



Kisoso v Kimamet & another (Suing as legal representatives of Kiporot Ole Totona alias Singo Arap Totona - Deceased) & 3 others (Environment & Land Case 267 of 2017) [2023] KEELC 64 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELC 64 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 267 OF 2017
FM NJOROGE, J
JANUARY 19, 2023**

BETWEEN

PRISCILLA JERUTO KISOSO PLAINTIFF

AND

LETEMA TOTONA KIMAMET & FREDRICK TOYONGO TOTONA (SUING AS LEGAL REPRESENTATIVES OF KIPOROT OLE TOTONA ALIAS SINGO ARAP TOTONA - DECEASED) 1ST DEFENDANT

TUNGO TOTONA 2ND DEFENDANT

LEDEMA TOTONA 3RD DEFENDANT

RONALD TOTONA 4TH DEFENDANT

JUDGMENT

1. The plaintiff’s claim has been brought by the plaint dated 26/01/2006 where she seeks the following prayers:
 - a. An order for eviction of the defendants.
 - b. An order of an injunction restraining the defendants by themselves, their servants, employees and/or agents from threatening the plaintiff, her servants, employees and/or agents and or in any other way interfering with the activities and the stay of the plaintiff on the suit land or a portion thereof.
 - c. An order for mesne profits from the year 1992 to date.
 - d. Costs of this suit.
 - e. Interest on (c) and (d) above.



- f. Any other remedy or relief that this Honorable court may deem fit to grant.
2. The plaintiff claims that she is the registered owner of land parcel No. Lembus/Chemogoch/10 measuring 58.0 hectares having been gifted by one Paul Chemirmir who had bought it at a public auction from Kenya Commercial Bank Ltd which had held the suit property as security after the 1st Defendant had secured a loan and defaulted; that she acquired the land in the year 1992 and took possession and commenced development; that at the time she took possession, the 1st defendant had vacated the property while the 2nd, 3rd and 4th defendants were looking for alternative settlement and she gave them three months to move but they were reluctant to do so; that the defendants are claiming fifteen (15) acres and they keep on threatening her employees; that in December 2005, an employee of the 4th defendant burnt down twenty acres of a maize crop belonging to the plaintiff which was ready for harvesting and that he was charged with a criminal offence at an Eldama Ravine Court; that even though the 1st defendant vacated the suit property, he encouraged the 2nd to 4th defendants to stay on the land with the hope of acquiring a portion of the land while claiming that he had no other land for settlement; the plaintiff states that as a result of the defendants' occupation of the land she has not been able to utilize the entire property.

Defence

3. The defendants filed their statement of defence dated 3/03/2006 on the same date. They filed a Further Amended Defence dated on 28/10/2011 on 04/11/2011 and then filed a Further Further Amended Statement of Defence and a Further Amended Counterclaim of the 1st defendant dated 31/05/2019 and filed on 03/06/2019.
4. They denied the contents of the plaint and averred that the 1st defendant had purchased the suit land in the year 1969 from Joel Chemirmir for a consideration of Kshs. 17,000/=; that they sought consent from the South Baringo Land Control Board which consent was granted; that upon grant of the consent, the 1st defendant and his family moved into the suit property but he did not collect his title deed from the lands office; that the 1st defendant is a stranger to the acquisition of the suit property by the plaintiff; they averred that the acquisition was done through a perpetuation of fraud involving Paul Chemirmir, the Kenya Commercial Bank and the Plaintiff and that he did not take a loan from Kenya Commercial Bank. The defendants set out particulars of fraud and averred that that this is a proper matter for rectification of the register for the registration of the plaintiff to be cancelled or amended and the 1st defendant's name be restored.

The Counterclaim

5. The 1st defendant in his counterclaim averred that upon further investigation at the land's office Baringo, he found out that he had allegedly taken a loan of Kshs. 350,000/= and charged the suit property to the Kenya Commercial Bank; that thereafter there was an alleged default and subsequent exercise by the Kenya Commercial Bank of its statutory power of sale and the property was transferred to Paul Chemirmir; he reiterated that he has never taken a loan on the security of the suit property and that he is not aware of the alleged default and ensuing exercise of statutory power of sale; he set out particulars of fraud and sought the following prayers:
- a. A declaratory order do issue that the transaction aforesaid leading to the issue of title deed in the name of the 1st defendant were tainted with fraud, illegality and is therefore null and void.
- b. That an order issue on the rectification of the register by directing the Registrar of Titles and the District Land Registrar Koibatek/Mogotio to cancel the registration of the 1st defendant



as the proprietor of LR No. Lembus/Chemogoch/10 and the name of the Plaintiff Kiporot Ole Totona restored on the register.

- c. An order of permanent injunction do issue restraining the 1st and 3rd defendants by themselves, their servants, employees and/or agents from entering, ploughing, grazing their livestock or in any other manner from interfering or trespassing to the suit land namely Lembus/Chemogoch/10 or a portion thereof.
- d. An order for mesne profits.
- e. Costs of the suit.
- f. Interest on (d) and (e) above.
- g. Any other remedy or relief that this honorable court may deem fit and necessary to grant.

