



**Cheptabut v Kimisik & 2 others (Environment & Land Case  
83 of 2021) [2023] KEELC 442 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 442 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE 83 OF 2021**

**MN MWANYALE, J  
JANUARY 31, 2023**

**BETWEEN**

**SUSANA CHEPTABUT ..... PLAINTIFF**

**AND**

**MARGARET CHEPTUM KIMISIK ..... 1<sup>ST</sup> DEFENDANT**

**MARY JELIMO ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Vide her Amended Complaint, Susan Cheptabut, the Plaintiff sought judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally for;-
  - a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as proprietors of land parcel No. Nandi/Kiptindil/28 was fraudulent.
  - b. A declaration that the issuance of a title deed by the Land Registrar Nandi based on the confirmed grant in Kapsabet PMCC Ldt No. 53/2009 which was fraudulently obtained by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is null and void.
  - c. An order that the registration of land parcel no. Nandi/Kaptildil/28 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 14/08/2019 be revoked and/or cancelled and the parcel be registered in the name of the Estate of the late Kiplemet Randich pending its distribution in Kapsabet Principal Magistrate Succession case No. 90 of 2006.
  - d. A permanent injunction to issue against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants their servants, agents, family members and any other person through whom they may act against trespassing, erecting fences, erecting structures, uprooting beacons, ploughing, planting, grazing, transferring, selling, leasing and/or in any other matter dealing with land parcel No. Nandi/Kaptildil/28 in any



way detrimental to the interests of the Plaintiff and the Estate of the Plaintiff's late husband Kiplelmet arap Randich.

- e. There be an order against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do pay to the Estate of Kiplelmet arap Randich mesne profits calculated from 14/08/2019 till payment in full.
  - f. An order of eviction to issue against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to remove themselves their servants, agents, family members and any other person or persons who enters land parcel Nandi/Kaptildil/28 on instructions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants together with all the properties and belongings.
  - g. Costs of the suit be awarded to the Plaintiffs together with interest
  - h. Any other and further relief that this Honourable Court may shall (sic) claim just and expedient to grant.
2. The Plaintiff sought as against the 3<sup>rd</sup> Defendant the following reliefs; a) A declaration that the registration of Margaret Cheptum Kimisik and may Jelimo as proprietors of Nandi/Kaptildil/28 on the basis of a Certificate of Confirmation of Grant issued on 10/7/2019 in Kapsabet Succession cause No. 11/2018 was illegal and void ab intio.
- b) An order that the registration of Margaret Cheptum Kimisik and Mary Jelimo as proprietors of Nandi/Kaptildil/28 be cancelled and Susana Cheptabut be registered as the proprietors of one half of the said land after the sub division of the parcel into 2 equal portions and other half be registered in the name of Estate of Jane Chesang and in the alternative the parcel be registered in the name of "Estate of the late Kiplelmet Randich" pending its distribution in Kapsabet PM Succ. Cause No. 90 of 2006.
  - c) General damages
  - d) Costs of the suit and interests

**Plaintiff's Case and Evidence: -**

3. It is the Plaintiff's claim that she is an administratrix of the Estate of the late Kiplelmet Randich in occupation of land parcel Nandi/Kaptildil/28 property that belonged to her late husband who died in the year 2005.
4. That she obtained on 1/12/2009 judgment in her favour vide Kapsabet PMCC Ldt No. 53 of 2009 with regard to land parcel Nandi/Kaptildil/28. The terms of the decree were that the land parcel be sub -divided equally into two portions for the 2 widows of the late Kiplelmet Randich the Plaintiff herein and Jane Chesang who was already deceased at the time.
5. It is the Plaintiff's further case that the suit property had been purchased by her late husband the late Kiplelmet Randich and not the late Kimisik Busienei who was the son of the late Kiplelmet Randich.
6. It is the Plaintiffs further case that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants undertook succession of their late husband Kimisik Busienei but misrepresented therein that Nandi/Kaptildil/28 formed part of the Estate of Busienei Kimisik with the consequence that the suit property was registered to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
7. The Plaintiff further pleads 'particulars of fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant as well as the 3<sup>rd</sup> Defendant.

