



REPUBLIC OF KENYA



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**Kenduiywa v Ngetich & another (Environment and Land Appeal
3 of 2022) [2024] KEELC 1213 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1213 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL 3 OF 2022**

MC OUNDO, J

MARCH 7, 2024

BETWEEN

JOHN KIPNGENO KENDUIYWA APPELLANT

AND

GILBERT NGETICH 1ST RESPONDENT

VINCENT NGETICH 2ND RESPONDENT

(Being an appeal from the Judgement and Decree of Honourable K. Kibelion, Principal Magistrate delivered and dated 4th May, 2022 at Bomet in PMC ELC Case No. E011 of 2020)

JUDGMENT

1. What is before me for determination on Appeal is a matter which was heard and determined by Hon. K. Kibelion, Principal Magistrate in the Principal Magistrate's Court at Bomet in PMC ELC case No. E011 of 2020 where the learned Magistrate, upon considering the evidence of both parties, entered judgment on the 4th May, 2022 in favour of the Respondents' counterclaim to the effect that indeed they had demonstrated that the registration of the suit property in favour of the Plaintiff had been obtained fraudulently for reason that at the time of the said transfer, the transferee had long been deceased. The Learned Magistrate thus ordered the cancellation of the title No. Kericho/Kimulot/1836 registered in favour of the Plaintiff.
2. The Appellant, being dissatisfied with the Judgement of the trial Magistrate has now filed the present Appeal based on the following grounds in his Memorandum of Appeal:
 - i. That the learned trial Magistrate erred in law and in fact by cancelling the title No. Kericho/Kimulot/1836 registered in favor of the Plaintiff merely on the grounds that the supporting documents as presented to court were shambolic without calling the Land Registrar to explain the registration status of the land.



- ii. The learned trial Magistrate erred in law and in fact by relying on uncertained copies of the grant, green card and title deed in making an adverse inference against the Appellant's title ownership.
 - iii. The learned trial Magistrate erred in law and in fact by disregarding the Plaintiff's evidence.
 - iv. The learned trial Magistrate erred in law and in fact by disregarding the undisputed fact that indeed the Plaintiff bought the land in dispute.
 - v. The learned trial Magistrate erred in law and in fact by failing to interrogate the manner in which the Plaintiff's title was conferred before cancelling the said title.
 - vi. The learned trial Magistrate erred in law and in fact by referring to documents that had been tampered with.
 - vii. The learned trial Magistrate erred in law and in fact by failing to appreciate the fact that the Appellant's title was not an isolated conferment but was as a result of succession of land Parcel No. Kericho/Kimulot/1807 which process also conferred title to 11 (eleven) other titles including the parcels owned by the Defendants/Respondents and a cancellation of one title should have the same effect to the other 11 (eleven) titles.
 - viii. The learned trial Magistrate erred in law and in fact by ordering the cancellation of title No. Kericho/Kimulot/1836 without specifying in which title number the parcel reverts to.
 - ix. The learned trial Magistrate erred in law and in fact by making an order that was incapable of implementation.
3. The Appellant thus sought that the judgement of the lower court dated 4th May, 2022 be set aside and an order of a permanent injunction be issued restraining the Defendants, their agents, employees and or servants from howsoever trespassing onto the Plaintiff's parcel known as LR No. Kericho/Kimulot/1836. That further he be granted general damages for trespass and the cost of the suit.
 4. The Appeal, was admitted on 18th July, 2023 and directions issued for the same to be disposed of by way of written submissions.

Appellant's submission

5. The Appellant summarized the factual background of the matter in issue to the effect that the dispute had been triggered by a sale agreement entered into by the Appellant and one Charles Kipngetch Langat, the father to the Respondents herein in respect of the Land Parcel No. Kericho/Kimulot/1836, then registered in the name of Janifer Chepkoske Bunei, for a consideration of Kshs. 2,028,000/=. That at the time of the said agreement, Jenifer Chepkoske Burnei had already subdivided the land but had not transferred it to the said Charles Langat at the time he entered the sale agreement with the Appellant.
6. That the Sale Agreement described who the vendor was, the property including in whose name it had been registered and was signed by both the vendor Charles Kipngetch Langat and Jenifer Chepkoske Burnei. That the vendor in his witness statement admitted to having sold his portion of the land to the Appellant.
7. That the Agreement had been clear that the suit land had been registered in the name of Janifer Chepkoske Bunei and that only she had the mandate to transfer the said land to the Appellant which she did since the vendor was transferring his interest in the entire suit land to the Appellant. That upon completing the payment of the purchase price, he had started utilizing the suit land from the year