Evidence of The Parties

6. Hearing of the matter commenced on 17/12/2019. Priscilla Jeruto Kisoso, the plaintiff, testified as PW1 and adopted her witness statements dated 16/03/2012 and 12/06/2019 as her evidence-in-chief. She corrected her statement dated 16/03/2012 at the 2nd and 3rd last paragraph and stated that the area the defendants continue to hold is about fifteen (15) acres.
7. She testified that she is the registered owner of land parcel No. Lembus/Chemogoch/10 and was issued with a title deed on 17/12/1991. She referred to her list of documents dated 16/03/2012 and produced documents No's 8 and 9 while the rest of the documents were marked for identification.
8. She testified that the property belonged to her uncle Paul Chemirmir who had bought the property at a public auction organized by the Kenya Commercial Bank in the year 1977. After he bought the property, he transferred the same to her as a gift and they sought the land control board consent together. She referred to the aforementioned list of documents which are at No. 4 and 5 respectively and indicated that they were a discharge of charge and transfer by chargee.
9. It was her evidence that the borrower from the bank was Kiporot Ole Totona who had deposited his title as security for a loan and as per the proceedings before the District officer which were produced as P.Exh 9, the said Kiporot admitted that he had borrowed money and defaulted in repaying.
10. She testified that she took possession of the suit property in the year 1992 and left her mother and David Kiprono to take care of the plot. The defendants constantly interfered with her possession and are holding onto fifteen (15) acres of the suit property. They stayed on the plot between the years 1992 to 2007 before they were evicted by the defendants who claimed that the plot belonged to them. It was her evidence that in December 2005, an employee of the 4th defendant burnt twenty (20) acres of her maize crop and was convicted as per P. Exh 8. In conclusion, she sought for judgement as prayed for in the plaint.
11. On cross-examination she was referred to paragraph 6 of the plaint upon which she reiterated that the plot was a gift from her uncle who had bought it at an auction after Kiporot was unable to repay his loan. She also averred that before Kiporot became the owner, Joel Chemirmir who was her maternal grandfather was the owner. She admitted that her mother, Lina Rotich, is the daughter of Joel Chemirmir and that Kiporot Ole Totona bought the plot from Joel Chemirmir in the year 1969 for a consideration of Kshs. 17,000/= . She also admitted that the South Baringo Land Control Board issued a consent to transfer the suit land from Joel Chemirmir to Kiporot Ole Totona and the transfer occurred in 1970 but she did not have any evidence to show that Kiporot obtained title from the land Registry after transfer; that Kiporot Ole Totona's witness statement dated 13/06/2012 denied his



having collected the title deed from the Lands Registry or taking a loan from the Kenya Commercial Bank. In her view, one cannot use a title as security in the bank if he has not collected title from the Lands Registry. PW1 confirmed that she was present in the District Officer's meeting where Kiporot admitted to taking a loan. She averred that she did not have anything from the bank to show that he took the loan or that he was unable to repay it; that she did not have any records of the auction where Paul Chemirmir was said to have been the highest bidder and that she did not see Paul Chemirmir sign for any loan at the Kenya Commercial Bank. She further admitted that she did not have any statutory notice for the auction and neither did she know how many people participated in the auction. She stated that she was given the land by her uncle because he was her guardian. She admitted that she testified in this case on 31/05/2007 where she told the court that she did not know why her uncle gave her the plot but that she answered that way because she was under a lot of pressure. She confirmed that at that time she had another parcel of land which was family land.

12. PW1 further averred that she was availed the title deed in the name of Paul Chemirmir and she effected the transfer but she did not retain a copy of the said title. She stated that her uncle purchased the plot at Kshs 45 while the loan was Kshs. 350,000/=. When she was referred to PMFI 12, she stated that it was a consent with Kiporot as the transferor with the consideration reflected as Kshs. 45,000/=.
13. PW1 stated further that when Paul Chemirmir bought the property, he farmed on it but did not live in it. She then also stated that it was her mother was farming the plot and not Paul Chemirmir. She confirmed that she has seen a copy of the green card of the plot which shows that it is 58 hectares.
14. She was referred to item No. 1 in the defendant's supplementary list of documents dated 12/07/2019 which is a copy of the green card of the suit property which she confirmed also stated that the plot is 58 hectares. She confirmed that the said document is also written 145 acres which is crossed by hand and not countersigned; she could not tell whether the entries No. 1 to 9 are written by the same person.
15. In the proprietorship section, she admitted that entry No. 4 is in her name and that her identity card number is indicated; further, that entry No. 3 is in the name of Paul Chemirmir but his identity card number is not given. She admitted that in PMFI 12, the nature of the transaction is stated to be a sale but that she has never seen any sale agreement between her and her uncle when he gave her the plot. She admitted further that upon her uncle gifting her the land, she went to see the plot and they subsequently went to the Land control board. After that she took possession and the defendants were not on the property.
16. She admitted that in paragraph 8 of her plaint she had indicated that when she took the plot, the 2nd, 3rd and 4th defendants were on the suit property but then reiterated that the defendants came after she had taken possession of the property; that she gave them a three months' notice to vacate.
17. She averred that the case at Eldama Ravine was instigated by Ronald Totona, the 4th defendant but she was not aware of any family member of the Totona family convicted; that she obtained her title deed to the property in the year 1991 but that it was her mother and her cousin known as Kiprono who were on the property from 1992 to 2007.
18. She was referred to PMFI 6 which is a search she conducted on 24/05/2006 that shows that the property is registered in her name which was contrasted with the document appearing as item No. 2 on the Defendants supplementary list of documents which is a search done on 29/07/2004 that shows that the property is registered in the name of Kiporot Ole Totona. She also admitted that she did not have in court a copy of the transfer as she alleged that the same was stolen from her.
19. On re-examination she stated that PMFI 12 indicated at the top left corner "Kiporot Ole Totona by Kenya Commercial Bank." She reiterated that Kiporot was the borrower and that the said consent was



