3 also told the court that there was a second green card for plot No 206 measuring 3.8 hectares in the name of Sonoiya Arap Kositany with a title deed issued on 11<sup>th</sup> September, 2000 and that the same was not been transferred to any other person although it was charged to Agricultural Finance Corporation on 6<sup>th</sup> June, 2006 to secure Kenya Shillings 100,000/= and there has been no discharge.
85. In cases where the court is faced with two titles in respect of the same parcel of land, in the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR the court held that:
- “A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”
86. The root of the Plaintiff’s title started from 1992 when they entered into an exchange agreement with one Kipkemoi Arap Siele who had a plot at Belbur Farm Njoro with Simon Mbote who had a plot in Kipkelion. It is on record that Kipkemoi was staying in Belbur and was allocated a plot which he later exchanged with Simon Mbote. The witnesses confirmed that they knew that he worked and stayed on the farm and even though not a shareholder together with another worker were given an opportunity to pay for shares and were issued with receipts from Belbur office and Bomet Fraser Advocate and later allocated land.
87. This was confirmed by the register that was produced in court by Mr. Machage advocate who stated that the register produced was different from the one he had in his office but did not produce in court for verification. This evidence of having another register, which was never produced in court, was not helpful hence will be disregarded. The court will therefore rely on the register that was produced and



that is the same register that was forwarded to the Land Registrar to produce titles as the procedure of land buying companies.

88. Mr. Machage's evidence was also shrouded with mystery as he was not able to explain why he wrote a letter asking the defendant to come and pick a title and there were errors on the names that did not tally with the register. Why did the advocate not come with the register as this is a crucial document to ascertain the membership and the plots allocated.
89. The Plaintiff's title was issued on 17<sup>th</sup> March 1995 having entered into an exchange agreement in 1992 and took possession thereof. The defendant's title was issued on 14<sup>th</sup> September 2000 and reissued on 16<sup>th</sup> March 2006.
90. It is trite law that when there are two competing titles, the first in time will prevail. This position was restated in the case of *Wreck Motors Enterprises vs. The Commissioner of Lands and Others* Civil Appeal Civil Appeal No. 71 of 1997, where the court held that:

**‘Where there are two competing titles the one registered earlier is the one that takes priority ‘**

91. Similarly, in the case of *Gitwany Investment Ltd vs. Tajmal Ltd & 3 Others* (2006) eKLR where the Court held that:

‘... the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

92. The defendant did not succinctly explain the root of his title and further that he was not even aware of what was happening on the suit land. If he was really the owner, he should have known when the plaintiffs had encroached on his land having claimed that the daughter/sister stayed in a neighbouring plot and did not tell him that his plot had been invaded or encroached upon by the plaintiffs.
93. The defendant also never took any steps to remove the plaintiffs from the suit land and has not been on the suit land for many years. This shows lack of interest or that the land does not belong to him.
94. From the evidence on record, the defendant having failed to explain the root of his title, how he got the parcel to be registered in his name, how he managed to take a loan from AFC which he claims to have paid and from the record the title has not yet been discharged. This is a case where two parallel parcel files were opened fraudulently whereby the defendant remained with a shell title.
95. In the case of *Narriman A. Khan v Ramadhan Hamisi & 2 others* [2018] eKLR, the court held as follows:

“The defendants questioned the validity of the plaintiff's titles. They however failed to adduce any evidence to contradict the evidence adduced by the plaintiff and neither did they adduce any evidence to support their contention that the plaintiff illegally acquired the suit titles through misrepresentation, forgery and trickery as alleged. I thus reach the finding that indeed the plaintiff is legally registered as the owner of the suit properties.”

96. DW1 told the court that his daughter might have sold the land but did not lead any evidence to show that such a transaction happened. The Defendant has not discharged the burden of proving that the plaintiff got the title fraudulently. The Plaintiff has proved the root of his title and are hence entitled to the orders of injunction and cancellation of the defendant's title.



97. The Court of Appeal in the case of Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR, 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.’

98. Section 80 (1) of the [Land Registration Act](#) provides that:

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

99. I have considered the pleadings, the evidence on record, the submissions by counsel and consequently make the following orders:

- a. A permanent injunction is hereby issued restraining the defendant by himself, his agents, his employees from entering, advertising for sale or in any way disposing of the parcel of land namely Njoro/NjoroBlock 4/206.
- b. An order is hereby issued for cancellation of the title issued to the defendant and amendment of the Register to reflect Nancy Wacheke Indakwa as the owner of LR NO Njoro/NjoroBlock 4/206, SIMON MBOTE KARIUKI as the owner of LR NO Njoro/NjoroBlock 4/270 (Belbur) and holding in trust LR Njoro/NjoroBlock 4/271 for the late Wanjiri Waithema children and Teresia Njeri Karanja holding LR No Njoro/NjoroBlock 4/272 in trust for the late Wachera Wanjiku Kariuki’s beneficiaries.
- c. The defendant’s counterclaim is hereby dismissed with costs.
- d. Costs of suit and interest to the plaintiffs

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OF JULY 2024.**

**M. A. ODENY**

**JUDGE**

