



**Koech v Koech (Environment & Land Case 8 of 2016)  
[2023] KEELC 149 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 149 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 8 OF 2016  
SM KIBUNJA, J  
JANUARY 25, 2023**

**BETWEEN**

**ISACK KIPKALUM KOECH ..... PLAINTIFF**

**AND**

**NATHAN KIBET KOECH ..... DEFENDANT**

**JUDGMENT**

1. Isaack Kipkalum Koech, the plaintiff, commenced this suit against Nathan Kibet Koech, the defendant, *vide* the plaint dated the January 16, 2016, seeking for orders that:
  - " a. The plaintiff's claim against the defendant jointly and severally is for an order of permanent injunction restraining the defendant whether by himself or his agents, servants, nominees or whomsoever claiming through from trespassing and moving into the plaintiff's parcel Nandi/Eisero/425 and removing, fencing off, evicting, alienating, ploughing, preparing for planting, planting, evicting or doing anything, act or matter detrimental and prejudicial to the plaintiff proprietary interest and rights over the said suit property.
  - b. The plaintiff's further claim against the defendant is for an order of declaration that the plaintiff is the legal and registered owner of parcel Nandi/Eisero/425 therefore the eviction and removal of the defendant, whether by himself or his servants, agents, personal or legal representatives, assigns or nominees or whomsoever acting on his instructions from that part or portion of parcel Nandi/Eisero/425 now forcefully occupied by the defendant.
  - c. Costs of this suit.
  - d. Any other or further orders as the court may deem fit to make."



The plaintiff averred that he is the registered owner of land parcel No Nandi/Eisero/425, measuring 36.75ha, the suit property, that was a partition from Nandi/Eisero/325 into two equal portions, and was issued with a title dated October 16, 1990. That his step mother, Hellen Barkutwo, now deceased, was a co-proprietor of the parent title, Nandi/Eisero/325 as a first registration. He averred that the defendant has trespassed into the suit property and is forcefully cultivating a portion of approximately 15.50 acres causing him loss and damages and hence this suit.

2. Nathan Kibet Koech, the defendant, opposed the claim through his filed defence and counterclaim dated the March 8, 2016. He admitted that the plaintiff is the registered owner of Land parcel Nandi/Eisero/425 but stated that the plaintiff is only entitled to a quarter (1/4) of 73.5 ha. He claimed the subdivision of Land parcel Nandi/Eisero/325 into equal parts of 36.75 ha was fraudulent and without the consent of Hellen Jemeli Barkutwo (deceased). The defendant averred that the initial land parcel Nandi/Eisero/325, which measured around 181 acres was first registered in the name of Kipkoech Arap Barkutwo, and title was issued in his name on the November 2, 1970. That on the September 8, 1979, the said Kipkoech transferred the land to the plaintiff and Hellen Jemeli Bargutwo, each holding  $\frac{1}{4}$  and  $\frac{3}{4}$  shares respectively. That the subdivision of the land into two equal portions by the plaintiff was fraudulent. The defendant contended that the plaintiff held the suit land in trust for his brothers and further claimed that the subdivision and the creation of Nandi/Eisero/425 and 426 without the involvement of Hellen Jemeli Barkutwo or the defendant and the others was fraudulent and ought to be cancelled. The defendant claimed that he not only occupies the 45 acres of land of the suit land, but further maintained that his two brothers, Stephen Kemeli Koech and Jonah Kipkosgei Kerich, are each entitled to 45 acres each, and hence the need to claim the extra 45 acres included in the suit property. It is the defendant's case that the plaintiff is only entitled to 45 acres like the rest of the brothers and denied the plaintiff's claim to the suit property, which is 90 acres. The defendant termed the acts of the plaintiff of subdividing the suit land in the absence of Hellen Jemeli Barkutwo, altering the records at the lands office for his share to read  $\frac{1}{2}$  instead of  $\frac{1}{4}$  of land parcel Nandi/Eisero/325, which belonged to their late father Kipkoech Arap Barkutwo, fraudulent. The defendant prayed for judgement against the plaintiff and sought for the cancellation of title No Nandi/Eisero/425 and costs of the counterclaim.
3. The plaintiff opposed the counterclaim through the filed reply to the defence and defence to counterclaim dated the March 8, 2016. The defendant denied the averments made therein especially the allegations of fraud and stated that the defendant's mother, Hellen Jemeli Barkutwo, consented to the subdivision of Nandi/Eisero/325. The said subdivision created Nandi/Eisero 425, the suit property, and Nandi/Eisero 426, which is in the name of Hellen Jemeli Barkutwo. The plaintiff urged the court to dismiss the defendant's defence and counterclaim and allow the prayers in his plaint as prayed.
4. The plaintiff testified as PW1 and called Grace Kwamboka Koech, Violet Lamu [Land Registrar, Nandi County], Bernard Kiplimo [Land Surveyor, Nandi County], Rosa Chepchirchir Barkutwa, Wilson Kiplating Arap Sugut, Jonathan Kiptarus Cheptabok and Stanley Kibet Mullah as witnesses and they testified as PW2 to PW8 respectively. The defendant testified as DW1 and called Kiprono Misrei, Stephen Kimeli Koech, Jonah Kipsei Kerich and Everlyne Chepkemboi Koech as witnesses who testified as DW2 to DW5 respectively.
5. The learned counsel for the plaintiff and defendant filed their written submissions dated the July 7, 2022 and August 26, 2022 respectively, which the court has considered.
6. The following are the issues for the court's determinations;
  - a. Who were the registered owners of the parent title, land parcel Nandi/Eisero/325, and in what share did they hold it?