- sought by the bank. She stated further that PMFI 5 shows that the consideration was Kshs. 45,000/= which is the same consideration as indicated in PMFI 12. She indicated that item No. 1 on the defendants supplementary list of documents is a green card whereby entries no. 1, 2 and 3 do not show ID. numbers.
20. She went on to state that in the encumbrances section, Entry No. 1 shows a loan of Kshs. 350,000/=, Entry No. 3 shows that Entry No. 1 was discharged under Section 77(1) and it shows that it was an auction sale. She also stated that she filed the case in the year 2006 as that is the time the farm was burnt and the harassment by the defendants increased. She also stated that the green card and the certificate of search are from the land registry and so she is unable to comment on the same.
 21. David Kiprono Toroitich testified as PW2. He adopted his witness statements dated 18/11/2013 and filed in court on 25/11/2013 and another witness statement dated 14/01/2020 and filed on 15/01/2020 as part of his evidence-in-chief.
 22. He testified that he knows land parcel No. Lembuse/Chemogoch/10 which measures around 58 hectares. He also testified that the suit property is registered in the name of Priscilla Kisoso and he has resided on the plot since the year 1992 as a caretaker.
 23. It was his evidence that he was invited by the plaintiff and her mother to take care of the plaintiff's goats and sheep. He constructed a goat and cowshed while also cultivating maize and beans. As he continued to stay there, the defendants were constantly harassing him especially between the years 2003 and 2006. Twenty acres of maize were burnt around that time and John Lotuu Lomak, the defendants' worker was arrested and charged in Eldama Ravine Criminal Case No.1252/2005 and was eventually convicted. He produced the proceedings as PExh. 8.
 24. It was his evidence that the plaintiff is no longer using the land but at the time he was farming the plot, he would harvest an average of 225 bags of 90 kg annually. That in 1992, a 90 kg sack of maize was Kshs. 3,000/= and that now it is Kshs. 8,000/=. That he also used to harvest 20 bags of beans annually.
 25. In the year 2007, the defendants destroyed the goat enclosure and the farm house and the matter was reported to the police under OB No. 5/21/10/2007. They also later destroyed the plaintiff's property which was also reported to the police under OB No. 19/8/3/2008 and OB 13/5/4/2008.
 26. On cross-examination, he admitted that in his witness statement dated 18/11/2013 at the 4th paragraph he had indicated that around the year 2003, the defendant set his maize plantation was set on fire. He stated that he referred to the maize as belonging to him because he was in charge. He admitted that he did not keep a record of the quantity of maize and beans that he used to harvest. He also admitted that in his most recent statement at paragraph 9 he indicated that the destruction was done by John Lotuu Lomuk but did not have anything to show that he was an employee of the defendants.
 27. On re-examination he reiterated that he stayed on the plot with the permission of the Plaintiff and her mother and that he knew that John Lotuu Lomuk was employed by the defendants.
 28. Susan Imbili testified as PW3. She testified that she is a District Land Registrar in Koibatek and her duties include receipt of land transaction documents, validating and registering them. It was her evidence that she had in court the records with regard to land parcel No. Lembus/Chemogoch/10 but she also pointed out that she did not have all the instruments pertaining to all the transactions on the parcel of land.
 29. She testified that as per entry No. 1 in the land register, the suit property was registered in the name of Joel Chemirmir on 7/07/1960 pursuant to land adjudication. Entry No. 2 on the register is dated