- 2013 until the land was transferred to him on 19th February, 2016 wherein he had continued to utilize the said land until sometime in the year 2020 when the Respondents herein, who are the vendor's sons forcefully entered the suit land, chased away his workers and took possession of the same thus prompting him to file a suit for eviction and trespass.
8. That the Respondents' case had been that there had been fraud and illegality on the part of the Plaintiff /Appellant the particulars being that the Appellant had transferred the suit land to himself without any legal authority, and without procuring consent to transfer from the Land Control Board. That he had also filed suit on an egregious title.
 9. That his title had not been as a result of a single transaction but a process of subdivision that had given rise to 12 titles issued to different individuals including a learning institution in a process which had been spearheaded by Jenifer Burnei who was the vendor's mother, grandmother to the Respondents herein and who had transferred the suit land to the Appellant.
 10. That the said Jenifer Burnei had obtained the consent to sub-divide which had resulted in 12 new numbers (including the Appellant's number) which had now been registered to several persons.
 11. The Appellant then framed his issues for determination in support of his Appeal as follows;
 - i. Whether the transfer of Parcel No. Kericho/Kimulot/1836 to the Appellant herein was fraudulent.
 - ii. Whether the Appellant's title was an isolated conferment and whether the cancelation of one title affects the other titles which went through the same procedure.
 - iii. Whether the Appellant is entitled to the prayers sought.
 12. On the first issue for determination, the Appellant submitted that in order to succeed in a claim of fraud, the Respondents were not only required to plead fraud but to also particularize it by laying out water tight evidence upon which the court would make such finding. Reliance was placed on the Court of Appeal decision in the case of *Vijay Morjaria vs. Nansingh Madhusingh Dardar & Another* [2000] eKLR. That further, the provisions of Order 2 Rule 4 of the *Civil Procedure Rules* provided for the same standard and procedure for allegations of misrepresentation and illegality.
 13. Regarding the standard of proof, he relied on the Court of Appeal's decision in the case of *Kinyanjui Kamau vs. George Kamau* [2015] eKLR to submit that whoever alleges must prove. That despite the Respondents' allegations that he had transferred land to himself without any authority, without procuring consent to transfer and that he had sued them on the basis of an egregious title yet they had admitted having knowledge of the fact that their father had sold the suit land to the Appellant before relocating to Kuresoi.
 14. That indeed the Respondents' witnesses had all confirmed to the fact that indeed Charles Langat had in the year 2013, sold his portion of land being Parcel No. Kericho/Kimulot/1836 to the Appellant herein.
 15. That indeed the Sale Agreement which had been prepared by the firm of M/s CK. Korir & Company Advocates and signed by Charles Langat had indicated that the original parcel of land No. Kericho/Kimulot/209 had been registered in the name of Jenifer Chepkoske Bunei the mother to Charles Langat and a grandmother to the Respondents herein.
 16. He reiterated that from the documents attached in the instant Appeal, it had been clear that it was Jenifer Chepkoske Bunei who had transferred that suit land to him after subdividing parcel No . Kericho/Kimulot/1807 which had given rise to 12 parcels of land. That the green card to Parcel No.