On the strength of the above, the Plaintiff sought the prayer as enumerated in paragraph 1 above.



8. The Plaintiff Susana Cheptabut testified as PW1 she adopted her witness statements, dated 30/9/2019 and supplementary statement dated 19/11/2019, she equally produced her list of documents dated 30/9/2019 and the supplementary list of documents dated 19/11/2019. She thus produced P Exhibits 1 to 8.
9. It was her testimony that Kimisik Busienei was registered as the owner according to the green card on 30/6/1965 yet he was only 15 years then, and the title issued to him after the demise of his late father on 23/5/2005, as the title was issued to Kimisik on 15/7/2009.
10. Upon discovery of the title having been registered to Kimisik, the Plaintiff placed a restriction and filed a matter before the Land Dispute Tribunal at Kapsabet, where the Tribunal resolved that the property belonged to her late husband and as the one widow she was entitled to half share. She registered the decision of the LDT in Court and a decree was issued.
11. It was her further testimony that her sons Shadrack Lelmet and David Singoei reside on the suit property.
12. It was her testimony that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were thus not entitled to the property; she thus prayed for Court the enter judgment as prayed for in the Plaint.
13. In cross – examination by Mr. Lagat for 1<sup>st</sup> and 2<sup>nd</sup> Defendant, the Plaintiff stated that a property cannot be registered in the name of a deceased person; hence the property cannot be registered in the name of the late Jane Chesang. That the property should thus be registered in the names of her sons, David and Shadrack who live on the property.
14. She stated that in the decree presented before the Land Registrar, she was not mentioned in person, but she was ready to abide by the decree issued by this Court. She stated that the decree only mentioned two wives with no names; and that the two wives of Kimisik Busienei were not part of the case.
15. It was her answer that the adjudication record (P Exhibit 7) was falsified. She stated in cross examination that she was married by the late Randich in 1965 while Kimisik had been born in in 1950 and he was only 15 years at the time of adjudication.
16. The witness did not have a copy of death certificate nor identity card for Kimisk Busienei. The register in respect of Nandi/Kiptinidil/28 was opened in 1965. From the green card, the first registration was not of her late husband.
17. Her co-wife had died in 2002, at the time of the LDT her co-wife was already dead. She undertook succession of the properties that had been registered in the name of her late husband. The late Kimisik had been given a property, Nandi/Kiptildil/15 at the time of his marriage.
18. On cross – examination by Ms. Tigo for the 3<sup>rd</sup> Defendant, she stated that the property was in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. She stated that all land records are in the land office and the first registration was in the name of Kimisik Busienei, the decree of the tribunal is silent on the names of the two wives and she was not aware whether the Defendant used the decree of the tribunal to register their names. She agreed that the land registrar did not know who the two wives were.
19. She stated that there was an illegality by the Land Registrar, but she could not proof the same.
20. In re-examination, she stated that her co-wife's name and her name were not on the decree, the wives of Kimisik were not on the tribunal proceedings.
21. PW2, Kipruto Kibet William an employee of the Judiciary at Kapsabet Law Courts and in charge of succession cases, testified, pursuant to witness summons issued to him so as to produce succession



cause number 11/2018 which related to the Estate of Kimisik Busienei who died on 7/7/2015 aged 65 years of age. He produced the succession file of P Exhibit 9.

22. On cross – examination by Mr. Lagat for 1<sup>st</sup> and 2<sup>nd</sup> Defendant, the witness indicated that he did not have the witness summons in Court that day, and that there is no date of Birth on the death certificate.
23. In re-examination by Mr. Otieno the witness stated that a death certificate confirms death of a person and it does not contain date of birth. He stated, that a death certificate contains date of death, date of registration of death serial number, entry number, and place of residence, place of death and names of deceased and age of deceased.