- 22/01/1970 which was a transfer for a consideration of Kshs. 17,000/= from Joel Chemirmir to Koporot Ole Totona.
30. Entry No. 1 in the encumbrance section is dated 31/12/1970 which is a charge by Kiporot Ole Totona to secure Kshs. 350,000/= in favor of National and Grindlays Bank Ltd. Entry No. 3 which is a transfer by Chargee in exercise of power of sale in favor of Paul Chemirmir is dated 7/07/1977. It was her evidence that the said entry is supported by entry No. 3 dated 7/07/1977 in the encumbrance section being discharge of charge. She testified that the bank must have exercised its power of sale.
 31. Entry No. 4 in the proprietorship section is dated 7/07/1977 which is the issuance of the land certificate to Paul Chemirmir. The last entry on the proprietorship section was made on 17/12/1991 and it was a transfer from Paul Chemirmir to Priscilla Jeruto Kisoso. It was PW3's evidence that there is a total of ten entries in the encumbrance section with the last one, a discharge of charges entries number 4, 7 and 9, having been made on 17/12/1991, She produced the register as exhibit P. Exh 13.
 32. On cross-examination, she admitted that the register is the correct record kept in their office. She admitted that entry No.7 is dated 28/01/1978 which was on a Saturday and that normally government offices are open from Mondays to Fridays; that as at the time of registration of the charge, time Kiporot Ole Totona was the registered owner. She also confirmed that she had in court a certified copy of the charge and had made an assumption that Kiporot Ole Totona had defaulted in repaying the loan he had taken. She admitted that she did not have any records to show that a public auction took place on that day to support Entry No. 3 of 07/07/1977 in the proprietorship section which was a transfer by chargee in exercise of powers of sale. She averred that from P. Exh 13, there is no evidence that Kiporot Ole Totona collected his Certificate of Title. She also confirmed that if the same was collected then it would be indicated against the entry for issuance of a land certificate. She however stated that there is a stamp rating that a certificate of title was issued but it was not clear to whom it was issued to.
 33. PW3 admitted further that a title was issued in Paul Chemirmir's name on 7/07/1977 but no identity card number was indicated against his name; that Entry No.5 in the proprietorship section is the transfer of land from Paul Chemirmir to Priscilla. She confirmed that currently they require surrender of title being transferred but that she was not aware of the practice at that time. She admitted that she did not have Paul Chemirmir's title but she stated that it must have been surrendered for cancellation. She also confirmed that she did not have the transfer that facilitated entry No. 5 and that her record was incomplete. Further that she could not tell what kind of transfer that was but it seemed to be a normal transfer. She also confirmed that when a transfer is a gift of an agricultural land, the transfer is not complete until a proper transfer is executed, stamped and then registered.
 34. She was referred to item No. 2 in the defendants supplementary list of documents dated 12/07/2019 which is a Certificate of Official Search dated 29/07/2004 which shows that the land belonged to Kiporot. According to her, it was a wrongful search based on an invalid record.
 35. On re-examination, she stated that documents are registered in the sequence that they are presented at the registry and are normally executed and then registered. She also stated that what she produced was a true record of the register. She also pointed out that they found two parcel files regarding the property in their records and that the second register was invalid and was cancelled. She stated that they have a title deeds dispatch register in which they record when someone collects a title deed; that entry No. 2 is supported by the charge instrument that she had in court. Further that 28/01/1978 was a Saturday and that when there is a lot of work and it was therefore possible to work on a Saturday.
 36. Paul Kipyator Cheronon testified as PW4. He stated that he was a retired chief of Lembus, Mogotio. He adopted his two witness statements filed on 25/11/2013 and 15/1/2020 as part of his evidence-in-chief.



37. He testified that the plaintiff's mother known as Liza Rotich went to him and explained that her daughter owned the suit property but that Totona had gone to stay on the said land. It was his evidence that he gave a notice to the parties so that he could hear them but Totona failed to show up and so he escalated the matter to the District Officer.
38. At the meeting with the District Officer, Totona showed up and admitted that he had taken a loan from the bank but had defaulted between the years 1977 and 1978 and so the land was advertised for sale. The District Officer and the elders noted that the land belonged to Totona before it was given to Priscilla and so they recommended that the plaintiff gives Totona 15 acres as they were related but that the said decision was made by the elders after the parties had walked out.
39. On cross-examination stood his ground that Totona took a loan but failed to repay the same but failed to submit evidence to show that Totona took a loan or that Paul Chemirmir bought the property at a public auction; that he was not aware of the gift issue; that Paul was the son of the ex-senior chief Chemirmir; that the Totona family is on the land and they have always been there.
40. On re-examination he stated that the elders made the award and that there was no agreement signed by each party. He further stated that at the meeting Totona confirmed that he had taken a loan. The plaintiff's case was then closed at that juncture.
41. Tungo Kaptil alias Tungo Totona testified as DW1. She adopted her witness statements filed on 13/6/2012 and 20/2/2020 as part of her evidence.
42. It was her evidence that she did not know the plaintiff. She testified that Kiporot Arap Totona was her husband who had bought the suit property measuring approximately 58 Ha from Chemirmir in the year 1969 for a consideration of Kshs 17,000/=. It was also her evidence that her late husband went to the South Baringo Land Control Board and got the relevant consent and the title deed was issued; that even though the title deed was issued, they never collected it from the land's office; that the land is at Chemogoch and she has lived on it all through but was not present when it was bought. She further testified that she was not aware of any loan taken by her late husband; that in the year 1995 when the plaintiff and her agents started to claim the land the defendants conducted a search on 29/07/2004 which confirmed that the land was still in Kiporot's name.
43. She testified that her late husband passed on and the land therefore belonged to her and that Priscilla the Plaintiff has never come to the property. She concluded her evidence by seeking that the court awards the land to her so that she can distribute it to her children.
44. On cross-examination she admitted that she did not know when the land was bought. She confirmed that her late husband was buried in his land at Ngetalel and not on the suit land. She was referred to paragraph 2 at page 2 of her witness statement and she stated that she agreed with it. The said paragraph stated that it was after the year 1995 that the plaintiff and her agents begun to claim that the suit property belonged to her.
45. She averred that she did not know Joyce Chesire and David Barus but that she knew Letena Totona and Ray Totona her sons. She also stated that she was not aware of any meeting at the District Officer's in 1997; that she does not recall when the land was purchased.
46. On re-examination she stated that the land at Ngendalel belonged to her husband.
47. Letema Totona Kimamet testified as DW2. He adopted his witness statements dated 13/6/2012 and 7/6/2019 respectively as part of his evidence and produced D. Exh 1, 2, 3, 4, 6, 7 and 8. It was his evidence that his father died on 1/4/2017 and he and Mr. Fredrick T. Totona obtained a grant (DExh 8). He testified that his father bought the suit property in the year 1969 which, according to him, is