- b. Whether there was fraud in the subdivision of Nandi/Eisero/325 into land parcels Nandi/Eisero/425 and 426.
  - c. Whether the plaintiff obtained registration of the suit land regularly and lawfully, and if so, whether the defendant has trespassed thereon.
  - d. Who pays the costs in the main suit and counterclaim.
7. The court has carefully considered the pleadings by both parties, evidence tendered, submissions by the learned counsel and come to the following findings;
- a. To understand the dispute herein, it is important to set out the relationship between the parties as can be obtained from the testimonies tendered. The parties are sons to the late Kipkoech Barkutwo, who had three wives and several children, as set out below;
    - i. Esther Barkutwo- 1<sup>st</sup> wife and mother to Isaack Kipkalum Koech (plaintiff).
    - ii. Prisca Barkutwo- 2<sup>nd</sup> wife and mother to William Koech and Julia Kessio. Her children were given 23 acres, and are not part of the dispute herein.
    - iii. Hellen Jemeli Barkutwo- 3<sup>rd</sup> wife, with 11 children. 3 sons Nathan Kibet Koech (defendant), Jonah Kipkosgei Kerich and Stephen Kemeli Koech and 8 daughters, the daughters were given 20 acres elsewhere, and are not part of this dispute.
  - b. The evidence tendered shows that on the November 2, 1970, Kipkoech Arap Barkutwo, his 3<sup>rd</sup> wife Hellen Jemeli Barkutwo, and his son from the first marriage, Isaac Kipkalum Arap Koech [PW1], were registered as the proprietors of land parcel No Nandi/Eisero/325. According to PW6, a cousin to both the plaintiff and defendant, Kipkoech Barkutwo was registered with the land, alongside his first son (the plaintiff) and his 3<sup>rd</sup> wife (Hellen), as a guardian as he waited for the two to acquire identity cards. And according to PW1, he and his step mother acquired identification cards numbers 3253397/66 and 325316/66 respectively in 1978. That after acquiring the identity cards, Kipkoech Barkutwo caused the land, Nandi/Eisero/325, to be transferred to his and that of Hellen Jemeli Barkutwo, and the title was issued on September 15, 1979. That the title was kept in the custody of his late step mother Hellen Jemeli Barkutwo. The issue that arises at this point is in what proportion did Isaac Kipkalum Arap Koech and Hellen Jemeli Barkutwo hold Nandi/Eisero/325? The plaintiff's case is that they both held equal shares, in that he was entitled to a half of land which translates to 90 acres, while Hellen Jemeli was entitled to the other half. The defendant's case is that the plaintiff was entitled to a quarter of the land which is roughly 45 acres, while his late mother was entitled to three quarters which was 135 acres. The defendant, who testified as DW1 contended that it on that basis that he claimed 45 acres from the suit property, registered with PW1, the plaintiff. The plaintiff countered the defendant's claim and contended that the green card produced by the defendant that shows, he is entitled to a quarter share and his step mother three quarters share was not genuine but a fake.
  - c. Through his advocate on record, C F Otieno & Co Advocates, the plaintiff wrote to Land Adjudication Officer, Nandi county on June 28, 2016 requesting for a confirmation of which of the two green cards were genuine. The first letter (PEX-3) was in reference to the green card which indicated that Isaac Kipkalum and Hellen Jemeli held Nandi/Eisero/325 were registered as proprietors on September 8, 1979 and were found to hold the same in equal shares on September 13, 1990. The second letter (PEX-4) was in reference to the green card which indicated that Isaac Kipkalum and Hellen Jemeli held Nandi/Eisero/325 were registered as