**1<sup>st</sup> and 2<sup>nd</sup> Defendant's Case: -**

24. The 1<sup>st</sup> Defendant Margaret Cheptum Kimisik testified as DW1. She adopted the joint statement which she had filed together with her co-defendant and produced documents listed in her list of documents dated 7/10/2019 as, defence Exhibits 1 to 5.
25. In her statement the Defendant indicated that the late Kiplelmet Randich owned Nandi/Kaptildil/15 and not Nandi/Kaptildil 28; and that under the decree of the LDT No. 53/2009 it was decreed that the land was to sub-divided into equal portions for the two wives which general interpretation meant the land be sub-divided to the two wives of the registered owner which was Kimisik Busienei.
26. In cross – examination by Mr. Otieno for the Plaintiff, the witness stated that she together with her co-wife had filed succession cause in respect of Kimisik Busienei who had died in 2015.
27. She further stated that the late Kimisik Busienei had a baptism card which indicated that he was born in 1950.
28. The first registration on the green card was indicated to have been on 30/6/1965 and that Kimisik Busienei was 15 years old then. She stated that the property had been bought by Kiplelmet Randich and that when she was married Susana Cheptabut was already married to Kiplelmet Randich. The suit property already existed, and she was aware that Susana had gone to the Land Dispute Tribunal which held that the suit property did not belong to Kimisik Busienei. When property was bought Kimisik was still a minor.
29. When she undertook the succession cause she was aware of the Land Dispute Tribunal matter, and the decree in the Land Dispute Tribunal matter was already in existence.
30. On cross – examination by Ms. Jepkemei, State Counsel for 3<sup>rd</sup> Defendant the witness stated that she was not aware of the Land Dispute Tribunal decision whilst filing the succession cause, and that the title had her husband's name.
31. In re-examination, the witness stated that she was aware of the Land Dispute Tribunal case but not of the decision.
32. DW2, Daniel Too, equally testified. He adopted his witness statement dated 5<sup>th</sup> October 2019, and it was his evidence that the suit property belonged to the late Kimisik Busienei who had two wives Margaret Cheptumo Kimisik and Mary Jelimo.
33. In cross – examination by Mr. Otieno, the witness stated that he knew Susana Cheptabuk, as well as the late Kiplelmet Randich who was the father of Kimisik Busienei. He stated that Kimisik Busienei had died and they were from the same clan with Kiplelmet Randich. That Nandi/Kaptildil/28 belonged to Kimisik Busienei who was the first registered owner during adjudication.



34. He knew that Susan Cheptabuk had gone to the Land Dispute Tribunal and that Shadrack Lelmet and Daniel Singoei children of Susana Cheptabuk while Kimisik Busienei was the son of Jane Randich.
35. He disputed that the property was to be divided into two, since the first registration was in the name of Kimisik Busienei and the adjudication record was signed on 8/4/2008.
36. In re- examination, he stated that he was not aware of the events before 1965, he did not take part in the tribunal case but first registered owner from the green card was Kimisik Busienei.
37. With the testimony of the two witnesses the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's case was closed.

### **3<sup>rd</sup> Defendant's Case and Evidence: -**

38. The Attorney General was sued on behalf of the County Lands Registrar Nandi.
39. The 3<sup>rd</sup> Defendant denied the allegations of fraud on its part, which had been pleaded against the County Land Registrar Nandi in the amended plaint.
40. The County Nandi Registrar Nandi Ms. Judith Cherutich testified on behalf of the 3<sup>rd</sup> Defendant, thus as DW3. It was her testimony relying on the copy of the register that the first registered person was Kimisik Busienei on 30/6/1965, and a title deed issued on 15/7/1965, and a caution was registered by the Plaintiff Susana Randich on 5/8/2009, until dispute between herself and Kimisk was settled, decree registered in Land Dispute Tribunal No. 53/2009 was registered, indicating that the parcel to be shared between two wives equally though the names of the wives not indicated.
41. The restriction was removed on 7/1/2010 and a Grant Registered on 13/8/2019 where Margaret Cheptum Kimisik and Mary Jelimo were registered as Administrators 14/8/2019, Margaret Cheptumo Kimisik and Mary Jelimo were confirmed as beneficiaries.
42. On 15/10/2019, an inhibition order was registered to maintain status quo. It was her further testimony that Mary Jelimo and Margaret Cheptum Kimisik were the widows mentioned in the decree
43. In cross – examination by Mr. Otieno the witness stated that she did not have any documents to show how the restriction was removed, she stated that ordinarily restriction is removed by an application for withdrawal. There was no evidence of how entry No. 6 was made though it is likely that the parties were acting in person. Copy of confirmed grant was registered with the lands office. The decree in Land Dispute Tribunal was registered but could not be found on the record.
44. On cross – examination by Mr. Lagat, the witness stated that there was no specificity as to who the two wives were. She stated that a restriction can be removed by the cautioner or by a Court Order or by the Land registrar; the decree registered as number 4 was not implemented.
45. With the testimony of the 3<sup>rd</sup> Defendant the 3<sup>rd</sup> Defendant's case was closed; and parties were directed to file submissions on three issues
  - i. Whether the decree in Kapsabet PMCC Land Dispute Tribunal 53/2009 is capable of being implemented.
  - ii) Adjudication process and its finality for the register to be opened.
  - iii) Powers of the Land Dispute Tribunal.Upon further perusal of the evidence and submissions, in addition to the 3 issues above, the Court shall further consider additional issues as follows.
  - i) Whether the Plaintiff has proved the allegations of fraud and her case, and if so