the year he was born. The family moved into the land in the year 1969. In the year 1970, they went to the Land Control Board and the relevant consent was given; that the land was transferred to his father officially on 17/1/1970 they have lived on the land for fifty-three (53) years. He testified that the history of the land was narrated to him by his father. He maintained that his father never charged the land and there was no gifting of the land to the plaintiff. He also testified that he went to the lands Registry and he found in the register 3 memos of Kshs. 163,000/= made in 1981, another memo of Kshs. 50,000/= made in July 1977, another memo of Kshs. 70,000/= also made in July 1977, with the last two made in the name of Paul Chemirmir. He stated that he did not know what the memos were for and that they did not see any title deed in Paul's name but only saw the title in Priscilla's name. He testified that there was nothing to show that Paul had surrendered his title and that it had been transferred to Priscilla.

48. When DW2 was referred to P. Exh 9 which are the proceedings before the District Officer, he stated that he did not attend the meeting and that he could not recognize the said document. While referring to the Defendants' further supplementary list dated 5/2/2020 and paragraph 9 of the Affidavit of Priscilla Jeruto Kisoso in C.A. 19/17 faulted them for not attaching any agreement. He produced the affidavit as D. Exh 10. He concluded his testimony by seeking that the prayers sought in his Further, Further Amended Statement of Defence and Counterclaim dated 31/5/2019 be allowed.
49. On cross-examination he admitted that the title (P. Exh 1) was in the Plaintiff's name; that they went to various banks physically to find out if their father had taken a loan but that they did not write any letters to those banks. He confirmed that from the green card it is reflected Joel sold the plot to Kiprot on 7/7/1960 and but averred that DExh 2, the official search having the same details is a forged document. Upon further cross-examination he expressed the same opinion of the green card and insisted that Kiprot never took any loan. Despite this stance, he admitted that the land records reflect that on 07/07/1977 there was a discharge of charge and on the same date there was a transfer by chargee in exercise of power of sale; he also admitted that KCB was supposed to be brought to the suit so that it could confirm the loan that his late father had taken. Though he admitted that he had living in Mombasa for a period of over six years by the year 2006, he maintained that the plaintiff has never set foot on the suit land; that he did not know John Lotnu Lomuk who was the accused in criminal case NO. 1252/2005 and that he has never heard of David Kiprono Toroitich, that no person by that name has ever conducted farming on the suit property; he also does not know if David is related to Priscilla.
50. He further confirmed that his father had never reported the dispute to the District Officer but agreed that his father was also known as Singo arap Totona, and his mother as Tungo Totona and that his name is Letama Totona. However, he denied that he was the one named at page 1 in P. Exh 9 which are the proceedings before the District Officer. He stated that the title deed in the name of his late father was never collected from the lands office but was hard pressed to provide evidence to prove that position. He was referred back to DExh.2 and he confirmed that the Land Registrar stated that there are no instruments to support the entries.
51. On re-examination he restated his name as Letama Kimamet Totona and that he had joined KCB to this case to explain how his father would have taken a loan on the property. He stated that he believed that it was Paul Chemirmir who had taken the loans. Of the land register regarding the suit property, he stated that the only genuine entries are in regard to the transfer from George Chemirmir to Kiprot Totona. The defence case was then closed at that point.

Submissions

52. The plaintiff filed her submissions dated 8/09/2022 on 14/09/2022 while the defendants filed their submissions dated 23/09/2022 on 26/09/2022.