proprietors on September 8, 1979 and held a quarter and three quarters shares respectively. The County Land Adjudication & Settlement officer, [PW2], on September 6, 2017, wrote back to the plaintiff's counsel, CF Otieno, and informing him that only the Land Registrar could identify which of the two green cards was genuine (PEX-5). Violet Lamu, the Nandi Land Registrar testified as PW3. She stated that in her custody was the original green card PEX-1 which showed that the plaintiff and Hellen each held half share of the land. She stated that the defendant's green card which showed that the plaintiff's share was a quarter and three quarters for Hellen differed from what she had and could not back its authenticity. On cross examination she stated that the quarter and three quarters share in the original land certificate are inserted after the full stop, meaning they must have been added after the title was issued to Hellen on September 15, 1979. On re-examination she insisted that her office does not have the green card with a quarter share for the plaintiff and three quarters for Hellen. She maintained that the defendant's title did not emanate from her office as it carries shares different from those in the green card held by her office.

- d. On November 25, 2020, the court directed the DCI Nandi to investigate the contested documents and file a report in court within 90 days. On March 8, 2022, the DCI Nandi North filed a report in court. The report indicated that the defendant's counsel, Mr Miyienda, had declined to record his statement as to how he came across the contested documents. The documents that were investigated were;
- i. The green card of Nandi/Eisero/325 indicating that Isaac and Hellen are each holding equal share, a partition was conducted on October 16, 1990 and title closed and the creation of Plot 425 and 426. (marked as A-3),
  - ii. The green card of Nandi/Eisero/325 indicating that Isaac and Hellen are each holding equal shares certified by the land registrar. (marked as A-2),
  - iii. The green card of Nandi/Eisero/325 indicating that Isaac and Hellen are holding a quarter and three quarters shares respectively. (marked as A-1),
  - iv. An title deed produced by counsel for the defendant opened on November 2, 1970 measuring 73.5 ha indicating that Issac and Hellen were to share a quarter and three quarters respectively.

The documents were examined by PC Evelyne Othim, and after subjecting the title document presented for Nandi/Eisero/325 to image enhancement, magnification, superimposition and ink differentiation procedures, she concluded that entry number 2 and 3 on the title document for Nandi/Eisero/ 325 were made by different instruments. As a result, the defendant was arrested on the July 16, 2021, charged with the offence of making a false document contrary to section 347 (b) of the *Penal Code* on July 19, 2021 before Kapsabet Law Courts and he pleaded not guilty. The DC1 report is in agreement with the report of the Land Registrar, Nandi County, JC Cherutich, dated February 5, 2021, that referred to the green card in their records, which showed that Isaac and Hellen each owned half share of the land and that a partition was registered on October 16, 1990 to create Plot 425 and 426. The Land Registrar concluded that after comparing their records, the green card which stated that Hellen and Isaac held equal shares was the genuine one. Further it was confirmed that the green card showing the portions of a quarter and three quarters shares seems to have been added after the title was signed.

- e. From the evidence on record, it is clear to the mind of court that the intention of the late Kipkoech Barkutwo in causing Nandi/Eisero/325 to be registered with PW1 and Hellen