- ii) What relief's ought to issue?
- iii) Whether the Defendants defence should be upheld?
- iv) Who bears the cost of the suit?

**Issues for Determination: -**

46. Thus for good order the issues that the Court has framed for determination in this case are as followed.
- i. The adjudication process and finality of the register to be opened.
  - ii. Whether allegations of fraud have been proved
  - iii. Powers of the Lands Dispute Tribunal
  - iv. Whether the decree in LDT No. 53 of 2009 is capable of being implemented?
  - v. Whether the Plaintiff has proved her case, and if so what reliefs ought to issue?
  - vi. If answer (vi) is in the negative, have the defences by the Defendants succeeded?
  - vii. Who bears the costs of the suit?

**Analysis and Determination: -**

47. With regards to issue number 1 as to the adjudication process and finality of the register. The Plaintiff submits that the adjudication process ends with the compilation of the adjudication register under section 28 of the Repealed [Land Adjudication Act](#); where after the land is registered and titles are issued.
48. The green card (P Exhibit 1) of this suit property was opened on 30/6/1965 which means that the adjudication process had ended; and the Plaintiff thus submits that the adjudication record (P Exhibit 7) Having been signed on 08/04/2008 did not meet the provisions of section 23 of the [Land Adjudication Act](#).
49. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant, submit that once an adjudication process has been finalized, under section 13 of the [Land Adjudication Act](#) can only make a claim within the period fixed under section 5 of this Act. The first and 2<sup>nd</sup> Defendant further rely on the decision in Civil Appeal 340/2002, Julia Kaburia vs Kabera and 5 Others; where the Court held that;
- “The Courts jurisdiction is ousted once the process of land adjudication has started until the adjudication register is final.”
50. It is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submission that the adjudication was completed in 1965 upon registration of the suit to Kimisik Busienei.
51. The 3<sup>rd</sup> Defendant in her submissions before Court on this issue submits that the P Exhibit 7 is dated 8/4/2008 and yet the green card was opened on 30/6/1965, hence P Exhibit 7 cannot met the threshold of the set out in [Land Adjudication Act](#); since the opening of the register/green card means that the adjudication process had been completed before this date and it is not possible to adjudicate upon a registered land.
52. The Court agrees with the submissions of the Plaintiff and the 3<sup>rd</sup> Defendant that the process of Land Adjudication under the [Land Adjudication Act](#) commenced on the declaration by the minister of an adjudication area under Section 3 of the [Land Adjudication Act](#); and terminates upon compilation of