53. The plaintiff in her submissions set out the background of the case and identified the following issues for determination; whether the plaintiff is the bona fide owner of the land, whether there was fraud as alleged by the defendants in the counterclaim and who should bear the costs of the suit.
54. On the first issue, it was submitted that Paul Chemirmir bought the suit property at an auction upon failure by the 1st defendant to service his loan as seen in P. Exh 9 where the 1st defendant admitted before the proceedings at the District Officer's office that he had borrowed money to the tune of Kshs. 350,000/= from Kenya Commercial Bank which he was unable to repay. The plaintiff submitted that the said entries were supported by the various entries in the register. She relied on Section 99 (2)(c) of the Land Act, 2012 the case of Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] eKLR.
55. On the second issue, the plaintiff submitted that she was given the land as a gift by her uncle and that she produced a title deed as proof of the said registration. It was submitted that the plaintiff's evidence was corroborated by that of the Land Registrar. The plaintiff relied on Sections 26 (1) (a) and (b) of the Land Registration Act 2012 and the case of Charles Karathe Kiarie & 2 Others vs Administrators of Estate of John Wallace Mathare (Deceased) & 5 Others.
56. On the third issue, the plaintiff submitted that though the defendants alleged fraud in their counterclaim they did not prove the same as required under Sections 107 and 108 of the Evidence Act. She also relied on the cases of Kinyanjui Kamau vs George Kamau [2015] eKLR and Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR.
57. On who should bear the costs of the suit, the plaintiff relied on the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR and submitted that costs follow the event and sought that she be awarded costs.
58. The defendants in their submissions identified the following issues for determination; whether Paul Chemirmir acquired the suit property legally as a result of a valid legal process, whether Priscilla Jeruto Kisoso legally acquired the suit property from Paul Chemirmir and again whether that acquisition followed a valid legal process, whether the plaintiff is entitled to the reliefs sought in the plaint, whether the defendants are entitled to the relief sought in their counterclaim and what are the appropriate remedies in this case.
59. On the first issue, the defendants submitted that in the year 1969, the 1st defendant Kiporot Ole Tona (deceased) bought the suit property from Joel Chemirmir who is the father of Paul Chemirmir for a consideration of Kshs. 17,000/= with the land measuring 58.0 Ha. The also submitted that it is not true that he took a loan as he had never collected his title deed from the land's office. It was submitted further that therefore since no loan was taken, no auction took place. They relied on the cases of Festo Ogeda Agutu vs Richard Odumbe & another [2022] eKLR and Daudi Kiptugen vs Commissioner of Lands & 4 Others [2015] eKLR. The defendants submitted that Paul Chemirmir's acquisition of the land did not meet the threshold of proper acquisition of property.
60. On the second issue it was reiterated that since Paul Chemirmir did not demonstrate that he acquired the suit property legally then he could not donate it as a gift to his niece the plaintiff. They relied on the cases of Macfoy versus United Africa Co. Limited [1961] 3 ALL 1169 at 1172, Henry Muthee Kathurima vs Commissioner of Lands & Another [2015] and Munyu Maina v Hiram Maina [2013] eKLR.
61. On the third issue, the defendants submitted that the plaintiff is not entitled to the orders sought in her Plaint as she was not able to demonstrate with credible evidence on a balance of probabilities how she acquired the suit property. The defendants relied on the cases of Benja Properties Limited versus



Syedna Mohammed Burhannudin Sahed & 4 Others [2015] eKLR and Bowmakers Ltd vs Bernet Instruments Ltd [1945] 1 KB 65.

62. On the fourth issue, the defendants sought that the orders in their counterclaim be granted and relied on the case of Hubert I. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR. In conclusion, the defendants relied on the cases of Kenya National Highway Authority vs Shalien Masood Mughal & 5 Others [2017] eKLR, Alberta Mae Gacie vs Attorney General & 4 Others [2006] and sought that the plaintiff's claim in the plaint be dismissed.

Analysis and Determination

63. After considering the Plaint, the further further amended statement of defence and counterclaim, the evidence by the parties and the submissions, the following issues arise for determination;
- a. Whether the plaintiff acquired the suit property fraudulently.
 - b. Whether the plaintiff is entitled to the orders sought in the Plaint.
 - c. Whether the defendants are entitled to the orders sought in their further further amended statement of defence and counterclaim
 - d. Who should bear the costs of the suit.
- a. Whether the plaintiff acquired the suit property fraudulently.
64. Section 24 (a) of the Land Registration Act provides as follows:
- “The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”
65. Section 26 of the Land Registration Act provides as follows:
26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
66. The plaintiff is the registered owner of the suit property and so the provisions of Section 24(a) and 26 of the Land Registration Act apply to her. under Section 26 a party can challenge a title of a registered proprietor of land on the basis of fraud. This is the ground upon which the defendants are challenging the registration of the plaintiff as the owner of the suit property and it remains to be seen whether they have established fraud.



67. Fraud is a serious allegation which must be proved on a standard higher than proof on a balance of probabilities but lower than that of the criminal law standard of proof beyond reasonable doubt. The Court in the case of Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others [2015] eKLR stated as follows:

‘It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

‘Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged ...’