- Kericho/Kimulot/1836 (the suit land) indicated that the said had originated from parcel No. Kericho/Kimulot/1807. That the Green Card in relation to parcel No. Kericho/Kimulot/209 showed that the register had been closed on 25th March, 1998 upon its sub-division to new parcels being Kericho/Kimulot/1178 and Kericho/Kimulot/1179 after succession.
17. That the green card for parcel No. Kericho/Kimulot/1178 indicated that indeed it had been created out of parcel No. Kericho/Kimulot/209 and that the same had been closed on 19th (sic) September, 2013 upon the creation of new numbers being Kericho/Kimulot/1807 and Kericho/Kimulot/1808. That it was upon the subdivision of Kericho/Kimulot/1807 that 12 new parcels were born, the suit land herein included.
 18. His submission was that at no point had fraud been attributed to him in the whole process as he had not been involved in the said sub-divisions. He reiterated that the suit land was never processed individually but together with the other 11 parcels which were as a result of a single process being parcel Numbers Kericho/Kimulot 1836, 1837, 1838, 1839, 1840, 1841, 1851, 1852, 1853, 1854, 1855 and 1856, instigated by one Jenifer Chepkoske Bunei who had signed the mutation forms.
 19. He also based his submission on the provisions of Section 26 (1) of the *Land Registration Act*, 2012 to reiterate that he had sufficiently explained how he had obtained the title to the suit land and that from the pleadings filed and the record, there had been no evidence leading to his involvement of fraudulent dealings over the manner in which he had obtained his title.
 20. That essentially, what the court was faced with was a situation where the vendor entered into a sale agreement to sale land, received Kshs. 2,028.000/= which money he used to relocate leaving behind his sons and then upon being pressurized by the said sons, he had renegaded the sale on a claim that he had no capacity to sell the suit land in the first place so as to deprive the innocent purchaser of his land. The Appellant's submission had been that there had been no case made out for fraud against his title to warrant the trial court's findings.
 21. On the second issue for determination as to whether the Appellant's title had been an isolated conferment and whether the cancellation of one title affected the other titles which had undergone through the same procedure, the Appellant's submission was that the entire process of obtaining the Land Control Board consents and the signing of the relevant land transfer forms had been prepared by the Respondents' family member, one Jenifer Bunei in whose name the suit land had been registered to. That an order of cancellation of a title must be followed with an order reverting the parcel to the previous number. That in the instant case, the suit land had been as a result of a joint mutation that had given rise to 12 parcel numbers but the order of cancellation of the title to the suit land as given by the court had not indicated the number which it ought to revert back to because it could not revert back to Parcel Number Kericho/Kimulot/1807 as the said number had already mutated.
 22. It was his submission that the twelve (12) titles having gone through the same procedure could not be invalidated in isolation of the others as the invalidation of one title had a direct effect on the other titles. That further, the invalidation of one parcel leaves that parcel hanging without a number and without an owner. He thus submitted that the conferment of the suit parcel to the Appellant had not been an isolated conferment as it was done simultaneously with 11 (eleven) other titles from Parcel Number Kericho/Kimulot/1807.
 23. The Appellant's submissions as to whether he was entitled to the prayers sought was in the affirmative to the effect that he had made out a case to warrant a finding that there had been no evidence of fraud that had been adduced before the trial court to warrant the said trial court reach the finding that it did. That subsequently, the Appellant's title had not been challenged before a competent court and adjudged as having been procured fraudulently and as such remained indefeasible proof of ownership.



Respondents' Submissions

24. In response to the Appellant's appeal and in opposition thereto, the Respondents after giving a brief history of the matter in question framed two issues for determination as follows;
- i. Whether the suit property was illegally or fraudulently transferred to the Appellant.
 - ii. Whether the Appellant is entitled to the prayers sought in the Memorandum of Appeal.
25. On the first issue for determination as to whether the suit property was illegally or fraudulently transferred to the Appellant, the Respondent submitted that while they pleaded fraud on the part of the Appellant, the said Appellant's suit had been anchored on the allegation that pursuant to a Sale Agreement, he had purchased the suit land from the Respondents' father in the year 2013 after which he started developing the same and later acquired the title to it. That the Appellant did not produce a copy of the search certificate of the suit land and when cross-examined on whether he had conducted a search before purchasing the land, he had admitted that he had not.
26. That contrary to the Appellant's allegations that the Land Registrar had not been called to explain the registration status of the suit land, the said Registrar adduced evidence in court as DW6 and gave the history of the suit land to the effect that the original title had been land parcel LR No. Kericho/Kimulot/209 registered in the name of Stephen Kiplangat Bunei and was later transferred to Francis Kipkebut Cherogony.
27. That according to the green card exhibited as Pf exh 6 by the Appellant in his supplementary list of documents, the original owner of the land transferred the suit land to him. That although there was a Certificate of Grant in relation to the estate of Francis Kipkebut Cherogony (deceased) to Sarah Cherogony, the transmission process had not been effected. That there had not been evidence of transfer of the suit property from the deceased to the Appellant and if there had been, the same had been fraudulent since the alleged transfer had been effected in the year 2018 after the death of the registered owner. They placed reliance on the Court of Appeal's decision in the case of *Evanson Wambugu Gachugi vs. Simon Wainaina Gatwiki & 2 Others* [2014] eKLR to submit that the Appellant fraudulently transferred land parcel LR Kericho/Kimulot/1836 to his name using forged documents.
28. That whereas Article 40 of *the Constitution* provided property rights protection from arbitrary deprivation and restriction from the enjoyment of the same without cause, Article 40(6) of *the Constitution* provides that the said protections were not available to a property that had been found to have been unlawfully acquired.
29. Their reliance was hinged on the Provisions of Sections 24 and 25 of the *Land Registration Act* to submit that the said sections provided for two instances in which a title may be impugned, which was on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title had been acquired illegally, un-procedurally or through a corrupt scheme. Further reliance was placed in the decided case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another* [2013] eKLR.
30. That the mutation form that had been produced by the Appellant as Pf exh 5 was dated 22nd November, 2011 had allegedly been signed by Francis Kipkebut Cherogony who had died on or before the year 1986. That further, the land Registrar who had testified as DW6 had stated that there was no way the deceased could have transferred the title to the Appellant in the year 2018 since he had passed on before the registration of the Appellant as the owner of the suit land.