- the Adjudication Register under section 23 of that act. the adjudication register is comprised of the adjudication forms which are completed under section 19 and compiled under section 23, before the suit property is registered.
53. In this case the Court wonders how the suit property was registered to Kimisik Busienei on 30/06/1965, yet the adjudication form in respect of Nandi/Kiptildil/28 was signed on 08/04/2008.
  54. The Court agrees with the submissions of the Plaintiff and 3<sup>rd</sup> Defendants Counsel, that if indeed the green card was opened on 30/06/1965, then the adjudication had been finalized before then, and that the adjudication form (P Exhibit 7) is not accurate as they could not have been an ongoing adjudication in respect of a property that had already been registered.
  55. The Court finds either the P Exhibit 1 the green card and particularly entry number 1 as to the opening of the register was falsified or the P Exhibit 7 the adjudication register was falsified; ordinarily the adjudication ought to have preceded the opening of the green card (P Exhibit 1) and since the entry number was made in 1965, when the Kimisik Busienei was still a minor aged 15 years. .
  56. The Court finds that the finds that the first registration of Kimisik Busienei whilst a minor was an illegality; since under section 23 of the Land Adjudication Act required a guardian of the minor to have been noted and the date of when the adjudication form is completed.
  57. It follows there from that under section 23 of the Land Adjudication Act, there was no adjudication form in existence so as to enable the adjudication register to be completed in respect of Nandi/Kaptildil/28 and the registration of Kimasik Busieinei a minor (then) as the owner of Nandi/Kiptildil must be deemed to have been procured illegally (in breach of section 23 of the Land Adjudication Act and the title issued to Kimisik Busienei is thus impeachable under provisions of section 26 of the Land Registration Act.
  58. On issue number 2, whether the allegation of fraud have been proved.
  59. The Plaintiff pleaded two sets of fraud, the first set of fraud particularized as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants while the second set of fraud was pleaded and particularized against the 3<sup>rd</sup> Defendant.
  60. As against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants the particulars of fraud pleaded were as follows;
    - a. Failing to disclose to the succession Court that there existed a decree affecting land parcel No. Nandi/Kaptildil/28
    - b. Failing to disclose to the Land Registrar that the persons referred to in the decree in Kapsabet PMCC Ldt No. 53/2009 are different and not themselves
    - c. Concealing from the Court that the true proprietor of the parcel was Kiplelmet Randich
    - d. Wrongfully representing to the Court that the proprietor of the land was Kimisik Busienei.
    - e. Failing to bring to the attention of the Court of the existence of a decree issued in Kapsabet PMCC LdtNO. 53 of 2009.
    - f. Presenting the confirmed grant to the lands Registrar Nandi to have the parcel registered in their names.
  61. In her testimony the Plaintiff produced as a P Exhibit 3, the decree dated 01/12/2009 in Kapsabet PMCC Ldt No. 53/ 2009, as well and the Lands Dispute Tribunal Award dated 17/09/2009. The copy of the green card/register was produced as P Exhibit 1 reveals that the Court decree was registered as entry number 4 on the green card. The 1<sup>st</sup> Defendant in her cross examination; the stated that when



she undertook the succession process, the decree in the Land Dispute Tribunal was in existence and that she was aware of the Land Dispute Tribunal matter.

62. The succession proceedings in respect of Estate of late Kimisik Busienei was succession cause No. 11/2018. It was thus commenced after the existence of the decree in Ldt no. 53/2009 and the Petitioners in the succession cause ought to have disclosed of the existence of the decree in LDT no. 53/2009 to the Succession Court and the failure to disclose was fraudulently on their part.
63. Accordingly the Court finds that on a balance of probabilities that particulars (a) and (e) of the particulars of fraud pleaded against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant have been proved. The said particulars related to the non-disclosure of the existence of the decree in LDT NO. 53/2009 to the Succession Court in succession cause No. 11/2018 in the Estate of Kimisik Busienei.
64. As regards the particulars of fraud on part of the 3<sup>rd</sup> Defendants, the green card/copy of the registrar entry number 4 thereof, registered the decree in Kapsabet PMCC Ldt No. 53/2009 on 30/12/2009 and there was failure to implement the decree, the said failure/ignoring was pleaded as a particular of fraud against the 3<sup>rd</sup> Defendant, and the Court finds the said decree ought to have been implemented since it was registered on 30/12/2009, while the certificate of confirmation of grant was issued on 10<sup>th</sup> July 2019 and registered as entry number 6 on 13/8/2019.
65. Had the 3<sup>rd</sup> Defendant implemented the decree and entry number 4, then half of the share of Nandi/Kiptildil/28 would not have formed part of the Estate of Kimisik Busienei, and the Court finds the particular (a) of the particulars of fraud against the 3<sup>rd</sup> Defendant has been proved.
66. On issue number (3) the powers of the Lands Dispute Tribunal. Under this issue, the Plaintiff submits that the disputed before the tribunal was occupation of Nandi/Kiptildil/28 which the tribunal had jurisdiction under Section 3 (a) of the Lands Dispute Tribunal, the Defendants all submit that the dispute was ownership of Nandi/Kiptildil/28 which the tribunal lacked jurisdiction pursuant to the decision of the Court of Appeal in *M'marete vs Republic and 3 others* Civil Appeal No. 259/2000 2004 (eKLR).
67. I have perused the proceedings of the Land Dispute Tribunal in LDT NO. 53/2009 in respect of Nandi/Kaptildil/28 as well as the resultant decree thereafter, the issues in contention in before the tribunal was both an issue of occupation and issue of ownership.
68. It is settled law under the decision of *M'arete vs Republic and 3 others* Civil Appeal No. 259/2000 2004 (eKLR), that in terms of a dispute of ownership, the land Dispute Tribunal lacked jurisdiction, however in terms of a dispute as to occupation the tribunal had jurisdiction.  
  