68. The Plaintiff’s case is that she was gifted land parcel No. Lembus/Chemogoch/10 measuring approximately 58.0 Ha by her uncle Paul Chemirmir. Paul Chemirmir had allegedly bought the property at a public auction from Kenya Commercial Bank which held the title deed as security after the 1st defendant had taken a loan from it and defaulted. It is further the plaintiff’s case that upon purchase of the property, she went to the land and found the defendants on it.
69. She gave them three (3) months to move out of the land but they failed to do so. She in the meantime instructed her mother and her cousin David Kiprono Toroitich to take care of the property and they allegedly took care of her cattle and sheep while also planting crops.
70. David Kiprono Toroitich testified as PW2 and confirmed that he had been instructed to take care of the property on behalf of the plaintiff. He stated that he was taking care of the sheep and cattle on the property while cultivating it but there were disturbances on the farm created by the defendants. In 2005, twenty (20) acres of maize were burnt down by John Lotuu Lomak who he alleged was an employee of the defendants.
71. The said John Lotuu Lomuk was arrested and charged in Eldama Ravine Criminal Case No. 1252/2005 and was allegedly convicted. In support of the allegations, the he produced as P. Exh 8, the proceedings and judgement in the said matter. It is the plaintiff’s case that this is what necessitated her mother and David Kiprono Toroitich to move out of the suit property. The plaintiff stated that in 1997, she had reported the matter to then area chief known as Paul Kipyator Cherono who testified as PW4. It was Paul Kipyator Cherono’s evidence that the plaintiff and her mother complained to her about the presence of the defendants on the suit property but when he summoned the 1st defendant to appear before him, he declined to go, prompting him to refer the matter to the District Officer. The District Officer summoned both the plaintiff and the 1st defendant and the case was heard on 7/10/1997. The proceedings before the District officer were produced as P.Exh 9.
72. In the said proceedings the plaintiff, 1st, 2nd and 3rd defendants were indicated to be present. The plaintiff in those proceedings indicated that she had been gifted the suit property by her uncle who had bought it during an auction conducted by the Kenya Commercial Bank. The plaintiff indicated that the 1st defendant charged the suit property as security for a loan in the year 1970 but later defaulted which led to the disposal of the property by the chargee. PExh 9 reflects that upon cross-examination by the District Officer, the 1st defendant confirmed that he had taken a loan of Kshs. 350,000/= from Kenya Commercial Bank, Nairobi and that he had offered the suit property as security for the loan. He had also admitted that he defaulted in repaying the loan and was contacted by the bank on the same. The findings of the proceedings before the District Officer were that Paul Chemirmir had bought the land



through an auction and on humanitarian grounds, the plaintiff could give the defendants 15 acres for settlement.

73. In support of the plaintiff's case, the Land Registrar testified and produced the register of the suit property as P. Exh 13. As per the testimony of the land Registrar, the suit property was first registered on 7/7/1960 in the name of Joel Chemirmir who sold it to Kiporot Ole Totona and a transfer effected on 22/01/1970. On 7/7/1970, Paul Chemirmir was registered as the owner upon transfer by chargee in exercise of power of sale and a Certificate of Title issued. On 17/12/1991, the plaintiff Priscilla Jeruto Kisoso was registered as the owner upon transfer from Paul Chemirmir and a title deed issued.
74. On the encumbrances section, entry No. 1 is a charge to secure the credit sum of Kshs. 350,000/= from National & Grindlays Bank Limited. Entry No. 3 is dated 7/7/1977 and is in respect of a discharge of charge under Section 77(4), entry No. 4 is a charge to secure Kshs. 50,000/= also dated 7/7/1977, entry No. 7 dated 28/01/1978 is a variation of charge to secure the sum of Kshs. 70,000/=, Entry No. 9 dated 18/09/1981 is a variation of charges No's 4 and 7 to the extent of Kshs. 163,000/= while entry No. 10 dated 17/12/1991 is a discharge of charge of No. 4, 7 and 9.
75. The defendants only acknowledge entry No's 1 and 2 on the register. It was their case that the 1st defendant bought the suit property from Joel Chemirmir in the year 1969 and he was issued with a title deed on 22/01/1970 but that he did not go to pick the title deed but left it at the Lands Registry. That they took possession of the suit property immediately and have been in occupation to date. The defendants deny that the 1st defendant took a loan from Barclays Bank and they also deny that there was a meeting before the District Officer to discuss the plaintiff's claim over the suit property. They deny that they were present at the said meeting and that the names on the said minutes are not their names. It was also their case that since the 1st defendant, Kiporot Ole Totona did not collect his title deed then there was no way he would have taken a loan from the Kenya Commercial bank and the charged the property.
76. The defendants produced a certificate of official search issued on 29/07/2004 that showed that the property was registered in the name of the 1st defendant, the late Kiporot Ole Totona and yet as per the register the land was already registered in the name of the plaintiff, Priscilla Jeruto Kisoso. The Land Registrar indicated during her evidence that the said search was wrongfully issued and based on an invalid record. On cross-examination the Land Registrar, admitted that she had the certified copy of the charge in court and confirmed that on 7/07/1977 there was a transfer by chargee in exercise of powers of sale but she did not have any record of the public auction. She also admitted that there is no evidence that Kiporot Ole Totona (deceased), the 1st defendant collected his title deed as there would have been an entry to indicate the same; on the other hand, she also indicated that there is a stamp rating, that a certificate of title was issued even though according to her, it was not clear who it was issued to. The Land Registrar also admitted that there were some documents missing from her records that included Paul Chemirmir's title that must have been surrendered for cancellation and the transfer that had effected the registration of the plaintiff as the proprietor of the suit property.
77. It is not disputed that the suit property is registered in the name of the plaintiff. It is on the basis of this registration that the plaintiff is seeking for the eviction of the defendants from the suit property. The defendants on the other hand, and as pointed out before, argue that the registration of the plaintiff as the owner of the suit property was fraudulent as Paul Chemirmir did not acquire the property procedurally. Their argument is that after the deceased 1st defendant acquired the suit property, he did not take a loan and charge the property and so the land could not have been sold at a public auction to Paul Chemirmir.