Jemeli Barkutwo, his 3<sup>rd</sup> wife, was to leave the said land to his two remaining houses in equal proportion. That decision may have been explained by the fact that the land was bought from proceeds of the maize crop grown by Esther (mother to the plaintiff) and the late Kipkoech Burkutwa, who were maize farmers according to PW6. That evidence of PW6 was corroborated by that of PW7, Jonathan Kiptarus Cheptabok, who stated in cross examination that Kipkoech informed him that he had given 90 acres of Esther's house, represented by the plaintiff, for her role in the development, and 90 acres to Hellen for looking after him after the death of Esther. The defendant has not demonstrated, either in his pleadings or the evidence adduced, that it was the intention of his late father, Kipkoech Barkutwo, to give the plaintiff a quarter of Nandi/Eisero/325. The defendant had claimed in his testimony that in 1978, his late father subdivided the land giving his mother 135 acres and the plaintiff 45 acres. He stated that in 1984 during the wedding of the plaintiff, their father had called the plaintiff, his mother Hellen and elders who pointed out to them the portion of the plaintiff's land which was 45 acres, and the rest was left for Hellen. However, on cross examination, he admitted that he was only 6 years when the plaintiff wedded and that he only learnt of what had transpired in the said meeting from his mother in the later years. The defendant's elder sister, Rosa Chepchirchir Barkutwo, testified in support of the plaintiff's case as PW5. She stated that their father gave land to their mother, Hellen and the plaintiff in 1979 and by that time the defendant was 2 years old, and that when their father died in 1988, the defendant was about 11 years old. She stated being the eldest, she had not heard their father state that the land was to be shared into four portions with each of the sons getting a quarter share. The court therefore finds that as the gift by the late Kipkoech was freely given, and transfer regularly and lawfully effected during his lifetime, no grounds have been made upon which to impugn it.

- f. The defendant has mounted a counterclaim against the plaintiff and averred that around October 16, 1990, the plaintiff illegally subdivided Nandi/Eisero/325 and apportioned himself a half share instead of a quarter share that was allocated to him by their deceased father, Kipkoech Barkutwo. He raised particulars of fraud and stated that the plaintiff carried out the subdivision without the involvement of his co-owner, Hellen Barkutwo, and urged court to cancel the plaintiff's title. That as the court has already made a finding above, that the plaintiff was entitled to half share of Nandi/Eisero/325, the question that now arises is whether the subdivision of the said land, and the creation of Nandi/Eisero/425 and 426 was fraudulently done. It is trite law that any allegations of fraud must be pleaded and strictly proved. The defendant had the burden of proving the fraud actioned by the plaintiff in the subdivision of Nandi/Eisero/325 and obtaining title Nandi/Eisero/425. The standard of proof required in fraud matters is higher than that required in ordinary civil cases, which is beyond balance of probabilities, but not beyond a reasonable doubt as in criminal cases. The Court of Appeal in *Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR* held that;

“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No 106 of 2000)* Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)”



The defendant stated in examination in chief that he heard that in 1990, the plaintiff had subdivided the land, but his mother stopped it. He made reference to a letter dated October 18, 1990 (DEX-2), that was addressed to the Land Registrar Kapsabet. In the letter, Hellen Jemeli, mother to the defendant, objected to the subdivision of Nandi/Eisero/325 on the ground that the same was done without her knowledge, and the portions in which the same was subdivided. He further testified that Hellen neither signed the Mutation form dated October 8, 1990 (DEX-5) nor the partition document dated October 15, 1990 (DEX-7). The defendant argued that the title to Nandi/Eisero/425 could not be issued without the surrender of the original title document to Nandi/Eisero/325 to the land registry. He stated that all this time, the original title document was in the custody of his mother and that after she died, it has been in his possession. He also stated that his mother did not attend the Land Control Board when summoned on September 27, 1990, and that the said subdivision was unlawfully done and should be cancelled. During his testimony, the plaintiff confirmed that Hellen did not surrender the title, and argued that there was no evidence tendered that the letter dated October 18, 1990 was served to the Land Registrar's office.

- g. In my view, the plaintiff and his step mother, Hellen, held Nandi/Eisero/325, as tenants in common. This is founded on the findings of the court that each registered proprietor held a half of the share in the land. A key feature of tenancy in common is that each tenant has a distinct share in the common property which is yet to be divided. Tenancy in common can be terminated by partition of the land, that's to mean the land is divided and each of the co-owners is allocated their specific portion, bringing to an end community of ownership. Section 103 and 104 of the *Registered Land Act* chapter 300 of Laws of Kenya, (repealed), was applicable when the plaintiff sought to partition parcel 325. The sections provided that:

Section 103

- (1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.
- (2) No proprietor in common shall deal with his undivided share in favor of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.