In the decree before Court in LDT No. 53/2009, the tribunal was thus right to determine the occupation which it determined that Shadrack Lelmet and Daniel Kiprop Singoei were in occupation as the sons of Kiplelmet Randich and that Kimisik Busienei had been removed from the property by his father Kiplelmet Randich; and given alternative parcel in Nandi/Kiplelmet/15.
69. The Court finds that the tribunal however lacked jurisdiction to order the title deed of Nandi/Kaptildil/28 to be divided into 2 for each wife as that was a matter of ownership for which it lacked jurisdiction.
70. On issue number 4, whether the decree is capable of implementation. The Plaintiff submits that the decree having passed on 1<sup>st</sup> December 2009 would be time barred by virtue of section 4 (4) of the [Limitation of Action Act](#) but that it is excepted under section 20 of the [Limitation of Action Act](#) the suit having been founded on fraud.



71. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants, submit that the decree is not capable of implementation as the tribunal lacked jurisdiction. The 3<sup>rd</sup> Defendant submission equally take the view that the since tribunal lacked jurisdiction its decree cannot be implemented.
72. It is the Courts finding that the Land Disputes Tribunal had jurisdiction to deal with the issue of occupation under Section 3(a) of the Land Dispute Act and there being no Appeal on the same, the occupation of Nandi/Kiptildil/28 by Shadrack Lelmet and Daniel Kiprop Singoei having been confirmed by PW1, DW1 and DW2 then that aspect of the award and decree is thus capable of enforcement, if it is not found to be time barred; however the aspect of the award and decree conferring ownership to the two wives was clearly made without jurisdiction and cannot be implemented.
73. It is common legal knowledge that a Court decree and/or order cannot be enforced after lapse of 12 years by virtue of Section 4 (4) of the Limitation of Action Act.
- The decree issued in Land Dispute Tribunal was issued on 1<sup>st</sup> December 2009 and it ought to have been implemented before 1<sup>st</sup> December 2021. This suit was initially filed in 2019 within time and the reliefs seek an implementation of that decree.
74. The Court is persuaded by the submission of the Plaintiff that the Plaintiff having pleaded fraud, time for purposes of implementation of the decree was excepted under the provisions of Section 20 of the Limitation of Action Act. In arriving at the above conclusion that this suit for implementation of the decree is not time barred, the Court relies on the fact that certain aspects of the fraud pleaded were actually proved and finds guidance in the decision in Mae Properties Limited vs Joseph Kibe and another (2012) eKLR where an interpretation and application of Section 20 of the Limitation of Action Act were discussed.
75. Thus it follows that the decree and award of Kapsabet LDT no. 53/2009 is for far as it relates to the occupation of Nandi/Kiptildil/28 by Shadrack Lelmet and Daniel Singoei is capable of implementation, and ought to be implemented however the aspect of the decree and award of Kapsabet LDT No. 53/2009 conferring ownership on the two wives is not capable of implementation as the tribunal did not jurisdiction to determine ownership.
76. The Court shall now consider whether the Plaintiff has proved her case; the Court has already found that the Plaintiff proved particulars (a) and (e) of the particulars of fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, and particular (a) of fraud against the 3<sup>rd</sup> Defendant, the Court equally has found that the registration of Kimisik Busienei in 1965 as the owner while he was a minor was in breach of section 23 of the Land Adjudication Act in so far as the adjudication form (P Exhibit 7) in respect of the property was filled in 2008 and the green card opened in 1965 hence the adjudication register did not indicate the names of the guardian and thus the registration a nullity and impeachable.
77. The Court has equally found that the aspect of occupation in the decree of the LDT No. 53/2009 capable of implementation, it follows that on the required standard of proof, to wit, on a balance of probabilities the Plaintiff has proved her case.
78. The Court shall now consider what reliefs can be granted in this matter.
79. The reliefs sought by the Plaintiff have been summarized at paragraph 1 of this judgment. In cross – examination the Plaintiff confirmed that a suit property cannot be registered in the name of a deceased person, hence the relief seeking that order for rectification to register the suit property in the name of the late Kiplelmet Randich and/or Estate of Jane Chesang and generally the reliefs as pleaded in the circumstances of this suit are untenable.