78. Since the defendants are challenging the ownership of the suit property on the basis of fraud, the onus is on them to prove the said fraud. It is my view that the plaintiff has established the manner in which she acquired the suit property and has produced all the relevant documents in support of her case. It is also my view that the defendants' case is entirely comprised of mere denials.
79. The defendants in their further further amended statement of defence and counterclaim set out the allegations of fraud against the plaintiff but did not adduce any evidence to support their allegations of fraud. For instance, the defendants deny that the deceased 1st defendant took a loan from the Kenya Commercial bank upon which he defaulted and the suit property sold at an auction; however, they never joined the Bank to the present proceedings for the effective trial of whether any credit was taken on the strength of the suit land's title.
80. As pointed out before, the plaintiff produced the original minutes of the meeting before the District Officer where the 1st defendant admitted that he had taken a loan from the Kenya Commercial Bank and had defaulted in making payments which led to the property being sold at a public auction.
81. The defendant merely denied the plaintiff's claims concerning the loan and the DO's meeting, but did not produce any evidence in support of their denials. The said denials are in my view not sufficient to prove the allegations set out by the defendants in their statement of defence and counterclaim against the plaintiff. The defendants can not adequately explain why they never joined the Kenya Commercial Bank for it to deny that any loan was taken by the 1st defendant or that it sold the land by way of public auction in exercise of its statutory power of sale. The probable reason for non-joinder may be that the defendants became apprehensive that the truth that the land had been charged and sold at an auction would emerge once the bank tendered its evidence.
82. Upon considering the evidence adduced in this case in its entirety, I have no doubt that the meeting before the District officer took place and that P. Exh 9 is a proper reflection of the proceedings thereat. Consequently, on the strength of the foregoing finding, I find that the 1st defendant did charge the land to the Kenya Commercial bank and that he defaulted on the loan and the exercise of the statutory power of sale saw the suit title transferred to Paul Chemirmir who transferred it to the plaintiff. This court has no evidence presented before it by the defendants to even remotely suggest that the entries registering Paul and later the plaintiff were fraudulently procured. In conclusion therefore, it is this court's opinion that the defendants have failed to prove that the plaintiff acquired the suit property fraudulently.

Whether the plaintiff is entitled to the orders sought in the Plaintiff.

83. The plaintiff has demonstrated that she properly acquired the suit property and I will now address whether she is entitled to the orders sought in the Plaintiff. The plaintiff is seeking for eviction of the defendants from the suit property. It is not disputed that the defendants have been in occupation of the suit property since the year 1969 and as per the minutes of the meeting before the District Officer that the plaintiff had produced as P. Exh 9, it was determined that on humanitarian grounds, the defendants could be given fifteen (15) acres of the suit property. The plaintiff also in her evidence stated that the defendants were in occupation of that extent of land in the suit property. I am inclined to uphold the determination made under the alternative justice system proceedings conducted under the local administrator, the District Officer, who must be deemed to have known his jurisdiction and its affairs quite well.
84. In the interest of justice and fairness, and considering the circumstances of this case, I will allow the defendants to occupy and obtain title to only fifteen (15) acres of the suit property and the plaintiff to take possession and title to the rest of the property.



85. The plaintiff is also seeking for mesne profits. Section 2 of the Civil Procedure Act defines mesne profits as follows:

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

86. The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR held as follows:

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.”

87. The court in the case of Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR stated as follows:

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act. The said provisions state as follows with regard to a decree for possession and mesne profits:

- “(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-
 - a. For the possession of the property.
 - b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
 - c. Directing an inquiry as to rent or mesne profits from the institution of such suit until:-
 - i. The delivery of possession to the decree-holder
 - ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
 - iii. The expiration of three years from the date of the decree, whichever even first occurs.
- (2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able to award the same.”



88. It is this court's view that the plaintiff did not table sufficient evidence before the court to enable it grant her mesne profits. In conclusion therefore, the plaintiff's case partially succeeds and the defendants' counterclaim is dismissed with costs. For avoidance of doubt I make the following final orders:

- a. The plaintiff's claim in the plaint dated 26/01/2006 is partially allowed.
- b. The defendant's claim in the further amended counterclaim dated 31/05/2019 is hereby dismissed with costs;
- c. The plaintiff shall subdivide the suit land that is land parcel No. Lembus/Chemogoch/10 and transfer only 15 acres thereof into the name of the administrator of the estate of Kiporot ole Totona alias Singo Arap Totona (deceased);
- d. The 15 acres in order No (c) above shall include as much as will be practicable the land currently occupied by the defendants but no occupation of more than 15 acres shall entitle them to that excess land.
- e. The defendants shall jointly and severally pay a half of the costs of the main suit and the counterclaim to the plaintiff and shall also bear the expenses of subdivision and transfer of the land as ordered in this judgment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