31. They reiterated that there had been no evidence of transfer of the suit property from the deceased to the Appellant and if there had been, then it had been obtained fraudulently, the same having been effected in the year 2018 after the death of the registered owner. Further, that the transfer forms had not been executed in favour of the Appellant who had not attended the Land Board. Reliance was placed in the Court of Appeal's decision in the case of *Munyu Maina vs. Hiram Gathiba Maina* [2013] eKLR.
32. That from the evidence on record and the documents produced by the Respondents, more so the original title deed for land parcel LR No. Kericho/Kimulot/209, it had been evident that the suit land belonged to Francis Kipkebut Cherogony (deceased). That although a Certificate of Confirmation had been issued to Sarah Cherogony, the transmission process had not been effected and indeed the original title deed LR No. Kericho/Kimulot/209 had never been surrendered so enable creation of new numbers. They placed reliance in the *Evanson Wambugu Gchubi's case* (*supra*).
33. That whilst the Appellant's claim was that he had bought the suit land from one Charles Langat, the said Charles was not the registered owner of the suit land and had no right on the said land thus the said sale was null and void ab initio. That there was no consent that had been obtained from the Land Control Board to transfer the suit land in violation of the provisions of Section 6(1)(a) of the *Land Control Board*. That further, from the evidence adduced in court by the Land Registrar, none of the procedures required for the transmission of the deceased's land had been adhered to by the Appellant herein before he could obtain the title to the suit land since no transmission documents had been prepared, executed, attested and presented to the Land Registrar for registration and neither had there been any receipts showing the payment of any fees or rates.
34. They thus submitted that the title deed to land parcel LR No. Kericho/Kimulot/1836 had been fraudulently and/or illegally acquired.
35. The Respondents' Submission as to whether the Appellant was entitled to the prayers sought in the Memorandum of Appeal was in the negative submitting that the process by which the Appellant had obtained the title deed to the land parcel LR. No. Kericho/Kimulot/1836 had been tainted with fraud since the alleged transferee had since been dead before the Appellant obtained the title to the suit land. That subsequently, the suit land belonged to the deceased and the rightful person to deal with the same had been Sarah Cherogony who was the deceased's estate administrator. That the title to the suit land should thus be cancelled having been fraudulently obtained. Reliance was placed in the *Elijah Makeri Nyangw'ra's case* (*supra*).
36. The Respondent thus submitted that the Appellant had been a party to the illegal, un-procedural and invalid process towards the acquisition and registration of the suit land in his name hence the instant Appeal should be dismissed with costs to the Respondents.

Determination.

37. I have considered the record of Appeal, the judgment by the trial Magistrate, the written submissions by learned Counsel as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (See *Seascapes Ltd v. Development Finance Company of Kenya Ltd* [2009] KLR, 384). I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982-88] 1 KAR 278).