80. The untenability of the relief's sought stems out of the fact that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were registered as proprietors of Nandi/Kiptildil/28 vide transmission in succession cause No. 11 of 2018 in the Estate of Kimisik Busienei and that the reliefs sought would mean this Court to usurp the jurisdiction of the succession Court which it cannot.

The cure for the grant of the relief sought by the Plaintiff thus lies in excluding Nandi/Kiptindilit/28 from the Estate of Kimisik Busienei and from the assets in succession cause no 11/2018 and to include Nandi/Kiptindil/28 in the list of Assets in the Estate of Kiplelmet Randich in Succession Cause No. 90 of 2006.

81. Having found that the Plaintiffs has proved her case and having found the relief's as sought are not tenable it would be unconsiable not to grant any orders in this matter at all, as equity suffers no wrong without a remedy. In arriving at this conclusion this Court takes cue from the Court of Appeal decision in *Uasin Gishu Memorial Hospital Limited vs Moi Teaching and Referral Hospital Board and 2 Others* (2017) eKLR where in similar circumstances the Court of Appeal the Court substituted the prayers in the originating summons with other reliefs.

82. Consequently the order that commends itself to the Court to grant is that judgment is entered in favour of the Plaintiff in the following terms; -

- i. The Court finds and declares that the suit property Nandi/Kiptilil/28 was purchased by the late Kiplelmet Randich and thus belonged to him and should form part of the Assets in Succession Cause No. 90 of 2006, in the Estate of Kiplelmet arap Randich and ought to have been excluded from the Assets in the Succession Cause No. 11/2018 in the Estate of Kimisik Busienei.
- ii. The Court hereby recognizes the occupation of Daniel Singoei and Shadrack Kiplelmet in Nandi/Kiptildil/28 as was decreed in LDT No.53/2009 and that the same ought to be taken into consideration during the distribution of Nandi/Kiptildil/28 in Succession Cause No. 90 of 20006, now that Nandi/Kiptildil/28 has been found to have formed part of Estate of Kiplelmet Randich.
- iii. The inhibition order registered on 15/10/2019 by virtue of this case formerly Eldoret Environment and Land Case No. 112/2019 is hereby partially lifted to the extent that the orders issued herein are registered and implementation of the same; upon conclusion of the succession cause No. 90 of 2006 and Succession Cause No. 11 of 2018 shall be fully lifted.
- iv. There shall be no orders as to costs.

Judgment accordingly.

**DATED AT KAPSABET THIS 31<sup>ST</sup> DAY OF JANUARY, 2023.**

**HON. M. N. MWANYALE,**

**JUDGE**

**In the presence of;**

Mr. Tallam holding brief for Mr. Lagat for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant

Mr. C.F. Otieno for the Plaintiff.

Ms Tigoi holding brief for Jepkemei for the 3<sup>rd</sup> Defendant.