Section 104

- (1) An application in the prescribed form to the Registrar for the partition of the land owned in common may be made by –
  - (a) one or more of the proprietors; or
  - (b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree,

From the above provisions of the law, it is clear to the court that the plaintiff could, on his own apply for partitioning of parcel Nandi/Eisero/325 as seen from his application for partition dated the October 15, 1990, (PEX-10). In the case of *Muburi Muchiri v Hannab Nyamunya*



(Sued as the Administrator of the Estate of Njenga Muchiri also Known as Samuel Njenga Muchiri (Deceased) [2015] eKLR, the court held that:

“It is also noted by the court that the law on the termination of a tenancy in common allows co-owners to by agreement sever the co-ownership by partition; by acquiring the interests of another co-owner and thus become solely entitled; or by the sale of the common property and division of the proceeds of the sale as shown in the decision in Shantaben Ramniklal Parmar & Another vs Beatrice Waruguru Gitutu, (2007) e KLR. It is also provided in Halsbury’s Laws of England, Fourth Edition (Reissue) Volume 39(2) at paragraphs 214-215 as follows in this regard:

“214. Determination of union of interests in one person. A tenancy in common may be determined by the union of the various interests, whether by acquisition inter vivos or by testamentary disposition, in the same person, who therefore holds the entirety of the land.

215. Determination by partition. A tenancy in common may be determined by partition. The legal term ‘partition’ is applied to the division of land, tenements and hereditaments belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership between some or all of them.”

- h. The evidence on record shows that on September 27, 1990 the Mosop Land Board approved the subdivision of parcel Nandi/Eisero/325 by the plaintiff and Hellen Jemeli. The claim advanced by the defendant that his mother did not attend the Land Control Board meeting held on September 27, 1990 has not been supported by any evidence. Further it has not been proved that indeed the letter dated October 18, 1990 objecting to the partition of parcel Nandi/Eisero/325 was served upon the Land Registrar. The defendant admitted in cross examination that from 1990 and until her death in 2009, his mother never objected to the said partition or subdivision, but chose to keep the original title of the land.
- i. The court therefore finds that considering that the defendant has admitted to being the family representative and custodian of the title deed after his mother passed on, it cannot be possible that he only knew of the partition of Nandi/Eisero/325 into parcels Nandi/Eisero/425 and 426 from the pleadings filed in this suit. The court is convinced that the Hellen, mother to the defendant, knew and approved of all the dealings on Nandi/Eisero/325 since she did not move to formally object to the said partition during her lifetime. The plaintiff is not a stranger to the defendant. He is the defendant’s eldest step brother and was cared for by the defendant’s mother after his mother died at infancy. They are therefore closely related and his decision to partition parcel Nandi/Eisero/325 was of no surprise to the defendant and his siblings. The fact that Hellen decided to keep the original title and not surrender it to the lands office after the partition did not invalidate the said partition or mean it was fraudulent. I therefore find that the partition of Nandi/Eisero/325 and the subsequent creation of Nandi/Eisero/425 and Nandi/Eisero/426 by the plaintiff was not fraudulent. The plaintiff is the absolute and bonafide proprietor of Nandi/Eisero/425, within the meaning of section 26 of the Land Registration Act, 2012 having been registered and issued with the title document on October 16, 1990.
- j. That though under section 27 of Civil Procedure Act chapter 21 of Laws of Kenya the costs follow the event unless for reasonable cause otherwise directed by the court, I am of the view that due to the parties’ close family relationship, each should bear his costs in both the main suit and counterclaim.



8. In light of the above findings, the court orders as follows;
- a. That the plaintiff having proved his claim against the defendant as required by the law, judgement is entered in his favour and prayers (a) and (b) of his plaint dated the January 16, 2016 is allowed as prayed.
  - b. That the defendant has failed to prove his counterclaim dated the March 8, 2016 to the standard required by the law and the same is hereby dismissed.
  - c. Party to bear his own costs.

Is it so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 25<sup>th</sup> DAY OF JANUARY 2023.**

**S M KIBUNJA**

**JUDGE.**

IN THE PRESENCE OF;

PLAINTIFF ...: Absent

DEFENDANT ...: Absent

COUNSEL : Mr Otieno for Plaintiff

WILSON .. COURT ASSISTANT.

S M Kibunja, J.

ELC MOMBASA.