38. According to the proceedings herein, the Appellant instituted suit against the Respondents vide a Complaint dated 30th July 2020 where he had sought for an order of permanent injunction restraining the Respondents whether by themselves or their servants, employees and/or agents from howsoever trespassing onto his parcel of land known as LR Kericho/Kimulot/1836. He had also sought for general damages for trespass as well as for cost of the suit and any other relief that the court would deem fit and just to grant.
39. In response to the case filed against them, the Respondents, had filed their joint statement of defence and Counterclaim dated 7th September 2020 on the 8th September 2020 generally denying the allegations contained in the Appellant's Complaint stating that the Appellant had irregularly, unlawfully and fraudulently acquired title deed to the land parcel LR Kericho/Kimulot/1836 therefore there be a declaration that his registration as proprietor to the said parcel of land was null and void and the same be canceled. That the Appellant moves out of the said parcel of land and in default there be eviction orders. The Respondents also sought for general damages, costs of the suit and any other relief that the court would deem fit and just to award.
40. After the confirmation of the preliminaries, the matter proceeded for hearing before Hon K. Kibelion the Principal Magistrate sitting in Bomet on the 10th March 2021 wherein the Plaintiff/Appellant's evidence in summary was to the effect that he was the proprietor to land parcel No. LR Kericho/Kimulot/1836 as per the Title deed produced as Pf exh 1 having purchased the same from one Charles Langat, the Respondents' father, via a sale agreement dated the 8th April 2013 and produced as Pf exh 2. That pursuant to the sale agreement, he had taken possession of the land which possession was peaceful until the 26th March 2020 when the Respondents chased away his workers from the land. That since then, he had not been in possession/occupation of the land due to the continuing threats by the Respondents who had alleged that their father had not consulted them before selling off the land.
41. His evidence was that after the vendor Charles Langat had sold him the land, you you you you or me he (vendor) had relocated to Kuresoi. That indeed he had not only bought the suit land from Charles Langat, but had also bought land parcel No. LR Kericho/Kimulot/1845 which he had sold to Mosoret Primary school.
42. He confirmed that at the time of the purchase, the land was still registered to one Jenifer Bunei. He produced the green card for parcel No 1836, a consent for subdivision of parcel number 1807 and a copy of the application for consent as Pf exh 6, 7(a)(b) respectively.
43. Further evidence was that he had received the title deed to the suit land on 18th December 2018. That he had not conducted a search prior to the purchase wherein he had later come to learn that the land had been registered to one Francis Cherongony a brother to Jennifer to Bunei. That upon the demise of Francis Cherongony, a Grant had been issued to his widow Sarah Cherongony in 1988 who then transferred the land to Jennifer to Bunei.
44. The sale transaction had been confirmed by PW2 who had introduced the vendor Charles Langat to the Appellant, and who had confirmed that the purchase price had been Ksh. 2,028,000/= and that he had been a witness to the sale agreement where the Appellant had paid Ksh. 680,000/= to the vendor before taking occupation of the land in the year 2020.
45. PW3, the Appellant's supervisor had confirmed in his evidence that indeed on 26th March 2020 as they prepared to work on the suit land, they had been chased wherefrom by the Respondents who were armed with 'pangas', wherein a report had subsequently been made at the Mogogosiek police station on the 28th March 2020. The Appellant had then closed its case.



46. The defense case was led by DW1, the 1st Respondent who produced copies of the following documents;
- i. A title deed to land parcel LR Kericho/Kimulot/209 as Df exh 1
 - ii. A certificate of confirmation of grant as Df exh 2
 - iii. A green card for parcel LR Kericho/Kimulot/209 as Df exh 3
 - iv. A green card to land parcel LR Kericho/Kimulot/1178 as Df exh 4
 - v. A letter dated 1st November 2020 from M/s Mitei & Co. Advocates as Df exh 5
47. DW 1 then proceeded to testify that he was a son to one Charles Langat and a grandson to Jennifer Cheposgei Mulei. That he was also aware that his father had sold land parcels LR Kericho/Kimulot/1836 and 1845 without informing him. That he was also concerned that the Appellant had obtained the title deed to the said parcel of land without there being succession proceedings conducted. That the original land parcel LR Kericho/Kimulot/209 had belonged to one Francis Kipkebut Cherogony Cherogony who had been issued with its title in 1978. That after the passing away of Francis, a Certificate of Grant had been issued on 7th June 1988 to his Administrator Sarah Cherogony. That he had not been aware if the parcel of land had later been transferred to his grandmother Jennifer Bunei but all he knew was that his grandmother had not subdivided the land.
48. The 2nd Respondent testified as DW2 the effect that he was in court to testify regarding the suit parcel of land LR Kericho/Kimulot/1836 and 1845. That he did not know whether his father Charles Langat had sold land, whether land had been transferred to the Appellant or whether his grandmother Jennifer Bunei had title to the suit land. He confirmed that the Appellant had been in occupation of the suit land LR Kericho/Kimulot/1836, which he had transferred in his name, since 2013 but denied having chased his employees from therein.
49. DW3. Raymond Langat testified that he was a brother to Charles Langat and an uncle to the Respondents. He had confirmed that he lived on a portion of land parcel LR Kericho/Kimulot/209 comprising of 1.6 acres which portion of land had been identified and given to him by his mother Jennifer Bunei who had also shown his brother Charles Langat his own piece of land which was bigger than his. That he was aware that his brother had sold his portion of land although he had not been present during the transaction.
50. He also confirmed that land parcel LR Kericho/Kimulot/209 had been registered in the name of Francis Cherogony whose estate had been administered by Sarah Cherogony and Kenneth Rotich in a Succession Cause that had been conducted in 1988. That he was not aware that the Administrators had transferred the land to his mother nor that his mother had subdivided the land to other parties. That what he knew was that the land had been subdivided by Sarah Cherogony resulting into land parcels LR Kericho/Kimulot/1178 and 1179 wherein David Chepkum had been given land parcel Kericho/Kimulot/117 while Kericho/Kimulot/1178 had remained in the name of Francis Cherogony. He confirmed that his mother Sarah Cherogony did not give the Appellant any title.
51. Charles Kipngetch Langat, who testified as DW4 confirmed that indeed the Respondents were his children and that he had sold land parcel LR Kericho/Kimulot/1836 and 1845 to the Appellant although he had not transferred the same to him. He also confirmed that LR Kericho/Kimulot/1836 had not been subjected to a succession process and that at the time of the sale transaction, it was still registered in the name of Jennifer Cheposgei Bunei. That he was willing to refund the purchase price



- to the Appellate together with an interest of 14% from the date he had received the payment of the sale agreement.
52. The Bomet Land Registrar testified as DW6 to the effect that parcel LR Kericho/Kimulot/209, which was the original land had been registered to one Stephen Bunei on the 2nd May 1973. On 23rd January 1974, the land had been transferred to Kiplagat A. Bunei as the correction of the name and title issued on 13th February 1974.
53. On 28th February 1978 the land had then been transferred to Francis Kipkebut Cherogony who had then been issued with a title deed on the same date. Subsequently the title had been closed on 25th March 1998 pursuant to a subdivision that resulted into parcels of land parcel LR Kericho/Kimulot/1178 and 1179 of which parcel of land LR Kericho/Kimulot/1179 was transferred to David Kiplangat A. Chepkwony who had been issued with a title deed on the same date.
54. That land parcel LR Kericho/Kimulot/1178 was closed on sub division thereby resulting into land parcels LR Kericho/Kimulot/1807 and 1808 on the 17th of August 2013. That whereas land parcel LR Kericho/Kimulot/1808 had been transferred to Peter Kipkorir Kirui who had been issued with a title deed on the same date, land parcel LR Kericho/Kimulot/1807 had been closed on sub division on 24th May 2017 resulting into parcels number LR Kericho/Kimulot/1836-1841 and 1851-1856. That land parcels number LR Kericho/Kimulot/1836 was then transferred to the Appellant who had been issued with a title deed on 19th December 2018.
55. Upon being referred to the Confirmation of Grant herein produced as Df exh 2, the Land Registrar had confirmed that the same having issued on 7th June 1988 in regards to the estate of Francis Cherogony, the transfer of land parcel number LR Kericho/Kimulot/1836 to the Appellant was therefore improper as its registered owner was deceased at the time the transfer was effected. The defence had thus closed its case.
56. With the said background in mind, I find the issues arising for determination as follows:
- i. Whether the Appellant's registration as proprietor of the suit land LR No. Kericho/Kimulot/1836 was lawful.
 - ii. Whether the learned trial Magistrate erred in law and in fact by ordering the cancellation of title No. LR Kericho/Kimulot/1836.
 - iii. Who is entitled to pay the costs of the suit
57. On the first issue for determination as to whether the Appellant's title was lawful or obtained through fraud, the onus was on the Respondents to prove these allegations. Fraud is a serious matter which must be proved to the required standard. In *R.G Patel vs Lalji Makanji* 1957 EA 314, the Court of Appeal stated as follows:
- “Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.
58. In the case of *Arthi Highway Developers Ltd vs West End Butchery Ltd & Others* [2015] eKLR, the Court of Appeal cited the following passage from *Bullen & Leake Precedents Pleadings* 13th edition at page 427:
- “The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss



complained of It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

59. I have no doubt in my mind that the Respondents herein had distinctly pleaded the facts on which fraud is alleged against the Appellant. The next step however was for them to prove those allegations to the required standard. I will therefore interrogate all those allegations of fraud, as submitted by the Respondents.
60. The summation of the matter before me is that whereas the Appellant’s argument is that he was the proprietor of land parcel LR Kericho/Kimulot/1836, having purchased the same from DW4 Charles Kipngetch Langat vide a sale agreement dated the 8th April 2013 herein produced as Pf exh 2, wherein he had taken peaceful possession of the land, the Respondents herein had unlawfully evicted him therefrom on the 26th March 2020 and therefore the Learned Magistrate had erred in his judgment when he ordered the cancellation of the title to LR No. Kericho/Kimulot/1836 registered in his (Appellant’s) name.
61. The Respondents argument on the other hand is to the effect that the transfer and registration of LR No. Kericho/Kimulot/1836 to the Appellant was fraudulent and illegal the same having taken place long after the death of the registered proprietor of the said parcel of land.
62. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gathika Maina* [2013] eKLR, held as follows:
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
63. Section 80 (1) of the *Land Registration Act* provides that:-
- “Subject to sub Section (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
64. From the above provision of the law, it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
65. I have considered the evidence adduced by the Appellant that he had purchased land parcel LR Kericho/Kimulot/1836, from DW4 Charles Kipngetch Langat vide a sale agreement dated the 8th April 2013. I have considered the Green card to land parcel No. LR Kericho/Kimulot/1836 which was produced at the hearing as Pf exh 6 and which clearly showed that the said suit land had been registered to the name of one Francis Kipebut Cherogony on the 21st May 2017 and that it had been a subdivision of land parcel No. Kericho/Kimulot/1807. That on the 19th December 2018 the suit land had subsequently been registered to the Appellant.



66. I have also noted the contents of the Sale Agreement dated the 8th April 2013 herein produced as Pf exh 2 for the sale and purchase of land parcel No. Kericho/Kimulot/1836 which is the land in question wherein the parties to the transaction had been Charles Kipngetch Langat as the vendor and the Appellant John Kipngeno Kenduiywa as the purchaser. The court was however not presented with any evidence of proof that the Vendor therein was the registered proprietor of the said parcel of land on sale, or any evidence that he had a good title to pass.
67. What the parties seem to agree and what is depicted on the impugned Sale Agreement is that at the time of the sale of the suit property, it had been registered to one Jennifer Chepkoske Bunei, but then again the court had not been provided with any evidence of the proprietorship of Jennifer Chepkoske Bunei to the suit land.
68. Indeed the evidence we have on record that is supported by documentary evidence is the evidence of DW6 the Land Registrar Bomet who had testified that the original land was parcel LR Kericho/Kimulot/209 which had been registered to Stephen Bungei on the 2nd May 1973 wherein on the 23rd January 1974, the land had been transferred to Kiplagat A. Bunei as the correction of the name and title issued on 13th February 1974. That on 28th February 1978 LR Kericho/Kimulot/209 had been transferred to Francis Kipkebut Cherogony who had then been issued with a title deed on the same date.
69. After Francis Kipkebut Cherogony had been registered as proprietor of the original Land parcel of land being LR Kericho/Kimulot/209 on the 28th February 1978, he passed away and a Succession Cause was filed at the High Court in Kisumu in Succession Cause No. 130 of 1986 wherein a Confirmation of a Grant to his estate was issued to his wife Sarah Cherogony on the 7th June 1988.
70. Now things become interesting from here because the Green Card to the original parcel of land depicted that title to the said parcel of land had been closed on the 25th March 1998 upon its subdivision. Evidence by DW6 was to the effect that the resultant parcels of land were parcel LR Kericho/Kimulot/1178 and 1179 of which parcel of land LR Kericho/Kimulot/1179 was transferred to David Kiplangat A. Chepkwony wherein he had been issued with a title deed on the same date and parcel No 1178 was registered to Francis Kipkebut Cherogony.
71. That land parcel LR Kericho/Kimulot/1178 was closed on sub division thereby resulting into land parcels LR Kericho/Kimulot/1807 and 1808 on the 17th of August 2013. That whereas land parcel LR Kericho/Kimulot/1808 had been transferred to Peter Kipkorir Kirui who had been issued with a title deed on the same date, land parcel LR Kericho/Kimulot/1807 had been closed on sub division on 24th May 2017 resulting into parcels number LR Kericho/Kimulot/1836-1841 and 1851-1856. That land parcels number LR Kericho/Kimulot/1836 was then transferred to the Appellant who had been issued with a title deed on 19th December 2018.
72. It is clear from the chronology of the events as they unfolded that pursuant to the death of Francis Kipkebut Cherogony who was the last registered proprietor of the original parcel of land, and the issuance of the Confirmation of Grant upon Sarah Cherogony on the 7th June 1988, no evidence had been tendered that the transmission process in relation to the original parcel of land had been effected. Indeed the subsequent subdivisions of the said land, the transfers and subsequent registrations therein had been marred with irregularities for lack of supporting evidence in regard to the authority to transact any business on the original land parcel of land. In fact a look at the Green card to parcel No. Kericho/Kimulot/1836 the suit land herein, one would not help but notice that the same is to the effect that the land had been registered to Francis Kipkebut Cherogony on the 21st May 2017 which was some twenty nine (29) years after the confirmation of grant had been issued to his administrator.



73. Indeed during the hearing of the suit, the Land Registrar had been referred to the confirmation of grant herein produced as Df exh 2, wherein he had confirmed that the same having issued on 7th June 1988 in regards to the estate of Francis Cherogony, the transfer of land parcel number LR Kericho/Kimulot/1836 to the Appellant was improper as its registered owner was deceased at the time the transfer was effected.
74. It will therefore not be necessary to belabor the point that title to No. Kericho/Kimulot/1836 was improperly acquired.
75. Indeed as it had been cited with approval by the Court of Appeal in in *Jivanji vs. Sanyo Electrical Company Ltd* [2003] KLR 425 at p. 431. that:

“No person has legal capacity or authority to transfer to another person a registered proprietors interest in a parcel of land registered under the *Registered Land Act* without the participation or knowledge and consent of the registered proprietor. The transfer of the suit parcel of land to the first Defendant on 5th April 1991 was done by a transferor who was not the registered proprietor of that parcel of land. It was done without the knowledge and consent, or participation of the Plaintiff. The transferor had no legal Title in the Plaintiff’s said parcel of land. The transferor had no proprietary rights in that parcel of land to pass to the first Defendant. Notwithstanding the fact that the transaction was or may have been blessed with consent of the relevant Land Control Board, was or may have been registered, that transaction was null and void ab-initio in so far as it purported to transfer the suit parcel of land to the first Defendant as there could be no valid transfer where the transferor has no Title to transfer. Documents may have been prepared, consent of the land control board obtained, signatures appended and attested and the transfer registered. But all those could not give the purported transferor the Title to transfer to the first Defendant. That transfer was unlawful.”

76. Having considered the evidence before me as well as the exhibits herein produced, and having further appreciated that under Section 107(1) of the *Evidence Act*, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which (s)he asserts, must prove that those facts exist, it clearly emerges that the Appellant’s title to No. Kericho/Kimulot/1836 was acquired illegally, un-procedurally or through a corrupt scheme since the vendor had no title to pass, as properly found by the Honorable trial Magistrate and therefore it goes without saying that title to parcel number No. Kericho/Kimulot/1836 having been canceled by the trial court the same shall revert to the estate of the deceased Francis Kipkebut Cherogony forthwith.
77. The Appellant’s appeal is herein dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 7TH DAY OF MARCH, 2024.

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M. C. OUNDO

ENVIRONMENT & LAND – JUDGE

